

CANADA / JUDGMENT

Bedeque Farms Ltd v. Canada (Attorney General)

2024 FC 1931

COURT

Federal Court

DECIDED

29 November 2024

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Bedeque Farms Ltd. v. Canada (Attorney General)

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Decision Content

Date: 20241129

Docket: T-2000-23

Citation: 2024 FC 1931

Ottawa, Ontario, November 29, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

BEDEQUE FARMS LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview [1] Bedeque Farms is a grower of potatoes in Prince Edward Island. Having planted “Elite II” seed potatoes with the intention of harvesting and selling them as “Elite III” seed potatoes, Bedeque Farms applied to have the Canadian Food Inspection Agency [CFIA] inspect the potato crop.

- [2] A CFIA inspector obtained the permission of Bedeque Farms to inspect the crop in the “McCardle Field” (a field 15.9 hectares in size) where the potatoes were planted. The same CFIA inspector and another inspector performed a visual inspection. The CFIA inspector informed Bedeque Farms later the same day that 3.17% of the potato plants in the McCardle Field showed signs of mosaic disease, meaning that these potatoes could not be certified for sale as Elite III seed potatoes [Inspector’s Decision].
- [3] Bedeque Farms’ subsequent discussions, including meetings with CFIA personnel and inspection manager Ellen McQuaid, to persuade them to reconsider the Inspector’s Decision were unsuccessful. The inspection manager issued a decision [Inspection Manager’s Decision] affirming, with reasons, the Inspector’s Decision.
- [4] In this judicial review application, Bedeque Farms challenges both decisions raising two issues. First, Bedeque Farms asserts procedural unfairness, arguing that the inspectors should have invited a Bedeque Farms representative to accompany them on the field inspection and should have provided Bedeque Farms with an opportunity to make representations that the grower meets the relevant standards. Second, Bedeque Farms argues that the Inspection Manager’s Decision is unreasonable. Bedeque Farms thus seeks an order directing the CFIA to inspect the crop through laboratory tests, rather than only visually.
- [5] The Respondent Attorney General of Canada [AGC] counters that the inspection was procedurally fair based on the process prescribed by applicable legislation and policies. They argue the inspection manager reasonably considered Bedeque Farms’ explanations for the inspection results but ultimately chose not to deviate from the process and findings reflected in the Inspector’s Decision.
- [6] I am not persuaded that the Inspector’s Decision was procedurally unfair or that the Inspection Manager’s Decision was unreasonable. For the reasons that follow, the judicial review application will be dismissed. In the ensuing analysis, I deal first with a preliminary issue regarding the two decisions covered in one judicial review application, and then consider the arguments on procedural fairness and reasonableness.

II. Background A. Regulatory Framework [7] The CFIA administers and enforces the Seeds Act, RSC 1985, c S-8 [Act], and the Seeds Regulations, CRC, c 1400 [Regulations]. According to section 3.1 and paragraph 4(1)(a.2) of the Act, a key purpose of the Regulations is to prevent the sale, import or export of seeds that could be harmful to human, animal or plant health or the environment. Part II of the Regulations governs the inspection and certification of seed potatoes (which are planted in the ground for the purpose of growing more potatoes). The Seed Potato Crop Inspection Manual, PI-005: Chapter 5 - Seed Potato Crop Inspection [Manual] rounds out the seed potato inspection regime carried out by inspectors. See Annex “A” below for relevant legislative provisions.

[8] Seeds generally must meet regulatory quality standards and be labelled accordingly to ensure accurate representation in the marketplace. Section 47 of the Regulations establishes the following classes of seed potatoes, listed from the highest quality to the lowest:

Nuclear Stock;

Pre-Elite;

Elite I;

Elite II;

Elite III;

Elite IV;

Foundation; and

Certified.

[9] The Regulations prescribe what AGC counsel characterized as a “flow through” system. This means that, for example, to produce Elite III seed potatoes, as Bedeque Farms sought to do, the grower must plant Elite II seed potatoes. The higher the quality of seed potatoes, the lower the tolerance for the visible signs of varietal mixture or disease symptoms in the plants.

[10] In all cases, there is zero tolerance for the diseases known as potato spindle tuber viroid [PSTV] or bacterial ring rot [BRR]. This Court observes the seriousness of BRR in *Griffin v Canada* (Agriculture Canada, Inspections Division), 1989 CarswellNat 592 [Griffin] at para 19.

[11] According to 5.3 and 5.7 of the Manual, inspectors may need to take samples during inspection for laboratory diagnosis in certain circumstances, including where there is suspicion of a zero tolerance regulated pest such as PSTV, BRR, or a quarantine pest, for example potato cyst nematode.

- [12] Otherwise, 5.7 of the Manual emphasizes that an inspection to assess various disease factors in a crop according to the regulatory tolerances in the Regulations is based on visual observations, with discretion to sample and test to confirm field observations (underlining added). This is consistent with section 47.101 of the Regulations, which states that the inspection of seed potatoes shall be made either visually, through laboratory testing, or both.
- [13] The Regulations stipulate further in subsection 47.5(3) regarding Elite III seed potatoes (i.e. those potatoes produced from planting Elite II seed potatoes), that the “percentage of plants showing visible varietal mixture or visible symptoms of disease” shall not exceed the prescribed tolerances shown in the table below (underlining added).

B. Seed Potato Crop Inspections [14] Once planted crops of seed potatoes in the Canadian Seed Potato Program reach a certain stage (i.e. 40-60 days after planting for an initial inspection), the grower applies to the CFIA for the requisite inspection.

- [15] During an onsite inspection, CFIA inspectors use plant counts (with one count consisting of 100 plants in a row) to determine disease infection within a crop and varietal mixture. Table 7-1—described in 7.1.2 of the Manual as “a guide intended to assist in determining the number of inspection counts based on the class planted, and the field size in hectares” (underlining added) —recommends a minimum of 30 counts for a field size of 15-20 hectares containing seed potatoes in the classes Elite I to Foundation (i.e. including Elite III).
- [16] Consistent with the Manual’s guidance, plant counts are completed by walking at regular intervals in a randomized pattern throughout the field to ensure the inspection results are representative of the field disease levels and varietal mixture. Visual observation remains the primary method of inspection in the Canadian Seed Potato Program and in most other countries with a seed potato certification system, according to Ellen McQuaid in her affidavit sworn in this matter and confirmed on cross-examination.
- [17] A crop that fails to meet the standards for the class identified in the application for inspection will be downgraded to the class for which the standards are met. Downgraded crops will continue to be inspected but must meet the standards for the applicable class.

III. Issues & Analysis A. Related decisions in one judicial review application permitted [18] The parties agree, as do I, that Bedeque Farms should be permitted to seek review of the Inspector’s Decision and the Inspection Manager’s Decision in a single judicial review application.

- [19] Rule 302 of the Federal Courts Rules, SOR/98-106 [Rules], stipulates that a judicial review application shall be limited to a single order, unless the Court orders otherwise. The underlined wording means that the Court retains discretion in this regard.

- [20] Here, the underlying circumstances of the two decisions are essentially the same: *Masouleh v Canada (Citizenship and Immigration)*, 2023 FC 1159 at paras 15–16. This Court previously has accepted that “closely linked decisions or a continuous course of conduct may be treated as a single decision”: *Cob Roller Farms Ltd v 9072-3636 Québec Inc (Écocert Canada)*, 2022 FC 1487 at para 14.
- [21] To the extent that the two decisions are considered separate, rather than parts of a single decision, I determine that it is appropriate that they nonetheless be heard together from the standpoint of securing the just, most expeditious and least expensive outcome, taking the principle of proportionality into account, further to rules 3 and 55 of the Rules.

B. The Inspectors Decision was not procedurally unfair [22] I am not convinced that the Inspector’s Decision was procedurally unfair.

- [23] Breaches of procedural fairness in administrative contexts have been considered subject to a “reviewing exercise ... ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied”: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54. The duty of procedural fairness “is ‘eminently variable’, inherently flexible and context-specific”; it must be determined with reference to all the circumstances, including the Baker factors: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.
- [24] Bedeque Farms argues that the inspectors should have asked a representative to accompany them on the field inspection and should have provided Bedeque Farms with an opportunity to make representations that the grower meets the relevant standards. Further, according to Bedeque Farms, the subsequent meeting with CFIA personnel, including the Inspection Manager, did not cure the inspectors’ failure.
- [25] While it’s true that 5.3 of the Manual encourages CFIA inspectors to invite the grower or the grower’s representative to accompany them when they are ready to start an inspection, I note that Bedeque Farms did not object to the inspection going ahead when the CFIA inspector contacted them for permission to enter the McCardle field for inspection. Further, Bedeque Farms’ counsel had no satisfactory answer when asked at the hearing how the outcome would have changed, given that it was a visual inspection.
- [26] Instead, Bedeque Farms focused in their written and oral submissions on why the CFIA should conduct laboratory tests on the crop, rather than rely solely on visual inspection, pointing to the contrary results of their own independent testing. During the oral hearing, Bedeque Farms also suggested that there were inconsistencies in CFIA process, including (i) testing the Dunk River Farms Field, but not testing the McCardle Field (both of which involved the same seed lot); and (ii) information about eight other growers involving the same seed lot who passed inspection.

- [27] While Bedeque Farms conceded that the CFIA was not required to accept the latter information, Bedeque Farms argued that there was no evidence the CFIA grappled with its own internal reasoning process. Bedeque Farms acknowledged at the hearing that the latter submission is more relevant to the issue of reasonableness.
- [28] Regardless, I am unpersuaded by these submissions. The notes for the Dunk River Farms Field inspection in the certified tribunal record show that the initial inspection was conducted by two inspectors who contacted the grower's representative later, after they had conducted their inspection and taken samples. In other words, as with the McCardle Field inspection, the inspection of the Dunk River Farms Field occurred initially in the absence of the grower or the grower's representative.
- [29] Next, the notes for the Dunk River Farms Field inspection also indicate that while the inspectors observed some discolouration in the first two counts, they saw very little to no mottling (i.e. no strong symptoms of mosaic virus). As a result, the inspectors felt it was not mosaic virus, unlike in the case of the McCardle Field inspection, and decided to sample the plants because of their uncertainty. The tests came back positive for potato virus y, strain yo. Upon redoing the visual inspection of the Dunk River Farms Field, the inspectors' results were high – 6.17% virus in their counts (well above the 0.3% tolerance permitted for Elite III seed potatoes on initial and subsequent inspections).
- [30] Bedeque Farms argues that the Dunk River Farms Field inspection influenced the outcome of the McCardle Field inspection. In my view, this is speculative, notwithstanding that one of the two inspectors in each inspection team was the same. The concern with the McCardle Field inspection was the observation by the inspectors of mosaic virus symptoms, which indicated a 3.17% virus presence, also well above the permitted tolerance of 0.3%. In my view, it was well within the regulatory discretion of the inspectors not to sample the McCardle Field. That lab results might have been viewed differently, as argued by Bedeque Farms, also is speculative in my view.
- [31] In addition, the notes indicate that different inspectors conducted the inspections of other fields involving the same seed lot. There is no evidence before the Court, however, about what transpired during those inspections where the growers passed, or the conditions under which the potatoes were grown. In other words, I find that there is a lack of evidence to support the argument that there was inconsistency in the inspections of seed potatoes from the same lot. In my view, the different outcomes, in themselves, also do not support this argument.
- [32] Bedeque Farms also takes issue with the fact that the CFIA completed only 28 counts, instead of the minimum 30 counts for a field size of 15-20 hectares recommended in 7.1.2 of the Manual. Table 7-1 entitled "Guide to Determine the Number of Inspection Counts" is described, however, as a guide to assist in determining the number of inspection counts, not to mandate them. Given that 28 counts revealed 3.17% mosaic symptoms, I am not persuaded that it was necessary or procedurally unfair for the inspectors not to have

completed two additional counts in the circumstances. I add that the AGC's efforts at the hearing to show, for the first time, that 30 counts were completed—based on a photograph of the McCardle Field with added circles representing the counts—was unacceptable bolstering. This contradicted an internal CFIA email from one of the inspectors dated September 12, 2023 confirming that only 28 counts were completed.

- [33] As for the tests that Bedeque Farms conducted, the Inspection Manager's Decision describes factors that may impact the test results including the part of the plant tested, such as stems, roots, etc. The Inspection Manager's Decision is discussed in further detail below. The Bedeque Farms testing reports indicate that tests were conducted on plant leaves. Otherwise, I find that there is scant information in the reports and no evidence about how the tests and the conditions under which they were conducted. I am not persuaded that these reports deserved different or more consideration given to them than that reflected in the Inspection Manager's Decision.
- [34] In the end, I find Bedeque Farms' reliance on the Griffin decision is misplaced. In particular, the general observations in paras 56–57 cannot be read in isolation because they are tied to the underlying facts.
- [35] Griffin involved decisions of then Agriculture Canada that the Griffin Family's entire production of potatoes grown in Prince Edward Island from seed in 1988 should not be certified for sale as seed because the crops were considered contaminated with BRR (i.e. a zero tolerance disease mandating testing). The Court found (at paras 56–57) that in the case of policy directives designed to foster consistency, the persons subject to them were entitled to know them and to have the opportunity to provide information or to make representations that the policy ought not to apply. According to Griffin, the inspector should apprise the grower of all of the requirements for certification, including those contained in departmental policy directives and the conditions of the field crops as the inspector finds them, then provide a reasonable opportunity for the grower to submit information and representations relevant to the application of the requirements in the grower's case.
- [36] Earlier in the decision, the Court noted (Griffin at para 49) that "the full regulatory regime is not set out in the Seeds Regulations, and the respondent relies upon departmental directives or guidelines." Further, the Court observed the respondent's acknowledgement that "the decision to reject the entire Griffin Family potato crop for certification under the Seeds Act ... was indeed made pursuant to a written policy directive, which provided guidance and direction to potato inspectors in performing their duties."
- [37] The Court in Griffin found (at para 48) that to the extent the policy directives affect substantive rights, they should be adopted formally in the Regulations; they should not be contained only in departmental guidelines or directives which may not be known readily even to the administrators.

- [38] Here, Bedeque Farms does not argue that it did not know the applicable policies or that the guidelines in the Manual are inconsistent with the Regulations. To the contrary, Bedeque Farms seeks to rely on the strict application of the Manual to its benefit (i.e. that the grower or its representative should have been invited to join the inspectors in the field during the inspection, rather than after it was completed). In my view, the Manual at best supplements the statutory or regulatory requirements but does not supplant them. Further, the very guidelines to which Bedeque Farms points underscore the prevalence of visual examination as a primary mode of inspection.
- [39] Even if a representative of Bedeque Farms had accompanied the inspectors who performed a non-adjudicative, fact-finding function, it would not change the fact that the observed mottling and crinkling in the leaves, which was consistent with mosaic symptoms, exceeded the regulatory standard. I underscore the language of subsection 47.5(3) of the Regulations, which refers to “visible symptoms of disease” (underlining added). In other words, notwithstanding the potential harshness of the consequences, the Regulations do not mandate a definitive finding of disease itself through testing, except in the case of the Nuclear Stock class of seeds.
- [40] There is much evidence suggesting that the CFIA provided Bedeque Farms opportunities to be heard following the initial findings, particularly in the context of the reconsideration request. Bedeque Farms met with the CFIA personnel several times between the Inspector’s Decision being finalized and the Inspection Manager’s Decision affirming the inspectors’ findings. The CFIA, in my view, took into consideration the concerns of Bedeque Farms. Simply put, the Inspection Manager was not presented with information sufficient to overturn the results of the visual field crop inspection or information that warranted a deviation from the established Seed Potato Program or inspection process.
- [41] I am satisfied that there was no breach of procedural fairness in the circumstances. I turn next to the reasonableness of the Inspection Manager’s Decision.

C. The Inspection Manager’s Decision was not unreasonable

- [42] I find that Bedeque Farms has not met its onus of showing that the Inspection Manager’s Decision is unreasonable: Vavilov, above at para 100.
- [43] Bedeque Farms argues that the Inspection Manager’s Decision is unreasonable in four respects, in that it:

does not acknowledge the testing regarding Dunk River Farms Field that, according to Bedeque Farms, foreclosed testing of the McCardle Field;

does not acknowledge information about eight other growers from the same seed lot passing inspection;

is defensive posturing; and

represents genial willingness to receive but not to engage with information provided by Bedeque Farms.

- [44] Regarding the first point, Bedeque Farms conceded at the hearing that there is no statutory or regulatory requirement regarding testing (i.e. concerning Elite III seed potatoes in particular). Bedeque Farms argues, however, that the Dunk River Farms Field testing foreclosed testing of the McCardle Field for improper reasons. I find this argument speculative, however, and not borne out by the evidence discussed above in these reasons in connection with the procedural fairness issue.
- [45] Regarding the second point, I observe that an administrative decision-maker's failure to mention evidence in itself does not render a decision unreasonable. It is a well-settled principle that administrative decision-makers are presumed to have weighed and considered all the evidence before them unless proven otherwise: *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36. Further, a failure to mention a particular piece of evidence does not mean that it was ignored: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.
- [46] Regarding the third and fourth points, Bedeque Farms refers, as an example, to an internal CFIA email dated August 11, 2023 discussing the testing for magnesium deficiency that Bedeque Farms was in the process of obtaining. The email indicates the Bedeque Farms representative was told that the test results would be welcome but that they would not change the decision. The email continues by explaining that the CFIA asked the representative, in the same conversation, whether he monitors aphid activity, to which he answered no. The representative also proposed having the tuber tested.
- [47] I understand from the August 11, 2023 email that there could be multiple reasons, including the disease itself, for the presence of mosaic symptoms in the McCardle Field seed potatoes. Because the regulatory requirements were met, however, this could not change the results of the visual inspection.
- [48] Further, I find that the Inspection Manager's Decision was responsive to the August 11, 2023 discussion with the Bedeque Farms representative. The inspection manager explained why testing of different parts of the plant would not be conclusive necessarily and, further, why the application of a particular herbicide (i.e. "prism") to the plants would not impact the results of lab analysis.
- [49] In the end, I find that the arguments of Bedeque Farms about the reasonableness of the Inspection Manager's Decision are tantamount to a request to reweigh the evidence, which is not the role of the Court on judicial review: *Vavilov*, above at para 125.

[50] In my view, the Inspection Manager's Decision bears the hallmarks of justification, intelligibility and transparency, with a logical chain of analysis and internally coherent reasons that permit the Court to "to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": Vavilov, above at para 97, citing Komolafe v Canada (Minister of Citizenship and Immigration), 2013 FC 431 at para 11.

IV. Conclusion [51] For the above reasons, I find the Inspector's Decision was not procedurally unfair, nor was the Inspection Manger's Decision unreasonable. The judicial review application thus will be dismissed.

V. Costs [52] Contrary to the Court's Amended Consolidated General Practice Guidelines dated December 20, 2023, and the discussion on costs at page 20, the parties neither informed the Court whether they discussed and agreed on a quantum of costs nor were they prepared to make costs submissions at the end of the hearing. Both parties confirmed though that they are seeking costs and requested the opportunity to make post-hearing costs submissions. I agreed to provide them with one week to give the Court written submissions not exceeding three pages in length.

[53] Having received and considered their costs submissions, I note the parties' agreement that costs at the upper-middle range of Column III of Tariff B are appropriate in the circumstances, but that they are about \$2,500 apart, owing largely, in my view, to the significant travel costs claimed by the AGC (which, according to Tariff B, are at the discretion of the Court).

[54] I exercise my discretion under rule 400 of the Rules to award the AGC lump sum costs in the amount of \$6,000, payable by the Applicant.

JUDGMENT in T-2000-23

THIS COURT'S JUDGMENT is that:

The Applicant's judicial review application is dismissed.

The Respondent is awarded lump sum costs in the amount of \$6,000, payable by the Applicant.

"Janet M. Fuhrer"

Judge

Annex "A": Relevant Provisions

Seeds Regulations, CRC, c 1400

Règlement sur les semences, CRC, ch 1400

Classes of Seed Potatoes and Class Names

Classes de pommes de terre de semence et noms de classe

47 The following classes of seed potatoes are established, as listed, from the highest quality to the lowest:

47 Les classes de pommes de terre de semence sont les suivantes, par ordre décroissant de qualité :

- (a) Nuclear Stock;
- a) Matériel nucléaire;
- (b) Pre-Elite;
- b) Pré-Élite;
- (c) Elite I;
- c) Élite I;
- (d) Elite II;
- d) Élite II;
- (e) Elite III;
- e) Élite III;
- (f) Elite IV;
- f) Élite IV;
- (g) Foundation; and
- g) Fondation;
- (h) Certified.
- h) Certifiée

Method of Inspection

Méthode d'inspection

47.101 The inspection of seed potatoes shall be made either visually or through laboratory tests or both.

47.101 L'inspection de pommes de terre de semences s'effectue soit visuellement, soit au moyen d'essais de laboratoire, soit par les deux moyens.

Elite III

Élite III

47.5 (3) The percentage of plants showing visible varietal mixture or visible symptoms of disease set out in column 1 of an item of the table to this section on the first inspection, any subsequent inspection and the final inspection shall not exceed the applicable percentages set out in columns 2 and 3 of that item.

47.5 (3) Le pourcentage de plants présentant visiblement un mélange de variétés ou des symptômes de maladies mentionnés à la colonne 1 du tableau, à la première inspection, aux inspections subséquentes et à l'inspection finale, ne doit pas dépasser les pourcentages indiqués respectivement aux colonnes 2 et 3.

Federal Courts Rules (SOR/98-106)

Règles des Cours fédérales (DORS/98-106)

General principle

Principe général

3 These Rules shall be interpreted and applied

3 Les présentes règles sont interprétées et appliquées :

- (a) so as to secure the just, most expeditious and least expensive outcome of every proceeding;
and
- a) de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;
- (b) with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.
- b) compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.

Forms

Formules

5 Where these Rules require that a form be used, the form may incorporate any variations that the circumstances require.

5 Les formules prévues par les présentes règles peuvent être adaptées selon les circonstances.

Limited to single order

Limites

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

302 Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

Discretionary powers of Court

Pouvoir discrétionnaire de la Cour

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-2000-23

STYLE OF CAUSE:

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FUHRER J.

DATED:

November 29, 2024

APPEARANCES:

J. Curtis Doyle

For The Applicant

W. Dean Smith, KC

For The Respondent

SOLICITORS OF RECORD:

Stewart McKelvey Charlottetown, Prince Edward Island

For The Applicant

Attorney General of Canada Halifax, Nova Scotia

For The Respondent

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