

Health of Animals Act
Registrar of Appeals



Loi sur la santé des animaux
Greffier des appels

Date: 20210811

Docket: P-1-19

Citation: 2021 FC 834

AN APPEAL TO THE ASSESSOR
PURSUANT TO THE *HEALTH OF ANIMALS ACT*

Ottawa, Ontario, August 11, 2021

PRESENT: Mr. Justice Fothergill, Deputy Assessor

BETWEEN:

VICTOR BERGEN AND CHRIS BERGEN

Appellants

and

**THE MINISTER OF AGRICULTURE AND
AGRI-FOOD CANADA**

Respondent

JUDGMENT AND REASONS

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I. Overview

[1] Victor and Chris Bergen [the Bergens] own and operate an elk farm near the village of Drake, Saskatchewan. The Bergens breed and raise elk for hunting stock and meat, and for the production of antler velvet.

[2] On November 28, 2017, the Bergens discovered the carcass of a three year old female elk on their property. They reported the death to the Canadian Food Inspection Agency [CFIA]. Laboratory testing confirmed a preliminary positive result of chronic wasting disease [CWD].

[3] CWD is a transmissible spongiform encephalopathy that causes a progressive neurological disease in elk and other cervids. CWD is generally believed to be caused by abnormal proteins called prions that affect an animal's central nervous system. The condition is highly contagious and inevitably fatal. CWD is a reportable disease under s 5 of the *Health of Animals Act*, SC 1990, c 21 [Act] and s 2 of the *Reportable Diseases Regulations*, SOR/91-2.

[4] The Bergens' herd of elk was slaughtered on December 13, 2017. On January 9, 2019, the CFIA issued a Notice of Award of Compensation respecting the destruction of the herd. The Bergens were awarded compensation in the amount of \$350,000.00 for the elk, and an additional \$26,597.20 for the costs of disposal pursuant to s 51(2) of the Act.

[5] The Bergens have appealed the award of compensation pursuant to s 56(1) of the Act.

[6] For the reasons that follow, the Minister's valuation of the Bergens' herd was fair and reasonable. The appeal must therefore be dismissed.

[7] The Bergens have raised legitimate concerns regarding their lack of opportunity to participate in the valuation process that resulted in the Notice of Award of Compensation dated January 9, 2019. While the procedural defects of the initial valuation process have been remedied by this appeal, which has proceeded as a hearing *de novo*, those defects are sufficiently serious to disentitle the Minister from an award of costs.

II. Background

[8] On November 29, 2017, the CFIA issued a Notice of Requirement to Dispose of all elk on the Bergens' property. On November 29, 2017, two CFIA veterinarians, Dr. Abel Akon and Dr. Lisa Wayman, attended at the Bergens' farm. Dr. Wayman advised the Bergens that Dr. Akon would oversee the depopulation of the herd.

[9] On December 11 and 12, 2017, the elk were tagged and prepared for transport. The elk were slaughtered on December 13, 2017.

[10] On January 2, 2018, the CFIA issued a second Order of Destruction to dispose of all elk that remained at the Bergens' farm. On January 11, 2018, a male elk (bull), thirteen female calves and nine male calves were euthanized and buried on the property.

[11] On December 11, 2017, Dr. Brian Wormald assumed responsibility for the Bergens' case. Dr. Lisa Wayman took charge of the file on May 1, 2018, and remained the lead CFIA official until the file was concluded.

[12] The Bergens asked their accountant, Mr. Bill Riach, to prepare a valuation of the elk for submission to the CFIA. Mr. Riach considered two options for determining value: market value and an economic model. Given that sales from the Bergen herd were limited, Mr. Riach prepared an evaluation based on the economic model.

[13] The CFIA retained Serecon, a company that provides appraisals, management advice and other services to the agricultural industry, to prepare a valuation of the Bergens' herd. Like Mr. Riach, Serecon based its evaluation on an economic model. Dr. Wayman subsequently decided that only market value could be used to determine compensation under the Act. She did not communicate this conclusion to the Bergens, or give them an opportunity to respond.

[14] Dr. Wayman was referred to Mr. Bruce Friedel, a senior and experienced figure within the elk production industry, and relied extensively on his advice in valuing the Bergens' herd. Again, Dr. Wayman did not share the advice she received from Mr. Friedel with the Bergens, or give them an opportunity to respond before she finalized the valuation on January 9, 2019.

[15] The CFIA did not immediately communicate the Notice of Award of Compensation dated January 9, 2019 to the Bergens. However, on February 8, 2019, the Bergens visited the local CFIA office to enquire why they had not been contacted regarding the negotiation of their compensation. They learned that the compensation had been determined more than a month earlier, and the valuations prepared by Mr. Riach and by Serecon had both been rejected by Dr. Wayman in favour of the advice provided by Mr. Friedel.

III. Decision under Appeal

[16] The explanatory section of Dr. Wayman's Valuation Report reads as follows:

All over 12 months Elk were transported to Bouvry Exports for slaughter. The slaughter report was provided including individual hot hanging weight for all carcasses.

The Hot Hanging Weight (HWW) was used to calculate a reasonable estimate of Live Weight for each animal for all classes of the herd by converting the HHW to Lbs, then dividing that weight by the percentage of shrink assigned. A normal shrink would be 58% (divide by 0.58), a severe shrink would be 53% (divide by 0.53) and a worse-case-scenario shrink for each carcass of 51.5%.

The latter, 0.515 was used to determine the live weight for this herd, due to the two days of assembly and handling made necessary by ID and tagging by CFIA, as well as assembly and loading on the third day. This assigned shrink had the effect of increasing the estimate of live weights of each animal and therefore the valuation based on body size/condition to the producer's advantage by 11.3%.

The hot hanging weights for many Bergen elk female carcasses were lower than average for female elk slaughtered at the Bouvry facility, which is 125 Kg average. Those females producing a higher than average carcass weight translated to a higher live animal value. The estimated live weights of the 2016 yearling cows in particular were very low, and unlikely at that weight to conceive and carry a live calf to term.

The Bergen Elk were evaluated as if no disease was present, and a value of \$11.50/Kg HHW was used for calculation of animal value, which is the typical value used for compensation purposes. This is derived from the "normal" amount paid per Kg HHW paid by AWAPCO for non-disease-status herds sent to slaughter. The amount paid for the Bergen herd by AWAPCO of \$8.65/Kg was a negotiated price from the competitive bid process won by AWAPCO. This was the value used to account for payment by AWAPCO to Mr. Bergen on the 4203 (\$198,419). There was no deduction was [*sic*] made for any cleanup/disposal costs incurred at the farm and after slaughter and sampling at the plant, as this was borne directly by CFIA as laid out in the Letters of Direction provided by Mr. Bergen for payments to AWAPCO for transportation of the herd to Bouvry and for disposal costs to other contractors.

In addition there was no deduction taken from the valuation for the trucking costs typically borne by a producer when sending their elk to slaughter. This typically amounts to \$75 to \$100 for each animal. This consideration increased the amount paid to Mr. Bergen for his animals.

The overall sale results of the 2017 and 2018 Production Sale auction prices, the economists herd evaluation (SERECON), the prices paid privately and in herd dispersal sales were all considered in determining a reasonable replacement cost for animals similar to those ordered destroyed. While Mr. Bergen may have chosen to select the highest quality elk of several classes available at public auction as replacements, this does not typically reflect the average animal in his depopulated herd.

IV. History of the Proceedings

[17] The Bergens submitted their Notice of Appeal on April 12, 2019. The Minister's Reply was filed on June 17, 2019.

[18] The appeal was heard over three days on March 29, March 30, and March 31, 2021.

[19] The Bergens filed their closing submissions on April 30, 2021. Due to an unexpected and urgent matter, the Minister requested an extension of time to May 7, 2021 in which to file closing submissions. This was granted subject to the condition that the Bergens' written submissions would not be disclosed to the Minister until the Minister's closing submissions were received. This occurred on May 6, 2021.

[20] Both parties were given the opportunity to respond to any new information or argument contained in the other party's closing submissions. The Bergens filed their written submissions in reply on May 19, 2021. The Minister filed written submissions in reply on May 20, 2021.

V. Evidence

A. *Appellants' Witnesses*

[21] **Mr. Victor Bergen** is one of the Appellants in this proceeding. He grew up in Drake, Saskatchewan, and has been farming since he was fourteen years old.

[22] **Mr. Ryan McClennon** is a farmer based in Alberta who has been in the elk business for 21 years. The primary focus of Mr. McClennon's farming operation is on breeding stock for velvet markets, as well as hard antler and export to the United States of America. For the last five years, he has also operated a ranch in Saskatchewan.

[23] **Mr. Bill Riach** is the Bergens' accountant. He has provided accounting services to the Bergens for the past 20 years. He also provides accounting services to other agricultural producers in the area.

[24] **Mr. Randy Wehrkamp** is the Bergens' representative in this appeal. He is an expert on the elk industry. Mr. Wehrkamp is also an elk farmer in his own right.

B. *Respondent's Witnesses*

[25] **Dr. Lisa Wayman** is the veterinary inspector whose compensation award is the subject of this appeal. Dr. Wayman has been employed by the CFIA since November 2000.

[26] **Mr. Bruce Friedel** is a fourth-generation farmer based in Alberta. He holds a bachelor's degree in agriculture specializing in range pasture and wildlife management, as well as a master's degree in agriculture and animal science specializing in wildlife productivity. Mr. Friedel assisted Dr. Wayman with the valuation of the Bergens' herd. His methods have previously been relied upon by the CFIA to prepare valuations of other herds whose destruction was ordered pursuant to the Act. Mr. Friedel has been involved in the elk industry for 40 years.

VI. Issue

[27] The sole issue raised in this appeal is whether the compensation awarded to the Bergens was reasonable.

VII. Legal Framework

[28] The Minister is authorized to dispose of contaminated animals or things pursuant to s 48 of the Act:

Disposal of affected or contaminated animals and things

48 (1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing

(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;

Mesures de disposition

48 (1) Le ministre peut prendre toute mesure de disposition, notamment de destruction, — ou ordonner à leur propriétaire, ou à la personne qui en a la possession, la responsabilité ou la charge des soins, de le faire — à l'égard des animaux ou choses qui:

(b) has been in contact with or in close proximity to another animal or thing that was, or is suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.

a) soit sont contaminés par une maladie ou une substance toxique, ou soupçonnés de l'être;

b) soit ont été en contact avec des animaux ou choses de la catégorie visée à l'alinéa a) ou se sont trouvés dans leur voisinage immédiat;

c) soit sont des substances toxiques, des vecteurs ou des agents causant des maladies, ou sont soupçonnés d'en être.

[29] The compensation payable to owners of animals disposed of pursuant to s 48 is addressed in s 51 of the Act:

Compensation to owners of animals

51 (1) The Minister may order compensation to be paid from the Consolidated Revenue Fund to the owner of an animal that is

(a) destroyed under this Act or is required by an inspector or officer to be destroyed under this Act and dies after the requirement is imposed but before being destroyed;

(b) injured in the course of being tested, treated or identified under this Act by an inspector or officer and dies, or is required to be destroyed, as a result of the injury; or

(c) reserved for experimentation under paragraph 13(2)(a).

Amount of compensation

Indemnisation: animal

51 (1) Le ministre peut ordonner le versement, sur le Trésor, d'une indemnité au propriétaire de l'animal:

a) soit détruit au titre de la présente loi, soit dont la destruction a été ordonnée par l'inspecteur ou l'agent d'exécution mais mort avant celle-ci;

b) blessé au cours d'un examen ou d'une séance de traitement ou d'identification effectués, au même titre, par un inspecteur ou un agent d'exécution et mort ou détruit en raison de cette blessure;

c) affecté à des expériences au titre du paragraphe 13(2).

Montant de l'indemnité

(2) Sous réserve des paragraphes (3) et (4), l'indemnité payable est égale à

(2) Subject to subsections (3) and (4), the amount of compensation shall be

(a) the market value, as determined by the Minister, that the animal would have had at the time of its evaluation by the Minister if it had not been required to be destroyed minus

(b) the value of its carcass, as determined by the Minister.

a) la valeur marchande, selon l'évaluation du ministre, que l'animal aurait eue au moment de l'évaluation si sa destruction n'avait pas été ordonnée,

b) déduction faite de la valeur de son cadavre.

[30] An owner who is dissatisfied with the compensation awarded pursuant to s 51 of the Act may appeal to an Assessor pursuant to s 56. The Assessor is appointed under Part II of the *Pesticide Residue Compensation Act*, RSC 1985, c P-10 [PRCA]. A judge of the Federal Court may be designated as an Assessor pursuant to s 14 of the PRCA. The Assessor may then designate a Deputy Assessor to hear and determine any appeal, as occurred here.

[31] An appeal of compensation is not an exercise in judicial review. It is, in effect, a *de novo* trial of the issue of whether the compensation awarded by the Minister under the Act was reasonable (*Willow Hollow Game Ranch Ltd v Canada (Minister of Agriculture and Agri-Food)*, 2016 FC 343 [*Willow Hollow*] at para 8, citing *Ferme Siclo v Canada (Minister of Agriculture and Agri-Food)*, 2004 FC 871 at para 55). The process is intended to give producers an informal and timely avenue to challenge decisions respecting compensation (*Willow Hollow* at para 8):

[32] Appeals are limited to questions of the inadequacy of compensation, or the justification for a failure to award compensation:

Appeal

56 (1) A person who claims compensation and is dissatisfied with the Minister's disposition of the claim may bring an appeal to the Assessor, but the only grounds of appeal are that the failure to award compensation was unreasonable or that the amount awarded was unreasonable.

Appel

56 (1) Il peut être interjeté appel devant l'évaluateur soit pour refus injustifié d'indemnisation, soit pour insuffisance de l'indemnité accordée.

[33] The Assessor may confirm or vary the Minister's disposition of the claim, or refer the matter back to the Minister. Costs of the appeal may be awarded to or against the Minister:

Powers of Assessor

57 (1) On hearing an appeal, the Assessor may confirm or vary the Minister's disposition of the claim or refer the matter back to the Minister for such further action as the Assessor may direct.

Pouvoirs de l'évaluateur

57 (1) L'évaluateur qui entend l'appel peut confirmer ou modifier la décision du ministre ou renvoyer l'affaire à celui-ci pour qu'il y soit donné suite de la manière que lui-même précise.

Costs

(2) Costs may be awarded to or against the Minister in an appeal.

Frais

(2) Les frais peuvent être accordés au ministre ou mis à sa charge.

[34] The decision of the Assessor is final, and not subject to appeal or review by any court (Act, s 57(3)).

[35] The applicable test is reasonableness (*Ferme Avicole Héva Inc v Canada (Minister of Agriculture)*, [1998] FCJ No 1021 [*Ferme Avicole Héva*] at para 9). As Justice Barry Strayer explained in *Nelson v Canada (Minister of Agriculture)*, [1991] FCJ No 1003 at paragraph 2:

The appeal is in effect a trial of the issue of whether the compensation ordered by the Minister was “unreasonable”, presumably having regard to the criteria laid down for the Minister whereby he is to determine what in his opinion is the market value that the animal ... would have had immediately before it was destroyed under this Act ...

[36] The focus of the analysis is not limited to the price to a seller, but encompasses the price at which a buyer would purchase. The depreciated replacement cost may be a reasonable method of valuation where there is no market (*Ferme Avicole Héva* at paras 31-34).

[37] Pursuant to s 55 of the Act, the Minister may make regulations respecting a method of calculating the market value of animals where the Minister is of the view that there is no readily available market. This provision permits the Minister to establish maximum amounts or the manner for calculating such amounts for the purpose of s 51(3) or s 52 of the Act:

Regulations

55 The Minister may make regulations

- (a) respecting the method of calculating the market value of animals for which the Minister considers there is no readily available market;
- (b) establishing maximum amounts, or the manner of calculating maximum amounts, for the purpose of subsection 51(3) or section 52; and
- (c) permitting compensation for any costs related to the disposal of animals and things and for determining the amounts of the compensable costs, including maximum amounts, or a manner of calculating them.

Règlements

55 Le ministre peut, par règlement:

- a) régir le mode de calcul de la valeur marchande des animaux difficilement commercialisables selon lui;
- b) fixer les plafonds des valeurs marchandes des animaux ou des choses ou leur mode de calcul;
- c) autoriser l'indemnisation pour frais de disposition — notamment par destruction — d'animaux ou de choses et fixer soit le montant de celle-ci ainsi que le plafond, soit le mode de leur détermination.

[38] The *Compensation for Destroyed Animals Regulations*, SOR/2000-233 [CDAR] provide in s 2:

2 For the purpose of subsection 51(3) of the Act, the amount that is established as the maximum amount with respect to an animal that is destroyed or required to be destroyed under paragraph 27.6(1)(b) or subsection 48(1) of the Act is

(a) if the animal is set out or included in column 1 of an item of the schedule, the amount set out in column 3 of that item; and

(b) in any other case, \$30.

2 Pour l'application du paragraphe 51(3) de la Loi, la valeur marchande d'un animal qui est détruit ou qui doit l'être en application de l'alinéa 27.6(1)b) ou du paragraphe 48(1) de la Loi ne peut dépasser :

a) le montant prévu à la colonne 3 de l'annexe, pour tout animal visé à la colonne 1;

b) 30 \$, dans tout autre cas.

[39] The schedule to the CDAR establishes that the maximum amount the Minister may award for individual elk is \$8,000 for bulls one year and older, and \$4,000 for all other elk that fall within that category.

[40] Where market information does not permit a precise evaluation, various indicators and assumptions may reasonably be used to value the animals. Justice James Russell said the following in *Willow Hollow* at paragraph 265:

Even though a precise evaluation was not possible, there are various indicators and assumptions that could reasonably have been used in this case to value the remaining bulls, including but not limited to:

- i) Age;
- ii) Velvet weights;

- iii) Cervid movement permits;
- iv) Source comparators; and
- v) The value of replacement bulls acquired after the 2014 depopulation.

VIII. Minister's Valuation

[41] Mr. Friedel's method of valuation, adopted by Dr. Wayman, may be summarized as follows.

A. *Grouping into Cohorts*

[42] The Bergens' elk were divided into cohorts by age and gender. The females were grouped into five age cohorts:

- Mature Cows born 2006-2013 – 25 animals;
- Cows born 2014 (3 years old) – 11 animals;
- Cows born 2015 (2 years old) – 20 animals;
- Cows born 2016 (1 year old) – 12 animals;
- Calves (female) born 2017 – 13 animals.

[43] The males were grouped into seven age cohorts:

- Mature Bulls born 2004-2010 – 20 animals;
- Bulls born 2011-2015 (5 & 6 years old) – 9 animals;
- Bulls born 2013 (4 years old) – 16 animals;
- Bulls born 2014 (3 years old) – 14 animals;
- Bulls born 2015 (2 years old) – 27 animals;
- Bulls born 2016 (1 year old – “Spikers”) – 4 animals;
- Calves (male) born in 2017 – 9 animals.

B. *Notation of Hot Hanging Weights*

[44] Mr. Friedel examined the Hot Hanging Weights [HHWs] of each of the animals that were transported from the Bergens’ farm for slaughter. Individual weights for each slaughtered animal were recorded by the Alberta Wapiti Products Co-op [AWAPCO] and provided to the CFIA. The HHWs were recorded in Kg, with two exceptions (animals that did not test positive for CWD).

C. *Multiplication of HHWs in Kg by \$11.50*

[45] The HHWs in Kg for each animal were multiplied by \$11.50. Mr. Friedel testified that these values served as a useful starting point, because they were the amounts that a member of AWAPCO would have received if the animals were sold for meat. (The Minister notes that the

Bergens were not AWAPCO members, and may not have benefited from this price.). Mr. Friedel determined that HHWs in Kg x \$11.50 was an “Initial Index Value” for the animals.

D. *AWAPCO Contract*

[46] AWAPCO obtained the right to acquire and sell the meat from the slaughtered animals into the exotic meat market as a result of participating in a bidding process in competition with other potential buyers. AWAPCO’s bid was \$8.65 per Kg. A second hypothetical slaughter value for the meat of each animal was therefore its HHW in Kg multiplied by \$8.65.

[47] Under the CFIA’s compensation process, these amounts were calculated for each animal and paid directly to the Bergens by AWAPCO as an initial installment on the compensation. The initial amounts are shown in the Award of Compensation as “Carcass Value/Valeur de la carcasse”. They are not compensation amounts, but rather initial payments based upon what the government was able to obtain for the meat from a private sector entity.

E. *Estimates of Live Weights*

[48] The CFIA sought to value the animals as if they were alive, requiring an adjustment of carcass values. In order to estimate the animals’ live weights, the HHWs were converted from Kg to Lbs, the conventional unit of measurement used by the elk industry. Transport and slaughter cause animals to lose weight, requiring the use of a “shrinkage” factor. Mr. Friedel

testified that a normal shrinkage factor would be 0.56. For example, if an animal's HHW was 300 Lbs, then its estimated live weight would be 536 Lbs ($300/0.56 = 535.71$).

[49] A more generous shrinkage factor of 0.515 is sometimes applied, resulting in a higher estimate of live weight. Using the previous example, if the shrinkage factor is 0.515, then the estimated live weight of the animal would be 583 Lbs. ($300 / 0.515 = 582.52$). Mr. Friedel estimated live weights using both the normal shrinkage factor and the more generous one.

F. *Absence of Animal-Specific Information*

[50] An antler score represents the sum of antler lengths, point lengths, circumferences and inside spread, and may be helpful in assessing the value of mature elk. The Bergens did not supply any antler scores, either from the depopulated animals or animals sold previously. This includes the 12 males that were sold into the hunt market in 2017.

[51] Very little information was provided regarding individual purchase prices for the animals in the Bergens' herd. The Bergens supplied no genealogical information about the animals in the herd, either through pedigree charts or otherwise.

[52] The Bergens supplied aggregate velvet sales records for the five years preceding Dr. Wayman's valuation, but no individual velvet production amounts for either the depopulated animals or previous animals in the same age cohorts.

G. *Cervid Movement Permits*

[53] Cervid Movement Permits [CMPs] were considered for the animals that were moved onto the Bergens' farm in the five years preceding Dr. Wayman's valuation. Two bulls (AJRG52A and AJRG38A) had been acquired from Golden Willow Elk Products in Clive, Alberta, which is known to supply high-quality animals. The valuation awarded the \$8,000 maximum for each of these animals. According to Dr. Wayman's notes, males with identification numbers beginning SLBW were accepted as originating from high quality source farms.

[54] CMPs for animals that were moved off the Bergens' farm in the five years preceding Dr. Wayman's valuation were also considered. 100% of the females had been sold for slaughter (*i.e.*, meat). None had been sold to other farms for breeding purposes or otherwise. 68% of the males had been sold for slaughter, while only 32% of the males had been sold into the hunt market.

H. *Pregnancy Rates*

[55] Mr. Friedel could not remember checking the number of slaughtered females who were carrying calves at the time of depopulation. Instead, he offered a rough calculation of estimated pregnancy rates in the year 2017 using information supplied by AWAPCO. In his opinion, 37 of the 68 female elk that were slaughtered would reasonably be expected to be carrying calves at the time. He therefore estimated the pregnancy rate to be 57.3%.

[56] Dr. Wayman took note of the low weights of the females, particularly the one-year-olds. She observed that females of such low weights would not be expected to carry calves to term.

I. *External Indicators*

[57] Mr. Friedel directed Dr. Wayman to the results for the bi-annual auction sales held by the Alberta Elk Ranchers Association operated by Gateway Auctions Ltd at Nisku, Alberta for 2017 and 2018. He also referred her to “prices paid privately” and “prices ... paid in herd dispersal sales.”

[58] According to Dr. Wayman’s Valuation Report, 2017 and 2018 Production Sale auction prices, Serecon’s evaluation, and prices paid privately and in herd dispersal sales were all considered. She referred to a publication titled “State of the Industry” by J. Galbraith (Alberta Agriculture and Forestry, March 23, 2018) [State of the Industry], and observed that “the Elk industry has been in decline since 2006.” She continued: “the Saskatchewan Elk Industry has seen a sharper decrease in private sales, as the option for export to the USA is not available to Saskatchewan producers.”

J. *Valuation of Females*

[59] The valuation of the females was reached by taking the Initial Index Valuations and grossing them upwards to approximately the next hundred dollar amount. This applied whether that margin was large or small. The Minister notes that the Initial Index Valuations were likely

higher than what the Bergens would have received had they decided to sell their animals for slaughter in the absence of the depopulation.

[60] The valuation of the females took into account the cohorts to which they belonged. Generally, the one-year-old females were valued between \$900 and \$1,200. The two-year-old females were valued between \$1,100 and \$1,700. The three-year-old females were valued between \$1,500 and \$1,700. The mature females were valued between \$1,500 and \$2,000.

K. *Valuation of Males*

[61] As noted above, the highest-quality bulls were accorded the maximum statutory value of \$8,000. The valuation of the remaining males took the Initial Index Valuations as the starting point. However, the gross ups were significantly higher. For example, the mature male identified as “Sample Number 126” had an Initial Index Value of \$2,128, while its compensation valuation was \$3,500.

[62] The valuation considered that 32% of the males had been sold into the hunt market in the preceding five years. The valuation of the males also took account of the “velvet component”. Buyers and sellers of male elk will often consider one year’s worth of expected velvet production as a factor over and above slaughter value.

[63] Most of the two-year-old bulls were valued at \$1,800. The three-year-old bulls were generally valued at \$2,300. The four-year-old bulls were generally valued at \$2,500. The five-

and six-year-old bulls were generally valued at \$3,000. The mature bulls (those seven years of age and older) were generally valued at \$3,500.

[64] As with the females, the valuations took into account the contracting state of the industry, decreasing demand, and the lack of access to either the United States or the Alberta market.

L. *Special Categories of Animals*

[65] A small number of animals needed to be valued separately.

[66] One elderly bull, born in 2014, was too weak to be transported from the Bergens' farm to the slaughter facility. The Minister says that an animal that is incapable of being transported arguably has no value. The CFIA nevertheless awarded compensation of \$2,500 for the bull.

[67] No weights were recorded for female or male calves. AWAPCO would not accept them, as they had no slaughter value. A willing buyer would have to transport the calves to a farm, keep them for at least a year, incur the associated costs, and then sell them subsequently. The cost of transport would likely be at least \$500 per animal, and the cost of feeding would be another \$500 per animal, for a total outlay of at least \$1,000. An interested buyer would not know how much the animals might weigh after a year, or what the slaughter price would be. Despite the possibility that the calves had no real market value, the CFIA initially awarded \$500 for each of the female calves and \$800 for each of the male calves. After the Bergens provided information regarding what they had paid for six replacement calves, the value of one female

was raised to \$800 and another to \$1,000. The value of one male was raised to \$1,000, and another to \$1,800.

[68] While the Bergens take the position that their depopulated calves were of the same genetic quality as the replacement animals they purchased in August 2018, the Minister says that this assertion is not adequately supported by expert testimony (citing *Alsager v Canada (Agriculture and Agri-Food)*, 2011 FC 1071).

[69] Two males for which no weights were recorded were valued at \$2,300 and \$2,500 respectively, which the Minister says was consistent with others animals in the same cohorts.

IX. Positions of the Parties

A. *Appellants*

[70] The Bergens acknowledge that the CFIA asked them to choose between a sole evaluator and a team approach. However, the Bergens say they clearly communicated to the CFIA that they would make the decision only once they were informed of the CFIA's valuation. According to the Bergens, it was never explained to them that proceeding with a "sole" evaluator meant that the valuation would be conducted exclusively by the CFIA, and they would be forfeiting their opportunity to submit their own valuation.

[71] The Bergens maintain that Mr. Riach's valuation based on the economic model should have been considered, and there should have been a dialogue with the CFIA to determine the

precise amount of compensation. Dr. Wayman led them to believe that all parties would meet and negotiate. According to the Bergens, they understood that Dr. Wayman was pursuing the team approach up to the point in late December 2019 when she unilaterally decided there was no need for a meeting.

[72] The Bergens argue that Mr. Riach is an independent expert with no personal interest in the elk industry. Mr. Riach does not own any animals, and his only exposure to the industry is through the information submitted to him annually by the Bergens for accounting purposes.

[73] The Bergens allege that the CFIA was negligent in failing to advise them that the valuation prepared by Mr. Riach was unacceptable. They say they should have been given an opportunity to hire an expert and/or complete another valuation within the parameters prescribed by the Act. The Bergens object to Dr. Wayman's reliance on the advice she obtained from Mr. Friedel, and the lack of an opportunity to submit their own market-based valuation.

[74] Because Dr. Wayman admitted that she is not an expert in the elk industry or the valuation process, and she relied almost entirely on Mr. Friedel's expertise, the Bergens argue that the Deputy Assessor can have no confidence in the objectivity of her decision. The Bergens acknowledge that Mr. Friedel has achieved great success in the industry, but say that his opinions were based almost exclusively on statistics from Alberta, hearsay and unsubstantiated assertions.

[75] The Bergens say that Mr. Friedel's valuation was based on data from 2019 and 2020, not December 2017 when the herd was destroyed. They assert that Mr. Friedel's valuation was

essentially meat price multiplied by carcass weight. They say their elk were above average in body size.

[76] The Bergens argue that Mr. Friedel's general statements regarding commercial sales are contradicted by actual sales data. Mr. Friedel did not take into account the Bergens' extensive culling program, or recognize the increased value of the elk that the Bergens chose to keep on their farm. Mr. Friedel also failed to acknowledge the increased values of any cows that were pregnant. The Bergens note that the pregnancy rates of the depopulated cows were not recorded, which they say was a serious oversight by the CFIA.

[77] The Bergens take issue with Mr. Friedel's statement that calves cannot be sold, and say that their documentation confirms both commercial and private treaty sales of calves. They say Mr. Friedel's assertion that elk in Alberta are more valuable than those in Saskatchewan, because Alberta elk can be exported to the U.S., is not substantiated by documentation. On the contrary, Mr. McClennon testified that Saskatchewan elk have a market advantage because Saskatchewan has hunt farms and Alberta does not.

[78] The Bergens maintain that values for individual elk available from the Agriculture Stability Program [AgriStability] are the most objective. Any variances in values reported by producers are challenged by program administrators and must be verified by actual sales and purchase receipts. The AgriStability numbers therefore represent a truly independent cross section "averaging" of values by age and gender. AgriStability values are accepted by Revenue Canada and the Saskatchewan Crop Insurance Corporation as true and accurate.

[79] The Bergens say that their elk must not be valued at “fire sale” prices at a single point in time, but must instead be valued with reference to a normal market. The Bergens allege that Mr. Friedel adopted a valuation based on a false market, resulting in a significant under-valuation of their elk and making it impossible for them to replace the herd that was destroyed.

[80] The Bergens claim that Dr. Wayman was in no position to test the accuracy of Mr. Friedel’s valuation, and she should therefore have obtained a second valuation as a “litmus test” to determine the accuracy of either or both valuations.

[81] The Bergens say they should also be compensated for 16 lbs of spiker antler at a rate of \$50/lbs, multiplied by 16 lbs, for a total of \$800.

[82] The Bergens therefore ask that their compensation be increased to \$784,844.00, based on AgriStability values, with an additional \$800 for spiker velvet. They say this constitutes fair and reasonable compensation that will permit them to replace the depopulated elk with animals of comparable genetics, genders and ages.

B. *Respondent*

[83] The Minister argues that, as live animals, the Bergens’ elk could not be exported to the large market in the United States. Nor could they be exported to Alberta. The only market in which they could be sold was limited to Saskatchewan.

[84] To the extent that the Bergens rely on prices realized on the sale of live elk at auctions in Alberta, the Minister says these are not reliable indicators of the value of the Bergens' animals. Alberta prices are generally higher because of the difference in market access. Furthermore, the semi-annual auctions conducted by the Alberta Elk Ranchers' Association sometimes feature breeding stock, *i.e.*, animals of exceptional quality that are intended to generate off-spring born on purchasers' farms.

[85] Auctions that include "dispersal sales", where a rancher sells groups of animals following a decision to exit the industry, may provide a more useful indicator. However, even in these circumstances, some of the animals may fail to draw even the minimum bid. The average price of the animals that are sold may not therefore be a good indicator of the genuine market value for all animals in a particular cohort, given the limited demand. Market access and animal quality must both be taken into account when considering Alberta dispersal sales records.

[86] Because Saskatchewan elk have ready access to the meat market, including in Alberta and the United States, the Minister says that slaughter prices for elk are useful indicators of value.

[87] According to the Minister, for live females a buyer and seller in Saskatchewan will often agree to the expected slaughter value plus 20%. For live males a buyer and seller may consider the slaughter value plus the value of one year's worth of velvet grown on the antlers. The price of live males may also reflect the possibility that some may be suitable for sale into the hunt market, but this is difficult to assess.

[88] Pregnancy and weaning rates for female animals, and genealogical records for both genders, may also be considered if they are available. The costs of transportation to the buyer's farm and the future cost of feeding will also play a role in the bargaining process.

[89] The Minister notes that, with the exception of one breeder male and one female, the Bergens did not supply purchase receipts. They supplied no sales receipts for slaughtered animals. They did, however, produce a handwritten note and copies of bank deposit slips for the sale of 12 animals into the hunt market in 2017. They supplied aggregate velvet records, but not individual records.

[90] The Minister says that Dr. Wayman worked closely with Mr. Friedel, a highly-respected industry expert who guided and directed her throughout the valuation process. Mr. Friedel's extensive knowledge of the market assisted Dr. Wayman in valuing the depopulated animals and assigning compensation for each animal. The weights of the animals and their ages were relied upon as indicators of value. CMPs were used to determine the origins and destinations of animals that had been sold during the preceding five years. Auction sale records were considered to the extent they were useful, as were industry publications produced by governments. All information provided by the Bergens was also considered.

[91] The Minister therefore maintains that the valuation of the Bergens' elk was fair and reasonable, and reflected the market value of the depopulated animals.

X. Analysis

A. *The Economic Model*

[92] The Bergens say that the economic model of valuation applied by Mr. Riach, and also by Serecon, is appropriate and should have been accepted by Dr. Wayman. The Bergens acknowledge the maximum allowable amounts of compensation under the Act, but argue that this does not preclude the use of standard accounting practices to value the Bergen's herd. The Bergens say that Mr. Riach provided a well-documented account of the value of the elk enterprise to the Bergens' farming operation.

[93] The Bergens maintain that the valuation prepared by Serecon, the CFIA's own expert, was better-presented and more detailed than Mr. Friedel's valuation. This is not to say that the Bergens agree with the Serecon valuation; only that Serecon considered a broader range of factors than Mr. Friedel.

[94] While the economic model of valuation might be appropriate for insurance purposes or the calculation of damages in a civil claim, it is well-established that this model cannot be used to determine compensation under the Act. Justice Danièle Tremblay-Lamer confirmed in *Ferme Avicole Héva* that lost profit or value to the owner is not the same as market value when determining compensation (at para 38):

It has been established in the case law that the value to the owner does not correspond to fair market value, and that the compensation was not intended to compensate the owner for its lost profits by putting it back into the same position as it was in before the animals were destroyed.

[95] Dr. Wayman's decision to reject the reports prepared by Mr. Riach and Serecon was therefore reasonable. I agree with the Minister that the reports are largely irrelevant to this appeal.

B. *AgriStability Values*

[96] The Bergens emphasize the values for elk by cohort group recorded by AgriStability, which they say are a reflection of many producers' combined input and data. According to the Bergens, this removes subjectivity from the valuation, and allows producers to receive fair and reasonable compensation that will allow them to restock based on average values.

[97] Little evidence was provided during the hearing regarding AgriStability, or the purpose for which the program values livestock. According to the Minister's closing submissions in reply, AgriStability values are unrelated to compensation under the Act. The Minister relies on the following excerpt from the AgriStability website:

AgriStability is one of the business risk management programs under the Canadian Agricultural Partnership. It protects Canadian producers against large declines in farming income for reasons such as production loss, increased costs and market conditions. AgriStability is a margin based program designed to help producers manage large income declines. Each year, you must enrol in the program, pay your fee and submit a form by the applicable deadlines. [Minister's emphasis]

[98] The Minister says that, unlike AgriStability, no premium must be paid in order to receive compensation under the Act. The Minister therefore argues that compensation under the Act is

intended by Parliament to provide limited relief to producers whose animals are destroyed because they are infected with a reportable disease. AgriStability is in effect an insurance plan that compensates for economic losses beyond the market value of the animals. This must be contrasted with compensation under the Act, which is limited to the market value of the depopulated animals.

[99] Based on the evidence and submissions provided, I conclude that AgriStability is a business risk management program that is intended to protect against large declines in farming income due to production loss, increased costs and market conditions. The valuation of animals in this context does not assist in assessing market value of the animals in accordance with the Act.

C. *Market Value vs Replacement Cost*

[100] The Bergens maintain that the valuation and compensation process should allow producers the opportunity to repopulate their farm with “a like product”. They say the value of their depopulated herd is most accurately validated by their sourcing and purchasing of replacement animals.

[101] According to the Bergens, the process is not as simple as confirming the meat price at the relevant time, as might be done in the valuing of commercial cattle or hogs. In the words of Mr. Wehrkamp, “slaughter elk are cull elk”. In the elk industry, slaughter is used only to dispose of elk that are no longer of value to the farm. However, the elk industry is based on antlers, not

meat. The production of velvet and hard antler scores are the primary factors in determining the value of elk.

[102] Justice Tremblay-Lamer observed in *Ferme Avicole Héva* that depreciated replacement cost may be a reasonable method of valuation, but only where there is no market (at paras 31-34). Similarly, in *Willow Hollow*, Justice Russell found that the value of replacement bulls acquired after depopulation may be considered, but only in conjunction with age, velvet weights; CMPs, and source comparators, among other indicators (at para 265(h)).

[103] I therefore conclude that market value will not necessarily allow producers to fully repopulate their farm with only the amounts compensated. The Act consistently uses the term “market value”, not “replacement cost”. Market value is to be determined at the time of the herd’s depopulation, not in accordance with the cost of securing replacement animals at a different time or in a different market. Replacement cost is to be considered, together with other factors, only where there is no local market for the depopulated animals. That is not the case here.

D. *Limitations of the Saskatchewan Market*

[104] The Bergens disagree with the Minister’s assertion that the Saskatchewan elk market is limited because live animals cannot be exported to either Alberta or the United States. The Bergens maintain that there is a protocol to export live animals to Alberta, but this is rarely used

because the Alberta market is generally understood to be self-sustaining. The Bergens acknowledge that live animals cannot be exported from Saskatchewan to the U.S.

[105] In closing submissions, the Minister provided significant additional information regarding legal restrictions on the export of live elk from Saskatchewan to Alberta. The Bergens object to this additional information, which they say should have been presented during the appeal hearing. However, the Bergens were given an opportunity to address any new arguments and information in their written submissions in reply. Furthermore, it is well-recognized that a court may take judicial notice of facts that are either so notorious or generally accepted as not to be the subject of debate among reasonable persons; or capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy (*R v Le*, 2019 SCC 34 at para 84, citing *R v Find*, 2001 SCC 32).

[106] The Minister's overview of restrictions on movements of Saskatchewan elk to Alberta are appended to these reasons as Annex A. Based on this overview, and the evidence adduced during the hearing, I am satisfied that provincial legal restrictions have the practical effect of preventing live Saskatchewan elk from entering Alberta for any purpose other than immediate slaughter for meat. The Bergens concede that live elk cannot be exported from Saskatchewan directly into the United States. I therefore accept the Minister's contention that the Saskatchewan producer is largely shut out of the Alberta market, and also the U.S. market.

E. *Verified Sales*

[107] Regardless of export restrictions, the Bergens maintain that the value of Saskatchewan elk is similar to that of Alberta elk. The Bergens rely on documentation of live animal sales in Alberta and private treaty sales data from Saskatchewan, which they say demonstrate that the amounts paid in the two provinces are within the same price range. This applies to calves, cows and bulls.

[108] Mr. McClennon and Mr. Bergen both testified that Saskatchewan offers an advantageous market for hunt bulls. Alberta does not have hunt ranches, and accordingly Alberta producers can gain access to the valuable hunt market only by selling into Saskatchewan or the U.S. Mr. McClennon is an Alberta producer who has often moved animals to Saskatchewan for the hunt market. Other Alberta producers, including Mr. Friedel, have sold bulls into the Saskatchewan hunt market at Saskatchewan prices. According to the Bergens, if the U.S. market is valued more highly, then Alberta producers would presumably ignore the Saskatchewan market and sell exclusively to the U.S.

[109] The Bergens submit that valuation requires concrete, supportive and verifiable data. The Bergens say that the Minister has failed to provide any documentation to support the contention that prices for elk in Alberta are higher than for those in Saskatchewan. Nor has the Minister provided documentation to demonstrate that the U.S. market commands higher prices. Mr. Friedel did not substantiate his testimony with receipts, and provided little detail regarding the alleged difference in pricing between Saskatchewan, Alberta and the U.S.

[110] The Bergens contrast what they describe as Mr. Friedel's unsubstantiated opinions with their sales receipts from multiple farms. They say this documentation supports higher values for hunt bulls in Saskatchewan.

[111] The Minister notes that Mr. Friedel testified as an expert witness, and no objection was made to his qualifications or impartiality. Mr. Friedel provided data based on his personal knowledge of elk sales in Saskatchewan, explaining that he did not have the permission of the purchasers and sellers to produce actual receipts. His personal knowledge of elk sales extended to Alberta as well. He has previously held the position of Alberta representative to a national elk ranching organization, and some of his knowledge of the market in both provinces was acquired in that capacity. He was able to testify to the movement of live animals from Alberta to Saskatchewan, as well as movements from Alberta to the United States.

[112] While Mr. Friedel did not visit the Bergens' farm himself, he conducted a careful examination of the limited evidence regarding the herd's particular characteristics, including velvet averages in males, pregnancy and reproduction rates in females, and animal weights. He then applied his knowledge of industry standards and practices to arrive at market valuations at the time of slaughter.

[113] In this appeal, the Bergens provided additional genealogical information about the animals in the herd, including records of their pedigrees. Mr. Friedel was given the opportunity to comment on this additional information. He said that ultimately pedigree is not important:

what matters is performance, *i.e.*, weight and production. Accordingly, the new genealogical information did not alter his conclusions.

[114] The Bergens object that Mr. Friedel “seemed to have data on velvet weights that no one else had”, and say that he must have “guessed” at the weights based on his personal assumptions. Mr. Friedel was given the opportunity to comment on the additional data regarding velvet weights supplied by the Bergens in this appeal. He said it did not alter his conclusions.

[115] The Bergens cite average sale prices for elk sold at four semi-annual public auctions organized by the Alberta Elk Ranchers Association and operated by Gateway Auctions Sales in Nisku, Alberta. They produced records from auctions held on February 17, 2017, August 11, 2017, February 16, 2018, and August 10, 2018. These include average sale prices for animals from different cohorts. The Bergens calculated “averages of averages” or “net averages” from the four sales for the different cohorts, which they say represent market values for the corresponding cohorts in their herd.

[116] The Minister says that the Bergens have not applied this methodology consistently, and have substituted rough estimates of prices in years when no animals from a particular cohort were sold at auction. In any event, due to export restrictions the Minister maintains that the semi-annual auctions at Nisku, Alberta do not reflect the market for elk in Saskatchewan. In addition, the Alberta auctions are often used for the sale of premier-quality animals, intended as breeding stock. The Minister notes that the Bergens have no history of selling their own animals at Alberta auctions. Indeed, the Bergens’ animals could not be moved to Alberta for sale as live animals.

Accordingly, the pool of potential buyers for the Bergens' animals cannot be compared to the pool of potential buyers for animals sold at auction in Alberta.

[117] As previously discussed, Dr. Wayman's valuation did take account of auction prices in 2017 and 2018, particularly dispersal sales. However, a significant proportion of animals in dispersal sales failed to attract the minimum or "reserve" bid. Dr. Wayman was therefore not satisfied that even dispersal sales were indicative of the typical value of a particular animal within a particular cohort.

[118] In some cases, the average values obtained at auction were for animals that did not share the characteristics of the Bergens' herd. For example, average sale prices for females born in 2016 were available from only two auctions: August 11, 2017 and August 10, 2018. This produced an average sale price of \$1,537.50 per animal. However, Dr. Wayman observed that the HHW for the Bergens' yearling heifers were "very low", and they were "unlikely at that weight to conceive and carry a live calf to term." The Minister therefore argues that the Bergens' depopulated one-year-old females were not of the same quality as those sold at the Alberta auctions.

[119] For females born before 2011, the Bergens have advanced the concept of "super females", *i.e.*, those that have a good track record of calving, a good temperament, and are able to produce plenty of milk for their calves. The Minister says the Bergens' assertion that some of their herd comprised "super females" is not supported by any objective evidence.

[120] The Bergens provided the following information regarding their sales of hunt-ready bulls between 2014 and 2017:

Year	Hunt	Slaughter
2014	3 (100%)	0 (0%)
2015	2 (6%)	31 (94%)
2016	9 (23%)	30 (77%)
2017	12 (100%)	0 (0%)

[121] The Bergens note that in 2017, 100% of the sales were hunt bulls. They say this confirms that they culled heavily in 2015 and 2016, and groomed the herd to focus aggressively on the hunt bull market. In my view, the number of sales are too low, and the time period too short, to infer anything meaningful about the ratio of hunt bulls to slaughter animals in the Bergens' farming operation during the relevant timeframe.

[122] The Bergens assert that all male elk five years of age and older should be considered "hunt ready", and should be valued based on previous sales into the hunt market. The Minister says that this is inconsistent with the Bergens' own sales records, which suggest that no more than 32% of their bulls were sold into the hunt market in the five years preceding the valuation.

[123] Of the 12 bulls sold in 2017, all were either nine or ten years old. Four bulls sold in 2016 were nine or ten years old. Another two, also sold in 2016, were each 14-year-old bulls. The records of two bulls sold in 2015 do not indicate their ages. The Minister therefore disputes the

Bergens' claim that all males in their herd aged five years or older should be valued as hunt-ready. The animals sold into the hunt market were generally much older.

[124] Dr. Wayman testified that the valuation exercise took into account the steady and sharp decline of private animal sales, as evidenced by CMPs. According to the State of the Industry publication, "the Saskatchewan Elk Industry has seen a sharper decrease in private sales, as the option for export to the USA is not available to Saskatchewan producers".

[125] I therefore conclude that the evidence provided by the Bergens of verified sales, whether from their farm or elsewhere, is insufficient to rebut the expert testimony of Mr. Friedel regarding the fair market value of the Bergens' herd. The Bergens' criticisms of Mr. Friedel's methodology amount to taking "pot-shots from the sidelines", rather than providing an independent and comprehensive account of Saskatchewan market pricing at the relevant time (*Astrazeneca Canada Inc v Apotex Inc*, 2015 FC 322 at para 298).

F. *Mr. Friedel's Credibility*

[126] Ultimately, the reasonableness of the Minister's valuation of the Bergen's herd depends to a very large extent on the credibility of Mr. Friedel. Having determined that the reports of Mr. Riach and Serecon were of little use, Dr. Wayman relied almost entirely on Mr. Friedel for the valuation of all age cohorts, males and females, and whether the animals should be considered hunt-ready, breeding stock, or suitable only for slaughter. The Minister continues to rely on the testimony of Mr. Friedel in this appeal.

[127] Mr. Wehrkamp acknowledged that Mr. Friedel has “an exceptional education and an exceptional background”, and has achieved significant prominence in the elk industry in Alberta and beyond. Mr. Wehrkamp described Mr. Friedel’s animals as being in a league of their own. He also praised Mr. Friedel’s “tremendous history in the industry”.

[128] While Mr. Friedel has previously been compensated for his work on valuations conducted by the CFIA, he did not receive any remuneration for his work in this case. He candidly admitted that he disliked giving evidence in this appeal. He said that he did not question the limited paperwork provided by the Bergens respecting the sales of their animals, and whenever possible he extended the benefit of any doubt to increase the valuation of the Bergens’ herd.

[129] I have no hesitation in accepting Mr. Friedel as a highly-qualified expert in the elk industry in Alberta, Saskatchewan, and beyond. He testified in a forthright manner, and with obvious discomfort that much of his evidence would not assist the Bergens in their appeal. I am satisfied that his evidence was impartial, well-considered and had a sufficient factual foundation to be reliable.

[130] By contrast, Mr. Wehrkamp performed a dual role in this appeal. He was both the Bergens’ representative and their primary expert witness. Mr. Wehrkamp performed a similar dual role in *Willow Hollow*, and Justice Russell’s reservations about this approach are equally pertinent here (at paras 54, 56):

[...] The Respondent has not objected to Mr. Wehrkamp playing this dual role – it may make some sense in the context of an appeal under s 56(1) of the Act – but in assessing Mr. Wehrkamp’s evidence and his arguments, the Court has to remain aware that he is acting as both witness and advocate for the Appellant.

[...] I have no reason to think that Mr. Wehrkamp testified in any way that was less than truthful, but his joint role as witness and advocate sometimes mingled in a way that requires the Court to be particularly careful when examining the Appellant’s evidence to ensure that it provides an objective evidentiary basis for the severe criticism levelled against CFIA [...].

[131] While I do not question the sincerity of the witnesses called on behalf of the Bergens, where their testimony differs, I prefer that of Mr. Friedel.

XI. Conclusion

[132] As Justice Russell remarked in *Willow Hollow*, CWD can be both economically and emotionally devastating for a producer. The rebuilding of an elk herd following depopulation cannot be done quickly, and may require years of hard work and significant reserves of intelligence, experience and mental and physical tenacity (*Willow Hollow* at para 2).

[133] The compensation scheme under the Act is not comprehensive, and often falls short of covering all of the losses sustained following an outbreak of CWD. Producers are asked to shoulder a general burden that often arises through no fault of their own; hence, some form of compensation is justified. But there are many calls upon the public purse, and Parliament has decided that compensation under the Act must be limited (*Willow Hollow* at paras 3-4).

[134] The outcome of this appeal is a function of the nature and quality of the evidence presented, including expert testimony. For the reasons explained above, I have found Mr. Friedel's valuation to be impartial, well-considered and supported by the facts. I therefore conclude that the Minister's valuation of the Bergens' herd was fair and reasonable.

[135] The Bergens have raised legitimate concerns regarding their lack of opportunity to participate in the valuation process that resulted in the Notice of Award of Compensation dated January 9, 2019. While the procedural defects of the initial valuation process have been remedied by this appeal, which has proceeded as a hearing *de novo*, those defects are sufficiently serious to disentitle the Minister from an award of costs.

JUDGMENT

THE DEPUTY ASSESSOR'S JUDGMENT is that:

1. The appeal is dismissed.
2. No costs are awarded.

"Simon Fothergill"

Judge

ANNEX A

EXCERPT FROM THE CLOSING WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA RESPECTING RESTRICTIONS ON MOVEMENTS OF SASKATCHEWAN ELK TO ALBERTA

1. It appears that Alberta, aware of the endemic nature of CWD in Saskatchewan and anxious to preserve the access to U.S. markets for its elk has moved aggressively to enact laws to try to limit the spread of the disease in the province. These appear to effectively operate as a prohibition on Saskatchewan elk moving into Alberta.

2. The movement of elk from Saskatchewan to Alberta is regulated by a permit system created by the *Livestock Industry Diversification Act* (“*LIDA*”)¹ and the accompanying *Domestic Cervid Industry Regulation* (“*DCI Regulation*”)² which are both put into operation through stringent import protocols.

3. Under *LIDA* and the *DCI Regulation*, elk are considered “diversified livestock” in Alberta:

LIDA

Interpretation

1.1 (m.2) “present diversified livestock animal” means an animal of a species prescribed by the Lieutenant Governor in Council that does not belong to the Crown, to the Crown in right of Canada or to a private owner who maintains it pursuant to a permit within the meaning of the

¹ RSA 2000, c L-17 (“*LIDA*”)

² Alta Reg 188-2014 (“*DCI Regulation*”)

Wildlife Act, that is identified and registered and that is in containment in Alberta, but does not include any of its exuviated parts...

DCI Regulations

Present diversified livestock animal definition in Act

6 The following species of animals are established with reference to section 1(1)(m.2) of the Act:

...

(d) elk...

4. *LIDA* establishes strict controls on the possession of diversified livestock animals and the operation of diversified livestock farms:

- (a) A licence or permit is required to possess a diversified livestock animal (*LIDA* s 18.02);
- (b) A permit is required to transport a diversified livestock animal outside a diversified livestock farm (*LIDA* s 18.1);
- (c) A “present diversified livestock animal” must be identified and registered (*LIDA* s1.1(m.2));
- (d) Any prospective diversified livestock animal must also be identified and registered (*LIDA* s11);
- (e) Diversified livestock farm operators must have a licence (*LIDA* s4(1)).

5. *LIDA* provides the Minister of Agriculture and Forestry with vast and sweeping powers. The Minister can impose terms and conditions on the licence to operate a diversified livestock farm under section 6(4) of the Act. Section 3 invests the Minister, or Director (a Crown employee designated as Director by the Minister), with broad discretionary powers:

Terms and conditions of permissions, etc.

3(1) A permission, order or other decision of the Minister or the Director pursuant to this Act, including a permit, may be made subject to any terms and conditions that the Minister or Director considers appropriate.

(2) A person shall not contravene any term or condition imposed under subsection (1).

6. A further aspect of the Minister's power under *LIDA* is control over prospective diversified livestock animals coming from outside Alberta. The importation of prospective diversified livestock animals into Alberta expressly requires a permit from the Minister pursuant to sections 10.1 and 19(1):

Permits — issuance, alternatives and terms and conditions

10.1(1) The Minister may issue a permit authorizing a prescribed activity that would or could otherwise constitute a contravention of this Act.

...

(3) The Minister may, instead of issuing a permit, by regulation provide for a permit, licence or other kind of permission under other legislation of Alberta or another jurisdiction as the authorization for the activity referred to in subsection (1).

(4) Section 6(4) applies with respect to a permit as it applies to a licence, and a person shall not contravene any terms or conditions of the permit.

...

Importation and exportation

19(1) Except as prescribed, a person shall not import a live prospective diversified livestock animal into Alberta unless the importation of that animal is specifically authorized by a permit.

...

7. These provisions in *LIDA* are clarified by section 17(1) of the *DCI Regulations*:

Permits — general provisions

17(1) The permits issuable under the Act, for the purpose of section 10.1(1) of the Act, are

(a) import permits authorizing the importation into Alberta of live prospective domestic cervids of the kinds specified in the permits...

8. The Director, or an inspector appointed by the Minister, also has significant investigatory powers under *LIDA* to ensure compliance with the Act's provisions:

Entry and inspection

26(1) The Director or an inspector may, without obtaining a warrant, enter at any reasonable hour

(a) any premises, other than the living quarters of a private dwelling, used in connection with the operation of a farm, or

(b) any vehicle that the Director or inspector has reasonable and probable grounds to believe is being or has been used to transport diversified livestock animals, to inspect the premises or vehicle or any animal found in or on them or it or any records required to be kept by this Act.

(2) If the Director or an inspector on reasonable and probable grounds believes that there is in the living quarters of a private dwelling evidence of a contravention of this Act, the Director or

inspector may obtain a warrant to enter the private dwelling for the purpose of inspecting those quarters or any animal found in them or any records required to be kept by this Act.

9. An offence against section 19(1) carries a maximum \$50,000 fine or 12-month period of imprisonment (*LIDA*, section 30(a)).

10. Thus, *LIDA* and the *DCI Regulations* establish a robust regulatory scheme to control the movement of cervids both within and into Alberta. The requirement for import permits under section 19(1) of *LIDA* and section 17(1) of the *DCI Regulation* appears to be the basis for the stringent import protocols adopted by the Alberta government since September of 2004.

11. The Alberta Department of Agriculture and Forestry evidently uses the broad powers conferred upon it by *LIDA* and the *DCI Regulation* to set out the practical requirements for importing cervids into the province. The document entitled “*Requirements for Movement of Farmed Cervids from Canada and the United States into the Province of Alberta*”, dated May 13, 2004, was introduced by the Respondent in its Fourth Notice of Intention dated March 23, 2021 at Tab 2. This publication came from the Office of the Provincial Veterinarian, Dr. Keith Lehman. It is submitted that it is the effective execution by Alberta of the powers conferred on the executive branch by the legislative branch. It appears to set out the requirements to obtain a permit to import farmed cervids for a purpose other than immediate slaughter.³ This document

³ This document is not to be confused with the separate protocol for cervid destined for immediate slaughter “Import Protocol for Farmed Elk, White-tailed Deer and Mule Deer from Saskatchewan to Approved Registered Abattoirs in Albert FOR SLAUGHTER ONLY” found at: <https://www.alberta.ca/assets/documents/af-import-protocol-for-saskatchewan-cervids-for-slaughter.pdf>.

was referred to in the testimony of Bruce Friedel during cross-examination by the Appellants' Representative.

12. The protocols set out in "*Requirements for Movement of Farmed Cervids from Canada and the United States into the Province of Alberta*" permit or prohibit the importation of live cervids depending on the classification of the exporting zone (either the province of origin or a subunit of the province). Zones are deemed high risk for CWD if, in the last three years, there has been a lack of acceptable surveillance for CWD or a lack of an acceptable disease response protocol. The importation of live cervids from high risk zones is entirely prohibited. Medium risk zones are zones in which CWD is present in local free-ranging cervid populations. This state may be applicable to Saskatchewan given the endemic nature of the disease in the province. Permits in situations where the live cervids are from a medium risk zone are possible but may be subject to an extensive list of mitigating conditions taken at the zone and farm level.

13. It is the far-reaching requirements specified in the protocols which have the practical effect of blocking Saskatchewan elk from entering Alberta for any purpose other than immediate slaughter for meat. This has the effect of shutting the Saskatchewan producer out of the Alberta market in the same way as he is shut out of the U.S. market. This has a significant effect on the fair market valuation of Saskatchewan elk.

AN APPEAL TO THE ASSESSOR
PURSUANT TO THE HEALTH OF ANIMALS ACT

SOLICITORS OF RECORD

DOCKET: P-1-19

STYLE OF CAUSE: VICTOR BERGEN AND CHRIS BERGEN v THE
MINISTER OF AGRICULTURE AND AGRI-FOOD
CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN GRONLID,
SASKATCHEWAN, SASKATOON,
SASKATCHEWAN, AND OTTAWA, ONTARIO

DATE OF HEARING: MARCH 29, 30, 31, 2021

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: AUGUST 11, 2021

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