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T-1597-21

2022 FC 625

Potatoes New Brunswick and **Richard Allan** (*Applicants*)

v.

Canadian Food Inspection Agency (*Respondent*)

INDEXED AS: POTATOES NEW BRUNSWICK V. CANADA (FOOD INSPECTION AGENCY)

Federal Court, Brown J.—By videoconference, April 14; Ottawa, April 29, 2022.

Agriculture — Application for judicial review of Canadian Food Inspection Agency (CFIA) decision to carry out national potato wart survey (Survey) pursuant to Plant Protection Act (Act), Plant Protection Regulations (Regulations) — Survey part of reform of CFIA's surveillance program following discovery of potato wart on Prince Edward Island in 2020, much earlier discovery of potato wart in Newfoundland and Labrador — Applicant Potatoes New Brunswick is non-profit organization — Applicant Richard Allan is member of Potatoes New Brunswick, grows seed potatoes with another producer in New Brunswick — Respondent is federal agency, which in particular acts under authority of Act, Regulations — Potato wart (PW) is fungus that attacks potatoes which can cause very harmful effects on crops — CFIA conducting review of its potato wart surveillance program, concluding need for more robust surveillance approach, increase in soil sampling outside of areas already regulated for potato wart — After review completed, CFIA decided to implement national survey in relation to potato wart, which resulted in creation of 2021 National PW Survey — As part of Survey, CFIA inspectors taking, testing soil samples from selected fields across Canada — Applicants opposing Survey — CFIA issued notice to seed potato growers advising producers that 2021 National PW Survey would take place in fall of 2021 — Applicants alleged that CFIA proceeded to unilaterally conduct Survey on farms associated with applicants, including unauthorized entry onto these farms, removing soil samples — Whether CFIA's decision to initiate 2021 National PW Survey reasonable; whether Act, Regulations infringing Canadian Charter of Rights and Freedoms, s. 8 — Respondent primarily relied on Act, ss. 25(1)(a),(c),(e), Regulations, s. 16(1) as authorizing legislation for 2021 National PW Survey — Was reasonably open to CFIA to interpret Act, s. 25(1) in manner it did so long as interpretation was consistent with provision's text, context, purpose — CFIA meeting requirement of grappling with issue of legislation before it, explain why its decision is within legislative constraints — Thrust of applicants' submissions were that Court on judicial review should arrive at different interpretation of relevant statutory, regulatory provisions from that of CFIA, but on judicial review Court not to proceed with its own statutory interpretation of Act or Regulations — Word "thing" broadly defined by Act, s. 3; includes plant, pest — Word "including" is term of extension which enlarges meaning of "thing" — Was reasonable for CFIA to rely on Act, s. 25(1) to conduct 2021 National PW Survey to determine if specific area remained pest-free; was reasonably in line with purpose of Act under s. 2, which is to protect plant life — CFIA's interpretation of legislation including Regulations, s. 16(1) was reasonable, consistent with

Act's, Regulation's text, context, purpose — Moreover, ample evidence existed to support CFIA's decision to conduct 2021 National PW Survey — Overall, respondent had reasonable grounds, including rational connection between purposes of legislation, objectives of 2021 National PW Survey, to embark on Survey — Decision transparent, intelligible, justified based on facts, constraining law — As to whether Act, Regulations infringing Charter, in regulatory context, lowered reasonable expectation of privacy — Applicants chose to engage in regulated activity — By growing seed potatoes, they agreed to abide by regulatory schemes ensuring protection, safe production thereof — Charter, s. 8 not infringed by 2021 National PW Survey — Application dismissed.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Canadian Food Inspection Agency (CFIA) carrying out national potato wart survey (Survey) pursuant to Plant Protection Act (Act), Plant Protection Regulations (Regulations) — Survey part of reform of CFIA's surveillance program following discovery of potato wart on Prince Edward Island in 2020, much earlier discovery of potato wart in Newfoundland and Labrador — Whether Act, Regulations infringing Canadian Charter of Rights and Freedoms, s. 8 — Charter, s. 8 is personal right which protects people, not places — Rational connection existing between purpose, objectives of Act, respondent's Survey — While regulatory powers of inspection constitute search within meaning of Charter, s. 8, guarantees under s. 8 impossible to apply in regulatory context — Search authorized by Survey in present case falling within regulatory context — In such regulatory context, regulatory inspections may be assessed on spectrum of reasonableness — Applicants having lowered expectation of privacy — 2021 National PW Survey, inspector's ability to enter farm, inspect soil in fields, outbuildings reasonably necessary to fulfill Act's purpose of protecting plants — Applicants chose to engage in regulated activity; by growing seed potatoes on their farms, they agreed to abide by regulatory schemes ensuring protection, safe production of seed potatoes — Compliance with Act, Regulations part of those relevant regulatory schemes — Expectation of privacy regarding their business operation also relatively low for same reasons — Therefore, in regulatory context of Act, Regulations, rights guaranteed by s. 8 not infringed by 2021 National PW Survey.

This was an application for judicial review of a decision by the Canadian Food Inspection Agency (CFIA) to carry out a national potato wart survey (the Survey) pursuant to the *Plant Protection Act*, (Act) and *Plant Protection Regulations* (Regulations). The Survey is part of a reform of the CFIA's surveillance program following the discovery of potato wart on Prince Edward Island (P.E.I.) in 2020 and the much earlier discovery of potato wart in Newfoundland and Labrador (N.L.). The applicant Potatoes New Brunswick is a non-profit organization created through legislation of both Canada and New Brunswick. It collaborates with industry partners to advocate for the industry needs of potato producers in New Brunswick. The applicant Richard Allan is a member of Potatoes New Brunswick. He grows seed potatoes with another producer in New Brunswick. Richard Allan has been involved in growing seed potatoes for 45 years. The respondent is a federal agency, which in the context of this proceeding acts under the authority of the Act and Regulations. The CFIA has been managing potato wart pest in N.L. since its inception and in P.E.I. since 2020.

Potato wart (PW) is a fungus that attacks potatoes causing a visible wart-like tissue on the surface of the tuber and which can cause very harmful effects on crops. The parties agreed potato wart is a "pest" for the purposes of the Act and Regulations. Potato wart is also a "quarantine pest" because of the fact it may establish itself and result in significant negative economic effects. Soil sampling is the new standard to test for potato wart. Potato wart has not been detected in New Brunswick. In October 2020, the CFIA detected potato wart in P.E.I.. This prompted the CFIA to conduct a review of its potato wart surveillance program, used to verify that areas are free of potato wart. The CFIA concluded the need for a more robust surveillance approach and for an increase in soil sampling outside of areas already regulated for potato wart.In 2021, after completing the review driven by the discovery of potato wart in previously potato wart-free seed potato farms in P.E.I., CFIA decided to implement a national survey in relation to the potato wart. The result was the creation of the 2021 National PW Survey. The National PW Survey includes CFIA inspectors taking and testing soil samples from selected fields used for seed potato production across Canada, including New Brunswick. The applicants were generally opposed to a national survey. The CFIA issued a "Notice to Seed Potato Growers" advising potato and seed potato producers and others that the 2021 National PW Survey would take place in the fall of 2021.The CFIA Notice cited its governing statute

and regulation, including section 25 of the Act and section 16 of the Regulations. It advised growers that the law authorizes CFIA inspectors to conduct the Survey and that owners or persons in charge of farms were responsible for assisting inspectors in carrying out their duties under the Act. The CFIA then sent a letter to those producers, including Mr. Allan, whose seed potato fields were selected for sampling. Mr. Allan claimed that he never consented to the 2021 National PW Survey and was never asked by the CFIA if potato wart had been found on any of the seed potatoes grown on his farm. The applicants' memorandum stated that the CFIA proceeded to unilaterally conduct the Survey on farms associated with the applicants, including unauthorized entry onto these farms, and removing soil samples. They subsequently started the application for judicial review.

The issues in this application were whether the CFIA's decision to initiate the 2021 National PW Survey was reasonable and whether the Act and/or Regulations infringed section 8 of the *Canadian Charter of Rights and Freedoms*.

Held, the application should be dismissed.

The respondent primarily relied on paragraphs 25(1)(a), (c) and (e) of the Act and subsection 16(1) of the Regulations as authorizing legislation for the 2021 National PW Survey. The applicants submitted that the CFIA did not comply with the Act and was therefore conducting an unlawful search and seizure. They stated that "thing" in subsection 25(1) of the Act has a narrow definition. The respondent disagreed and submitted that subsection 25(1) grants broader powers to CFIA inspectors than the applicant allowed. Section 3 of the Act defines "thing" as including "a plant and a pest", meaning the definition is not exhaustive. In this case, the "things" to which the Act applied were a potato and the pest potato wart in any of its forms through its life cycle including spores. The Act grants corollary power to enter into a place to ensure no pest exists in that place. It was reasonably open to the CFIA to interpret subsection 25(1) in the manner it did so long as the interpretation was consistent with the provision's text, context and purpose.Perfection is not the standard and the interpretation of administrative actors such as the CFIA may not look like those of a lawyer or judge. However, the decision maker must grapple with the issue of the legislation before it and explain why its decision is within legislative constraints. These requirements were met by the CFIA. The thrust of the applicants' submissions were that the Court on judicial review should arrive at a different interpretation of the relevant statutory and regulatory provisions from that of the CFIA. But on judicial review, the Court is not to proceed with its own statutory interpretation of the Act or the Regulations. What the Court must do instead is to discern the decision maker's interpretation from the record and determine whether this interpretation was reasonable. In this case, the CFIA unambiguously stated it was conducting the 2021 National PW Survey to "confirm whether areas of Canada where PW has not been detected remain free from this quarantine pest." The "thing" contemplated by paragraphs 25(1)(a) and (c) of the Act and reasonably applied by the CFIA may be a seed potato or potato or soil in a seed potato or potato field in addition to the potato wart pest in any of its forms through its life cycle including spores. In this connection, and contrary to the applicants' submission, "thing" is broadly defined by section 3 of the Act: "***thing*** includes a plant and a pest" [emphasis in original]. The word "including" is a term of extension which enlarges the meaning of "thing". A broad reading of "thing" does not reasonably yield an absurd result. Reading the provision and the entirety of the Act, an inspector does not have a "complete and unfettered right of inspection" simply from the existence of a plant or pest. It was reasonable for the CFIA to rely on subsection 25(1) to conduct the 2021 National PW Survey to determine if an area remained pest-free. This was reasonably in line with the purpose of the Act under section 2. The statutory purpose does not restrict the focus of the Act to only pests, as submitted by the applicants. Ultimately, the Act mandates the protection of plant life such as seed potatoes in this case, including by preventing, controlling and eradicating pests such as the potato wart in all its forms from spore to potatoes. The legislative purposes of protection of plant life including seed potatoes and the prevention, control and eradication of potato wart could reasonably be seen as having a rational connection to the inspection, investigation and inquiry inherent in conducting the 2021 National PW Survey. The CFIA acted reasonably in its reliance on subsection 25(1) for its legal authority to conduct the 2021 National PW Survey. The CFIA's interpretation of the legislation including subsection 16(1) of the Regulations was reasonable and consistent with the Act's and the Regulation's text, context and purpose.

Assessing the record as a whole, ample evidence existed to support the CFIA's decision to conduct the 2021 National PW Survey. The supporting evidence highlighted the difficulty of pinpointing a source for the spread of potato wart in P.E.I. and the need to confirm the pest was actually contained in regulated areas. In addition, the evidence emphasized the general shift towards soil sampling as the standard surveillance technique for potato wart and Canada's need to adapt accordingly. The respondent's relative expertise was a further relevant consideration in conducting reasonableness review. The respondent demonstrated on the record that its decision to conduct the National PW Survey was made by bringing its institutional expertise and experience to bear. Overall, the respondent had reasonable grounds including a rational connection between the purposes of the legislation and the objectives of the 2021 National PW Survey to embark on the Survey.

With respect to section 8 of the Charter, the respondent rightly submitted that section 8 of the Charter is a personal right which protects people, not places. It was right in arguing in particular that there is a "rational connection" between the purpose and objectives of the Act and the respondent's Survey. The Supreme Court of Canada has determined regulatory powers of inspection constitute a search within the meaning of section 8 of the Charter. However, it has explicitly held that the section 8 guarantees are "impossible" to apply in the regulatory context. Regulatory context was the context of the search authorized by the Survey in the case at bar. In a regulatory context, the underlying purpose of inspection is to ensure that a regulatory statute is being complied with. Moreover, in the regulatory context as here, regulatory inspections may be assessed on a spectrum of reasonableness, assessing factors such as the context of the inspections, the extent of the expectation of privacy, the intrusiveness of the inspections, and whether there are restrictions imposed on the inspections. The applicant had a lowered reasonable expectation of privacy. The purpose of the Act is the protection of plants such as seed and other potatoes from pests including the potato wart. The 2021 National PW Survey and the inspector's ability to enter the farm and inspect the soil in fields and outbuildings but excluding dwelling places were reasonably necessary to fulfill this purpose. The applicants chose to engage in a regulated activity namely growing seed potatoes for sale domestically and internationally. By growing seed potatoes on their farms, they agreed to abide by the regulatory schemes ensuring the protection and safe production of seed potatoes. Compliance with the Act and the Regulations are part of those relevant regulatory schemes. The expectation of privacy regarding their business operation also for this reason was relatively low. Therefore, in the regulatory context of the Act and the Regulations, the rights guaranteed by section 8 of the Charter were not infringed by the 2021 National PW Survey.

In conclusion, the applicants did not show that the CFIA's decision was unreasonable or that it infringed rights or freedoms guaranteed by section 8 of the Charter. The decision was transparent, intelligible and justified based on the facts and constraining law.

STATUTES AND REGULATIONS CITED

Agricultural Products Marketing Act, R.S.C. 1970, c. A-7.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 8.

Farm Products Marketing Act, R.S.N.B. 1973, c. F-6.1.

New Brunswick Potato Order, SOR/80-726.

Plant Protection Act, S.C. 1990, c. 22, ss. 2, 3, 25, 26(1).

Plant Protection Regulations, SOR/95-212, s. 16.

CASES CITED

APPLIED:

Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, [2019] 4 S.C.R. 900;

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Doyle v. Canada (Attorney General)*, 2021 FCA 237; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3, leave to appeal to S.C.C. granted, 39855 (March 3, 2022); *Miel Labonté Inc. v. Canada (Attorney General)*, 2006 FC 195, [2006] 4 F.C.R. D-37; *Motz v. Saskatchewan Egg Producers*, 2001 SKQB 565 (CanLII).

CONSIDERED:

Bertram S. Miller Ltd. v. R., [1986] 3 F.C. 291, 31 D.L.R. (4th) 210 (C.A.).

REFERRED TO:

Safe Food Matters Inc. v. Canada (Attorney General), 2022 FCA 19, [2021] 3 F.C.R. D-20; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Friends of Point Pleasant Park v. Canada (Attorney General)*, T-1235-00, 38 C.E.L.R. (N.S.) 45, 188 F.T.R. 280; *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406; *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145; *Mandziak v. Animal Protection Services of Saskatchewan*, 2022 SKQB 75 (CanLII); *X (Re)*, 2017 FC 1047, [2018] 3 F.C.R. 111; *A Lawyer v. The Law Society of British Columbia*, 2021 BCSC 914, 487 C.R.R. (2d) 222; *R. v. Miller*, 2015 ABPC 237; *R. v. Diep*, 2005 ABCA 54, 363 A.R. 321.

AUTHORS CITED

United Nations, Food and Agriculture Organization, *International Standards for Phytosanitary Measures*, Rome.

APPLICATION for judicial review of a Canadian Food Inspection Agency decision to carry out a national potato wart survey pursuant to the *Plant Protection Act* and *Plant Protection Regulations*. Application dismissed.

APPEARANCES

Rodney J. Gillis, *Q.C.* for applicants.

Kaitlin Stephens for respondent.

SOLICITORS OF RECORD

Gilbert McGloan Gillis, Saint-John, New Brunswick, for applicants.

Deputy Attorney General of Canada for respondent.

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

BROWN J.:

I. Nature of the matter

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

(P.E.I.) in 2020, and the much earlier discovery of potato wart in Newfoundland and Labrador (N.L.).

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

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

[4] The respondent, CFIA, is a federal agency which in the context of this proceeding acts under the authority of the PPA and PPR. CFIA has been managing potato wart pest in N.L. since its inception, and in P.E.I. since 2020.

II. Facts

A. *Background*

[5] Potato wart (*Synchytrium endobioticum*) (PW) is a fungus that attacks potatoes, causing a visible wart-like tissue on the surface of the tuber. The fungus produces spores which can germinate and cause new infections. The presence of spores on tubers and in the soil may spread through movement on crops, soil or equipment; such spores may last for 30 years in the soil.

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

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

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

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

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

[11] In October 2020, CFIA detected potato wart in P.E.I. This prompted the CFIA to conduct a review of its potato wart surveillance program, used to verify areas are free of potato wart. The P.E.I. 2020 discovery was a “new find” in previously pest-free potato

seed farms. Potato seed farms are high risk due to their capacity to spread potato wart. The CFIA concluded the need for a more robust surveillance approach and for an increase in soil sampling outside of areas already regulated for potato wart.

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

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

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

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

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

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

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

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

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

B. *Events leading to the application*

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

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

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

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

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

III. Decision under review

A. *Notice to Seed Potato Growers*

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

[27] The Notice further explained the nature of potato wart and its history in Canada. As it was found in P.E.I. and N.L., farms in both provinces are now under CFIA management to contain the spread of potato wart. Controls include movement certificates, quarantine controls, and mandatory soil samples. The Notice also advised that potato wart had been detected in certain P.E.I. fields over the past 20 years, most recently in 2020. Considering the above, the Notice to Seed Potato Growers advised: "The National PW Survey is required to enhance the national surveillance program and to further verify that other areas of Canada are free from this quarantine pest. By demonstrating that Canada is committed to preventing and managing the spread of PW, the National Survey will strengthen domestic and international confidence in the Canadian seed potato system and reduce the risk of trade disruptions."

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

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

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

B. *Letter to Richard Allan*

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

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

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

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

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

IV. Issues

[34] The issues in this application are whether the CFIA's Decision to initiate the 2021 National PW Survey was reasonable, and whether the PPA and/or PPR infringe section 8 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter).

V. Standard of Review

A. *Reasonableness*

[35] With regard to reasonableness, in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, issued at the same time as the Supreme Court of Canada's decision in *Vavilov* [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653], the majority *per* Justice Rowe explains what is required of a reasonable decision, and what is required of a court reviewing on the reasonableness standard [at paragraphs 31–33]:

> A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> A reviewing court should consider whether the decision as a whole is reasonable: "… what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). (Emphasis added.)

[36] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up" [at paragraphs 104–105]:

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

[37] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs [at paragraph 125]:

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

[38] The Federal Court of Appeal recently held in *Doyle v. Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence [at paragraphs 3–4]:

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

VI. Analysis

A. *Reasonableness*

(1) PPA and PPR

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

> **Inspection**
>
> **25 (1)** For the purpose of detecting pests or for a purpose related to verifying compliance or preventing non-compliance with this Act, an inspector may
>
> **(a)** subject to section 26 [which requires a warrant or consent to enter a dwelling place and is not applicable in this case, ed.], at any reasonable time, enter and inspect any place, or stop any conveyance, in which the inspector believes on reasonable grounds there is any thing in respect of which this Act or the regulations apply;
>
> **(b)** open any receptacle, baggage, package, cage or other thing that the inspector believes on reasonable grounds contains any thing in respect of which this Act or the regulations apply;
>
> **(c)** examine any thing in respect of which this Act or the regulations apply and take samples of it;
>
> **(d)** require any person to produce for inspection or copying, in whole or in part, any record or other document that the inspector believes on reasonable grounds contains any information relevant to the administration of this Act or the regulations; and
>
> **(e)** conduct any tests or analyses or take any measurements. (Emphasis added.)

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

> **16 (1)** An inspector may conduct an investigation or survey of a place or any thing in that place in order to detect pests or biological obstacles to the control of pests and to identify areas in which a pest or biological obstacle to the control of a pest is or could be found.

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

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

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

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

[42] The respondent disagrees, and submits subsection 25(1) grants broader powers to CFIA inspectors than the applicant allows. Section 3 of the PPA defines "thing" as "includes a plant and a pest", meaning the definition is not exhaustive. In this case, the "things" to which the Act applies are a potato and the pest potato wart in any of its forms through its life cycle including spores. The PPA grants corollary power to enter into a place to ensure no pest exists in that place. Therefore, inspectors may rely on subsection 25(1) to enter into places for the sole purpose of delimiting a pest-free area. There is no legislative requirement to obtain consent, approval, or a warrant to enter any place that is not a dwelling place.

[43] In my respectful view, it was reasonably open to the CFIA to interpret subsection 25(1) in the manner it did, so long as the interpretation is consistent with the provision's text, context and purpose, see *Vavilov*, at paragraph 120; *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19, [2021] 3 F.C.R. D-20 (*Safe Food Matters*), at paragraph 40; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3 (*Mason*), at paragraph 42 (per Stratas JA, Rennie JA and MacTavish JA concurring), leave to appeal to S.C.C granted, 39855 (March 3, 2022).

[44] The Federal Court of Appeal says the following in *Mason* [at paragraphs 16–19]:

> *Hillier* [*Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] 2 F.C.R. D-3] begins by reminding reviewing courts of three basic things they should appreciate when conducting reasonableness review. First, in many cases, administrators may have a range of interpretations of legislation open to them based on the text, context and purpose of the legislation. Second, in particular cases, administrators may have a better appreciation of that range than courts because of their specialization and expertise. And, third, the

> legislation—the law on the books that reviewing courts must follow—gives administrators the responsibility to interpret the legislation, not reviewing courts.
>
> For these reasons, *Hillier* tells reviewing courts to conduct themselves in a way that gives administrators the space the legislator intends them to have, yet still hold them accountable. Reviewing courts can do this by conducting a preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land before they examine the administrators' reasons. But the lay of the land is as far as they should go. They should not make any definitive judgments and conclusions themselves. That would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits.
>
> Instead, *Hillier* recommends (at paragraph 16) that a reviewing court should "focus on the administrator's interpretation, noting what the administrator invokes in support of it and what the parties raise for or against it", trying to understand where the administrator was coming from and why it ruled the way it did: *Hillier*, at paragraph 16.
>
> Under this approach, the reviewing court does not act in an "external" way, i.e., "arrive at a definitive conclusion about the best way to read the statutory provision under review before considering how the [administrator's] interpretation matched up with [the] preferred reading". Rather, as Professor Daly has observed, the reviewing court acts in an "internal" way, i.e., "a relatively cursory examination of the provision at issue, with a view to analyzing the robustness of the [administrator's] interpretation". See Paul Daly, "Waiting for Godot: Canadian Administrative Law in 2019" [2019 CanLIIDocs 4436] (online: https://canlii.ca/t/t23p, at page 11).

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

[46] The thrust of the applicant's submissions are that this Court on judicial review should arrive at a different interpretation of the relevant statutory and regulatory provisions from that of the CFIA. But on judicial review this Court is not to proceed with its own statutory interpretation of the PPA and or PPR, see *Safe Food Matters*, at paragraph 39. What the Court must do instead is to discern the decision maker's interpretation from the record and determine whether this interpretation was reasonable. If the decision maker failed to respect the legislation, it may result in reversal, see *Safe Food Matters*, at paragraph 44; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374, at paragraphs 33 and 35.

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

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

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

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

> **Purpose of the Act**
>
> **2** The purpose of this Act is to protect plant life and the agricultural and forestry sectors of the Canadian economy by preventing the importation, exportation and spread of pests and by controlling or eradicating pests in Canada.

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

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

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

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

(2) Reasonable Grounds

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

[56] The respondent submits the CFIA has met the test for reasonable grounds as stated in *Miel Labonté Inc. v. Canada (Attorney General)*, 2006 FC 195, [2006] 4 F.C.R. D-37 (*Miel*), approving *Friends of Point Pleasant Park v. Canada (Attorney General)*, T-1235-00, 38 C.E.L.R. (N.S.) 45, 188 F.T.R. 280, (*Friends of Point Pleasant Park*), and as discussed later, conforms with the Supreme Court of Canada's decision on search and seizure in the administrative context set out in *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406 (*Comité paritaire*).

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

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

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

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

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

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

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

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

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

B. *Section 8 of the Charter*

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

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

[67] With respect, I agree with CFIA. I acknowledge the Supreme Court of Canada has determined regulatory powers of inspection constitute a search within the meaning of section 8 of the Charter, see *Comité paritaire*, at pages 417 and 441.

[68] However, it is also the case that the Supreme Court of Canada has explicitly held the section 8 guarantees set out in *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 are "impossible" to apply in the regulatory context. Regulatory context is the context of the search authorized by the Survey in the case at bar. In a regulatory context, the underlying purpose of inspection is to ensure that a regulatory statute is being complied with, see *Comité Paritaire*, at page 421.

[69] Moreover, in the regulatory context as here, regulatory inspections may be assessed on a spectrum of reasonableness, assessing factors such as the context of the inspections, the extent of the expectation of privacy, the intrusiveness of the

inspections, and whether there are restrictions imposed on the inspections, see *Mandziak v. Animal Protection Services of Saskatchewan*, 2022 SKQB 75 (CanLII) (*Mandziak*), at paragraph 107.

[70] Similar case law, including cases cited and analyzed by both parties, *Motz v. Saskatchewan Egg Producers*, 2001 SKQB 565 (CanLII) (*Motz*) and *Bertram S. Miller Ltd. v. R.*, [1986] 3 F.C. 291, 31 D.L.R. (4th) 210 (C.A.) (*Bertram*), have set out indicia of a reasonable and proportional power of inspection.

[71] In *Motz*, with which I am in substantial agreement, a number of relevant authorities are gathered up and discussed. In addition, *Motz* sets out some necessary indicia including the presence of a "rational connection" between the purpose and objectives of the act and the inspection, restrictions on the inspection power, and the claimant's decision to engage in a regulated activity [at paragraphs 12–18]:

> In his decision in the *Comité Paritaire* case Mr. Justice LaForest said this at p. 421:
>
> > It is thus impossible, without further qualification, to apply the strict guarantees set out in *Hunter v. Southam Inc., supra,* which were developed in a very different context. The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statues incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection. However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them.
>
> Madam Justice L'Heureux-Dubé, who was of a like opinion, put it this way at p. 444:
>
> > The rules in *Hunter v. Southam Inc., supra,* requiring a system of prior authorization based on the existence of reasonable and probable grounds, simply do not apply to administrative inspections, like those at issue here, in the case of a regulated industrial sector. The ACAD is regulatory legislation providing for administrative inspections in a regulated industrial sector, subject to a decree….
>
> She later went on, commencing at p. 452, to state that there is no requirement for a warrant to conduct a regulatory investigation:
>
> > For the inspectors to have to obtain a warrant, as in a criminal matter, would require them to have reasonable and probable grounds to believe that an offence against the ACAD had been committed. The very reason the inspectors have been granted powers of inspection is to determine whether an offence has been committed. According to the rules laid down in *Hunter v. Southam Inc.*, a warrant could never be issued in such circumstances. It can thus be seen that, in pragmatic terms, the rule in *Hunter v. Southam Inc.* must necessarily be inapplicable to administrative inspections in a regulated industrial sector, like those at issue in the present appeal. Those rules simply constitute here "too high a threshold" (Thomson Newspapers, supra, at p. 595 (per L'Heureux-Dubé J.))

…

> ... Additionally, the rules in *Hunter v. Southam Inc.* cannot be applied to administrative inspections in a regulatory industry. Accordingly, there was no need for the inspectors to obtain a warrant prior to entry into the respondent's premises.

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

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

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

It is otherwise in respect to s. 29(2) of *The Agri-Food Act*. There is a rational connection between the purpose and objectives of the Act on the one hand and the inspection, investigation or inquiry on the other hand. The appointed person cannot act on a whim, but must be engaged in administering and enforcing the legislation.

That person cannot enter a private dwelling without a warrant. While the section speaks of "any place or premises" by necessary implication that is restricted to premises in which the regulated activity is carried on. Thus one is concerned only with business or commercial premises and in most instances it will be outbuildings on farms.

The section further restricts the authority of the appointed person. If there is belief that an offence has been committed, then a warrant must be obtained. Thus, where there may be a higher expectation of privacy, judicial approval is required in advance of any search.

Finally, it must be remembered that the plaintiff made the decision to engage in the regulated activity. He knew the rules and must be assumed to have accepted them. This being so, his expectation of privacy in regard to his business operation must be relatively low. (Emphasis added.)

[72] I note the foregoing or extracts thereof are similarly elaborated upon in *Comité Paritaire*, at pages 449–450; *Mandziak*, at paragraphs 105–110; *X (Re)*, 2017 FC 1047, [2018] 3 F.C.R. 111, at paragraphs 123 and 236; and *A Lawyer v. The Law Society of British Columbia*, 2021 BCSC 914, 487 C.R.R. (2d) 222, at paragraphs 152–157. In *Bertram*, indicia included the nature of the property or things seized, character of the premises where the search and seizure may normally be expected to be carried out, and the legitimate interests and expectations of the public at large and the person subject to the search, see paragraph 114 [on QL; page 343 in the F.C.].

[73] In my respectful view, the applicant has a lowered reasonable expectation of privacy. The purpose of the PPA is the protection of plants such as seed and other potatoes from pests including the potato wart. The 2021 National PW Survey, and the inspector's ability to enter the farm and inspect the soil in fields and outbuildings but excluding dwelling places, are in my view reasonably necessary to fulfill this purpose. As mentioned above, surveillance by means of soil sampling is necessary to detect spores that may take years to manifest into warts which can be seen on tubers. Potato wart spores—the very early stage in the life cycle of the potato wart pest—are not detectable by visual inspection; they are microscopic and detectable only by soil samples. Without the ability to enter land and take soil for sampling, the CFIA would not be able to fulfill its mandate and legislative purpose and objective. See also *R. v. Miller*, 2015 ABPC 237, at paragraphs 28–29 and 33; *Mandziak*, at paragraph 108.

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

[75] In addition, per *Bertram*, the nature of the things searched, which may be potatoes or soil or if any the potato wart pest in any of its forms including spores, are for the most part outdoors and open to public view. They are plant material, soil or pests "in which there can be no legitimate expectation of privacy", see *Bertram*, at paragraph 114 [on QL; page 343 in the F.C.]. There may be no search of dwelling houses, although as *Motz* notes and paragraphs 25(1)(a) and (c) [of the PPA] provide, outbuilding may be inspected and samples of soil taken therefrom. Notably, because the potato wart pest is in the soil, the pest may spread through the movement of potato crops or equipment such as found in out buildings.

[76] I also note that the applicants choose to engage in a regulated activity namely growing seed potatoes for sale domestically and internationally. By growing seed potatoes on their farms, they agreed to abide by the regulatory schemes ensuring the protection and safe production of seed potatoes. Compliance with the PPA and PPR are part of those relevant regulatory schemes. The expectation of privacy regarding their business operation also for this reason, is relatively low. See *Motz*, at paragraph 18; *R. v. Diep,* 2005 ABCA 54, 363 A.R. 321, at paragraph 13.

[77] With respect, I also note CFIA's mandate and the PPA's purpose are in the public interest. Early detection and prevention of potato wart and the concomitant prevention of costly international and intra-provincial trade disruption, are in my view reasonably considered to be in the public interest. It is also reasonably in the interests of potato and seed potato farmers themselves to ensure they produce healthy and marketable crops thereby maintaining their livelihoods. These interests in combination with the other factors outweigh any privacy interest under section 8 of the Charter in this context, see *Bertram*, at paragraph 115 [on QL; page 343 in the F.C.].

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

VII. Conclusion

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

VIII. Costs

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

JUDGMENT in T-1597-21

THIS COURT'S JUDGMENT is that:

1 This application for judicial review is dismissed.

2 The applicants shall pay to the respondent its costs in the all-inclusive amount of $7 500.00.