

Health of Animals Act
Registrar of Appeals



Loi sur la santé des animaux
Greffier des appels

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

Ottawa, Ontario, March 22, 2016

PRESENT: The Honourable Mr. Justice Russell, Deputy Assessor

BETWEEN:

WILLOW HOLLOW GAME RANCH LTD.

Appellant

and

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

Respondent

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JUDGMENT AND REASONS

I. THE APPEAL

[1] This is an appeal by Willow Hollow Game Ranch Ltd. [Appellant or WHGR], pursuant to s 56(1) of the *Health of Animals Act*, SC 1990, c 21 [Act], of the level of compensation awarded in accordance with the valuation appraisal of the Canadian Food Inspection Agency [CFIA] of May 2, 2014, for the destruction of 266 of the Appellant’s bull elk.

II. INTRODUCTION

[2] The evidence before me in this appeal reveals that the fallout from chronic wasting disease [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.

[3] In order to assist with the rebuilding process, the government of Canada has provided a compensation scheme under the Act, but this scheme is not fully comprehensive and it often comes nowhere near to covering the full losses that occur when CWD strikes. The compensation scheme under the Act is limited to the market value that the destroyed animal would have had at the time of its evaluation by the Minister if it had not been required to be destroyed, minus the value of its carcass. And even this amount is subject to maximums established under the regulations for the particular kind of animal that has been destroyed.

[4] A compensation scheme for destroyed animals is socially justifiable because when an animal is found to have CWD, the whole proximate herd is destroyed even though, as occurred in the present case, it is subsequently found that only a few animals had actually contracted the disease. The evidence before me is that this obliterative approach to controlling CWD (one that is extremely costly to the producer involved) has had little impact upon the general incidence of the disease in Saskatchewan. So producers are shouldering a general burden that often arises through no fault of their own. Hence, some form of compensation is justifiable.

[5] But there are many calls upon the public purse, so that Parliament has decided that compensation under the Act must be limited in the ways set out above.

[6] The evidence before me is that, generally speaking, both producers and CFIA understand the inherent limitations of the system and usually work towards an acceptable, though inevitably inadequate, compromise. In the present case, the economic impact of CWD upon the Appellant has been so huge that, given the limited nature of the compensation available, the Appellant naturally wishes to ensure that it receives the maximum to which it is entitled. On the other side, those fixed with assessing the compensation – no matter how sympathetic they may be with the plight of the producer – must adhere to the legislative scheme and remain faithful to the public trust that is reposed in them. The elk market is fairly new in Saskatchewan, has undergone a significant recent evolution, and has singular features that make it far from easy to determine a market value for animals that are destroyed. Both sides in this dispute have very different views on what is required to identify what is reasonable and fair in the particular circumstances of this case. Inevitably, then, tensions have arisen, and these have led to some *ad hominem* criticism of the chair of the compensation committee, Dr. Greg Graham. He is accused of lacking the qualifications for the task at hand and of being myopic when it comes to the factors that determine the value of elk in today's evolving market. In my view, the evidence shows that personal attacks upon Dr. Graham are unwarranted. The tensions that have arisen in this case are a function of the significant financial losses suffered by the Appellant as a result of the depopulation of its elk herd, the limited assistance available to it under the statutory scheme, the particular valuation difficulties that arose in this case, and the unique features of an evolving elk

market that make it very difficult to determine a fair market value for elk that have been destroyed under the Act.

III. ROLE OF THE COURT

[7] The Court's role as an Assessor in handling compensation appeals under the Act is not, in my view, an entirely happy one. The only recourse for producers who are not satisfied with compensation decisions under the Act is to appeal to the Federal Court as an Assessor in accordance with the Act. The Court's decision is final.

[8] The Court is well versed in the principles that govern judicial review of the decisions of boards and tribunals. But an appeal of compensation under the Act 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. See *Ferme Siclo v Canada (Agriculture and Agri-Food)*, 2004 FC 871 at para 55 [*Siclo*]. The Court has no expertise in the elk market and yet, in this case, is being called upon to identify, and possibly apply, the principles that should determine a reasonable market value for destroyed elk in a context where the market itself is fairly new and still evolving, and where a consensus on principle, at least on the evidence before me, has yet to emerge. The Court would normally be assisted in this task by expert testimony, but in the context of an appeal process that has no pre-trial discovery and is intended to give producers a fairly informal and timely way of questioning compensation decisions, experts are unlikely to be called, and none were called in this case.

[9] This kind of decision, in my view, should be made by those knowledgeable in the industry whose decisions could be made subject to judicial review if necessary. Experts were used by both CFIA and the Appellant as part of the compensation process but, as I will discuss later, they used different valuation principles, so no consensus is detectable. Both sides agree, however, that the evaluation process was difficult in this case.

[10] Notwithstanding these problems, I highly commend both sides for the respectful and conscientious manner in which they conducted the hearing before me in Battleford. All involved, including the Court, are doing their best to render workable what is, in my view, a flawed and fraught compensation and appeal process.

IV. BACKGROUND

[11] I detect no disagreement between the parties as to the general background to this dispute. It is accurately summarized by the Respondent in written submissions which I set out below.

A. *Overview*

[12] The Appellant owns and operates a game ranch near Turtleford, Saskatchewan. The Appellant's operation includes meat and velvet production, hunting and breeding of elk (a member of the family Cervidae). Cervids are bred to produce males for the purpose of meat and velvet production as well as for hunts to hunters who will pay a fee in exchange for a hunting experience in natural surroundings.

[13] On February 3, 2014, a preliminary positive result of CWD was confirmed by the National Laboratory in Ottawa, Ontario of one of the Appellant's elk – a 7-year-old male. The Minister of Agriculture and Agri-Food Canada issued a Destruction Order to depopulate all of the Appellant's bull elk. The Minister paid compensation to the Appellant for the destruction of these elk, and the Appellant has appealed the assessment.

B. *The Facts*

[14] On February 3, 2014 it was confirmed that one of the Appellant's elk, a 7-year-old male, tested positive for CWD, a transmissible spongiform encephalopathy that causes a progressive neurological disease in elk and other Cervidae. CWD is generally believed to be caused by abnormal proteins called prions that will affect the animal's central nervous system. It is highly contagious and inevitably fatal.

[15] CWD is a reportable disease under s 5 of the Act and s 2 of the *Reportable Diseases Regulations*, SOR/91-2.

[16] On February 3, 2014 and February 5, 2014, Notices of Quarantine (for separate pastures) were issued by CFIA to the Appellant pursuant to s 6 of the *Health of Animals Regulations*, CRC, c 296 that placed all cervids connected to the Appellant's premises under quarantine.

[17] On February 5, 2014 and March 20, 2014, CFIA issued Notices of Requirement to Dispose to the Appellant, pursuant to s 48(1) of the Act, stating that destruction would occur by

May 31, 2014. By March 27, 2014, the 266 bull elk identified by CFIA for depopulation were euthanized, culled, or had died of CWD.

[18] On February 3, 2014 and March 14, 2014, Declarations of Infected Place were issued by CFIA pursuant to s 22 of the Act for the identified premises of the Appellant based on the suspicion of CWD.

[19] The Minister engaged the Appellant for the purposes of valuing its animals in respect of compensation to be ordered under the *Compensation for Destroyed Animals Regulations*, SOR/2000-233 [*Compensation for Destroyed Animals Regulations*].

[20] An evaluation team approach was used which included: Dr. Graham, the Chairperson on behalf of CFIA; Mr. Randy Wehrkamp, an industry evaluator proposed by the Appellant; and Dr. Clarence Bishop, an evaluator proposed by CFIA.

[21] On March 5, 2014, a Compensation Meeting was held at Mervin, Saskatchewan with the Appellant (represented by its business partners, Mr. Bentley Brown and Mr. Keith Conacher), Dr. Graham, Dr. Bishop and Mr. Wehrkamp in attendance. Dr. Graham was the CFIA Chairperson for the evaluation with the appropriate delegated authority. General matters of valuation were discussed and it was determined that Dr. Bishop and Mr. Wehrkamp would each formulate their own report on the valuation of the Appellant's depopulated elk.

[22] At the Compensation Meeting, the parameters of compensation were reviewed and there was a discussion related to the determination of “market value” and the importance of bills of sales, receipts and relevant pedigree and production records such that a determination on the profile of the herd and their appropriate values could be made. Mr. Wehrkamp provided a preliminary hand-written presentation at the Compensation Meeting to the Chair, Dr. Graham and Dr. Bishop for their review.

[23] Antlers are the basis for the industry scoring system by which the value of male elk can be assessed (the Safari Club International scoring system known as “SCI”). The bull elk in this case had not yet fully grown their antlers for the 2014 season; antlers will generally grow in fully by autumn. Without the antlers to score and with little supporting documentation respecting the value of the animals, valuation can be difficult, and was in this case.

[24] By March 27, 2014, the Minister depopulated the Appellant’s bull elk. During the depopulation of the Appellant’s elk, accurate inventories were established, confirming the ages and the numbers of animals that had been identified for depopulation.

[25] Mr. Wehrkamp completed his final report and submitted it to Dr. Graham for consideration on or about March 10, 2014. The Appellant provided one receipt relevant to one of the bull elk depopulated (SNOR 901W) and declined to provide receipts, invoices or other information in relation to the Appellant’s depopulated animals as requested by Dr. Graham. The explanation given for this was that purchase receipts were irrelevant because most of the animals to be valued had been acquired under a “block-purchase” arrangement and receipts did not

indicate the acquisition cost of the animals to be valued for compensation purposes. Dr. Bishop completed and submitted his report on or about March 26, 2014 to Dr. Graham for consideration. On May 2, 2014, Dr. Graham completed his Report of Valuation for the Appellant's elk.

[26] On May 2, 2014, in accordance with the Valuation Report completed by Dr. Graham, and in accordance with the true inventory numbers, the Minister issued Notices of Award of Compensation to the Appellant for their bull elk. The Minister also issued Notices of Award of Compensation to the owners of two bull elk that were in close proximity to the Appellant's animals and therefore included in the depopulation.

[27] The Appellant was awarded compensation of \$476,343.00 for the depopulation of its bull elk herd. Testing of the animals following depopulation resulted in a total of 5 positive results for CWD.

[28] The Appellant filed a Notice of Appeal on or about July 7, 2014 pursuant to s 56 of the Act stating that they wished to appeal the compensation of their bull elk.

V. DECISION UNDER APPEAL

[29] The award of compensation for the Appellant's destroyed bulk elk made by the Minister was based upon Dr. Graham's Valuation Report of May 2, 2014.

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

Attended the premise of Bentley Brown of Mervin, Saskatchewan on March 5/14 to meet with Bentley and his business partner Keith Connacher (Willow Hollow Game Farms) to chair a CWD compensation meeting with their Industry representative Randy Wehrkamp of Tisdale, Saskatchewan and Dr. Clarence Bishop representing the Canadian Food Inspection Agency.

The parameters of compensation were reviewed and discussed. Bills of sale and receipts were deemed very important (hunt, slaughter, velvet and breeding sales) to determine the herd profile components and their appropriate values.

Willow Hollow Game Farms elk herd consists of a meat, velvet and a hunt component. The herd started in 2009 with the purchase of females and males from at least ten producers. WHGF has provided no purchase receipts during this entire compensation process but did indicate they were purchased at meat prices. Above average/superior genetics would have reflected higher prices upon purchase. The hunt component of the operation averaged 31 hunts per year the past five years. There is no proof that the trophy quality (antler score) of the existing herd is similar to the animals hunted off over the last three years. Many of these animals were purchased "hunt ready", already bearing hunt-worthy antlers and the remaining animals in the herd are not linked to these values. The owners have not provided purchase receipts to substantiate that the existing herd is as valuable as the trophy animals already hunted off. The remaining animals not hunted out each year are harvested for velvet. Mr. Wehrkamp insists that the herd is basically for hunt, but the farm sold at least \$120,000 of velvet in 2013 as attested Dr. Jim McLane of the Battleford District Office. (4000 lbs @\$30 per lb - 2013 price)

Together with the information provided by Mr. Wehrkamp for the prospective sale of 2014 hunt bulls from various suppliers (price lists) averaging \$4500 and an invoice provided by Bentley for the recent purchase of 17 replacement trophy bulls for \$72,500 for 2014 hunt season I will assign a value of \$4500 to a trophy bull. Since velvet should average at least \$700 per bull for 2014 (20lb at \$35 per lb.) and meat value average of \$1675 per bull, (AWAPCO average slaughter value for the March 13 and 27/14 slaughter dates) a value of \$2375 will be assigned to a velvet/meat bull.

With the assignment 15% of the approximately 200 animals in the mature herd being of trophy quality (approximately 31/200) I will assign a weighted composite (hunt, velvet, meat) value of \$2700 to each animal aged 2010 and older. (85% of \$2375 = \$2019) plus (15% of \$4500 = \$675) equals \$2700.)

Similarly 2011 animals to be assigned \$1800 (\$1275 meat and \$525 velvet; AWAPCO return average plus 15 lb velvet at \$35 lb) and \$1400 (\$1050 meat and \$350 velvet; AWAPCO average slaughter value plus 10 lb velvet at \$35 lb) to 2012 animals based on meat/velvet values.

SNOR 901W will be assigned \$8000 since a receipt of \$9250 was provided.

Points to review.

1. Velvet sales play a significant part of total herd income. ... at least \$120,000 for 2013.
2. Dr. Bishop's assigned value of \$4800 to the hunt herd is premised on the fact that the entire herd is made up of trophy bulls. I have asked WHGF and Mr. Wehrkamp at least three separate times for receipts and/or documentation to validate that is the case. Nothing was provided. My assignment of \$4500 is based on Mr. Brown's recent purchase of 17 "like" (similar to the year before) trophy bulls and the price lists for suppliers for the 2014 hunt year.
3. For the last five years WHGF has averaged 31 hunts/year with a large number of trophy bulls being purchased just prior to the hunts as being "hunt ready". Animals hunted out each year do not give an accurate profile of what remains in the herd.
4. 15% of the mature herd has been assigned trophy status... approximately 31 hunts per year for the past five years of approximately 200 in the mature herd.

[signature]

Greg Graham DVM May 2/14

VI. LEGAL FRAMEWORK

A. *The Legislation*

[31] I set out the applicable legal framework for an appeal of this nature in my decision in *Alsager v Canada (Agriculture and Agri-Food)*, 2011 FC 1071 [*Alsager*] which the Respondent has ably summarized in written submissions as set out below.

[32] The issue in this matter is limited to the question of whether compensation issued to the Appellant is reasonable. The Act states:

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] In *Siclo*, above, Blanchard J. noted that in terms of the adequacy of compensation pursuant to the Act, "we must rely on the test of what is reasonable."

[34] In *Alsager*, above, the Appellant sought to appeal the compensation awarded by the Minister for the depopulation of his elk due to CWD under the Act. As Deputy Assessor, I confirmed that the grounds for appeal "are limited to whether the failure to award compensation was unreasonable, or whether the amount awarded was unreasonable."

[35] In response to issues raised by the Appellant in *Alsager* related to the compensation process established under the Act, I stated that the Appellant's general views were both complex and controversial political issues that belonged in the political forum:

... In any event, they belong in the political forum and I am sure that Mr. Alsager, who was both forceful and forthright in representing himself before me, is fully aware that these general

views need to be pursued and tested in the political arena. All that the Court can do is to determine whether, given the present scheme that Parliament has devised, and the methodologies and criteria used to evaluate his animals in this case, the compensation he received was reasonable.

[36] In *Ferme Avicole Heva Inc v Canada (Agriculture)*, [1998] FCJ No 1021 (TD) [*Ferme Avicole Heva Inc*], Tremblay-Lamer J. stated that lost profit or value to the owner was not the same as market value when determining compensation:

[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.

[37] In *Siclo*, above, Blanchard J. outlines the applicable legislation, beginning at paragraph 22, respecting the Minister's authority to order the destruction of animals and the discretion to order compensation corresponding to the fair market value of the animal at the time of its destruction:

[22] Section 48 of the *Animal Health Act* authorizes the Minister to order the destruction of animals which are, or are suspected of being, affected or contaminated by a disease. Under section 51, when the owner's animals are destroyed the Minister may order compensation to be paid to the owner. At the same time, under subsection 51(2), the compensation payable to the owner must correspond to the market value of the animal minus the value of its carcass, as determined by the Minister, at the time of the appraisal if its destruction was not ordered.

[38] Subsection 48(1) of the Act states:

48.(1) The Minister may dispose of an animal or thing,

48 (1) Le ministre peut prendre toute mesure de disposition,

or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing	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 :
(a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;	a) soit sont contaminés par une maladie ou une substance toxique, ou soupçonnés de l'être;
(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	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) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.	c) soit sont des substances toxiques, des vecteurs ou des agents causant des maladies, ou sont soupçonnés d'en être.

[39] Section 51 of the Act addresses 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	51 (1) Le ministre peut ordonner le versement, sur le Trésor, d'une indemnité au propriétaire de l'animal :
(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;	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) injured in the course of being tested, treated or identified under this Act by an	b) blessé au cours d'un examen ou d'une séance de traitement ou d'identification effectués,

inspector or officer and dies, or is required to be destroyed, as a result of the injury; or	au même titre, par un inspecteur ou un agent d'exécution et mort ou détruit en raison de cette blessure;
(c) reserved for experimentation under paragraph 13(2)(a).	c) affecté à des expériences au titre du paragraphe 13(2).
(2) Subject to subsections (3) and (4), the amount of compensation shall be	(2) Sous réserve des paragraphes (3) et (4), l'indemnité payable est égale à 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, déduction faite de la valeur de son cadavre.
(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.	
(3) The value mentioned in paragraph (2)(a) shall not exceed any maximum amount established with respect to the animal by or under the regulations.	(3) La valeur marchande ne peut dépasser le maximum réglementaire correspondant à l'animal en cause.
(4) In addition to the amount calculated under subsection (2), compensation may include such costs related to the disposal of the animal as are permitted by the regulations.	(4) L'indemnisation s'étend en outre, lorsque les règlements le prévoient, aux frais de disposition, y compris de destruction.

[40] The Minister's discretion to compensate is limited by maximum amounts established under the *Compensation for Destroyed Animals Regulations*:

2. For the purpose of subsection 51(3) of the Act, the amount that is established	2 Pour l'application du paragraphe 51(3) de la Loi, la valeur marchande d'un animal
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<p>as the maximum amount with respect to an animal that is destroyed or required to be destroyed under subsection 48(1) of the Act is</p>	<p>qui est détruit ou qui doit l'être en application du paragraphe 48(1) de la Loi ne peut dépasser :</p>
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<p>(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</p>	<p>a) le montant prévu à la colonne 3 de l'annexe, pour tout animal visé à la colonne 1;</p>
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<p>(b) in any other case, \$30.</p>	<p>b) 30 \$, dans tout autre cas.</p>
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[41] In the particular case of elk, the schedule, pursuant to the above noted s 2(a) of the *Compensation for Destroyed Animals Regulations*, provides that the maximum amount the Minister may award is as follows:

- 39.** Elk (*Cervus elaphus*) Bull, 1 year and older Cervidae 8,000
- 40.** Elk (*Cervus elaphus*) All elk other than those Cervidae referred to in item 39 4,000

[42] In *Donaldson v Canada (Minister of Agriculture)*, 2006 FC 842 [*Donaldson*], Kelen J. stated that the proper approach when determining the reasonable amount to award for the compensation of an animal destroyed under the Act is the market value that the animal had at the time of destruction, subject to any maximum amount referred to in s 51(3) of the Act.

[43] The Act also provides direction on the powers of the Assessor, potential costs and finality of the Assessor's decision where an appeal has been brought by the person who claims compensation:

<p>57. (1) On hearing an appeal, the Assessor may confirm or vary the Minister's disposition</p>	<p>57 (1) L'évaluateur qui entend l'appel peut confirmer ou modifier la décision du</p>
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of the claim or refer the matter back to the Minister for such further action as the assessor may direct. ministre ou renvoyer l'affaire à celui-ci pour qu'il y soit donné suite de la manière que lui-même précise.

(2) Costs may be awarded to or against the Minister in an appeal. (2) Les frais peuvent être accordés au ministre ou mis à sa charge.

(3) The decision of the Assessor on an appeal is final and conclusive and not subject to appeal to or review by any Court. (3) Les décisions de l'évaluateur ne sont pas susceptibles d'appel ou de révision.

[44] I confirmed the framework and principles as set out above in my capacity as Deputy Assessor in *Alsager*, above.

B. *The Common Procedures Manual*

[45] Both sides acknowledge the relevance of the *Common Procedures Manual* as a guide to the compensation process.

[46] Subsection 12.1.2 of the *Common Procedures Manual* makes it clear that eligibility for the payment of compensation includes “animals ordered destroyed pursuant to section 48 of the *Health of Animals Act*, including animals that die before they are destroyed.”

[47] Subsection 12.1 of the *Common Procedures Manual* requires CFIA, *inter alia*, to provide the owner of the animals with an explanation of “the basis of awarding the compensation.”

[48] The evaluation team approach to compensation that was used in the present case is governed by ss 12.3.2 and 12.3.3 of the *Common Procedures Manual*:

12.3.2 Establishing an Evaluation Team

3. Use an evaluation team in the following circumstances:

- the above conditions for a sole evaluator are not met; or
- the market value of the animal and/or thing cannot be readily established.

4. An evaluation team must include the following:

- a CFIA veterinary inspector to chair the team;
- an industry expert evaluator selected by the CFIA; and
- an industry expert evaluator selected by the owner and acceptable to the CFIA.

5. Confirm that the industry experts named to the evaluation team are knowledgeable of the market values of the following:

- the species type, class, and breed of animals being evaluated; and
- any things being evaluated, such as milk, eggs, semen, embryos, hay, fodder, feed stuffs, fertilizer, packing materials, and containers.

6. Confirm that each individual engaged as an industry expert evaluator is free of any conflict of interest in relation to the owner of the animals or things being evaluated, or in relation to the animals or things being evaluated.

12.3.3 Evaluation

7. On behalf of the CFIA, enter into a contractual agreement for evaluation services with each industry expert evaluator. Use standard contract documents, and add the following statements:

- Contractors are aware and understand that, under the *Health of Animals Act*, the Minister may pay compensation to the owner of an animal or thing that is destroyed under that Act and that the amount of compensation shall be the market value (up to the

maximum amount allowed), according to the *Compensation for Destroyed Animals Regulations* schedule (section 3) and (as determined by the Minister) that the animal would have had at the time of its evaluation – less any carcass salvage value – had it not been ordered destroyed.

- Contractors act as follows:
 - They provide, in writing to the CFIA, an opinion of the market value of each animal or thing evaluated, together with the reasons for holding that opinion of the market value.
 - They acknowledge that they were provided with the Minister’s definition an understanding of market value and how it is to be assessed, as set out in this section of the manual.
 - They declare freedom from conflict of interest in relation to the owner of the animal or thing being evaluated, or in relation to the animal or thing being evaluated.

[49] The central concept of “market value” and how it must be established is set out in s 12.4 of the *Common Procedures Manual*:

12.4 Market Value

This section ensures a common understanding of market value among owners, industry experts, and the Canadian Food Inspection Agency (CFIA).

For the purpose of awarding compensation, market value is the value that the animal or thing would have had at the time of its evaluation if it had been sold in the open market (i.e. to a willing buyer from a willing seller) and not been ordered destroyed.

12.4.1 General Procedures

1. Consult the network veterinary program specialist to determine the amounts of compensation that have been awarded recently for similar animals. This discussion should always occur before the owner is given the compensation form. (Form CFIA/ACIA 4203 - Requirement to Dispose and Award of Compensation

and Form CFIA/ACIA 4210 - Requirement to Dispose and Award of Compensation [for Things] should be used in conjunction with Form CFIA/ACIA 4202 -Requirement to Dispose of Animals or Things.)

2. The maximum values found in the Compensation for Destroyed Animals Regulations are reviewed on a periodic basis and adjusted to reflect current market values.
3. Confirm the understanding of market value with the owner by asking the owner to provide the following:
 - bills of sale and receipts for relevant transactions during the past two years, for reference purposes; and
 - relevant pedigrees and production records.
4. Confirm the industry expert's understanding of market value by clarifying that market value should be as follows:
 - comparable to the price paid by a willing buyer to a willing seller in an arm's-length transaction for comparable animal or thing;
 - based on current prices charged by local suppliers; or
 - based on current prices paid by marketing agents or agencies for milk, eggs, etc.

[50] The *Common Procedures Manual* provides specific guidance on the valuation of animals and things in s 12.6:

12.6 Evaluating Animals and Things

This module provides guidance on the evaluation of animals and things.

1. The evaluation team must conduct a market value assessment, which includes a review of current price information derived from animal industry sales of similar breeds and types of the relevant species, such as the following:
 - local auction markets;
 - stockyards;

- herd dispersal and production sales;
 - sales held in conjunction with shows and exhibitions; and
 - documented private treaty transactions.
2. Complete an evaluation report documenting the evaluation of each animal eligible for compensation, using the worksheets in modules 12.16 and 12.17, and Module 12.5: Economic Model - Evaluating Poultry With No Readily Available Market. The worksheets may be modified if necessary.
 3. The industry expert evaluators, selected jointly by the owner and the Canadian Food Inspection Agency (CFIA), describe and evaluate each animal or group of animals eligible for compensation. Their determinations are recorded on the evaluation worksheet by the veterinary inspector who chairs the team.
 4. Industry expert evaluators must base their opinions of the market value of each animal eligible for compensation on the following:
 - their assessment of the relevant characteristics of each animal, including the following:
 - type (e.g. dairy, beef, layer, broiler),
 - breed,
 - class or purpose (e.g. breeding, meat, velvet, milk), or age (may require looking at dentition),
 - gender,
 - genetic merit (examining records of production or performance), or pedigree (grade vs. purebred),
 - stage of production or pregnancy (e.g. open, pregnant, nursing, stocker, weaned),
 - production level of milk, velvet, wool, litter size, multiple births,
 - conformation (e.g. physical defects, body weight and size for type or breed purpose),
 - physical condition,

- special health status, such as specific pathogen free, and
 - other features of the animal not included in the above factors and which reflect, in most cases, the availability of a comparable animal in the open market;
 - their knowledge of prices paid for comparable animals in the open market place, obtained during the evaluation team's market value in accordance with Module 12.4: Market Value; and
 - making no allowance for past market prices or anticipated future values.
5. The owner and the evaluation team may agree to group animals of the same type, class or purpose, age, gender, stage of production, physical condition, and weight to establish the market value of each animal in the group. For example, each animal in a group of finished beef breed steers weighing 440-460 kg and in good physical condition may be assigned the same market value. Similarly, each bird in a flock of leghorn hens at 95 days laying may be assigned the same value.
6. In the case of an animal for which registration papers are unavailable or have not been transferred into the name of the owner, the following should occur:
- the industry expert evaluators should determine both grade and purebred market values;
 - the CFIA veterinary inspector should award compensation based on the grade market value; and
 - supplementary compensation based on the difference between the grade market value and the purebred market value should be awarded when the registration papers are provided to the CFIA, if they are received within 90 days of the date the animal was evaluated.
7. All members of the evaluation team sign an evaluation worksheet for each animal or group of animals evaluated, as well as the record of values for things, and any notes for the rationale or justification of the values assigned.
8. In cases where the evaluation team is unable to reach agreement, the industry and CFIA evaluation experts should each present a written report, along with supporting documentation, to the

evaluation team chair. The chair (i.e. CFIA district veterinarian or staff) will determine the compensation to be awarded and outline the reasons in an evaluation chair report. All compensation may be appealed.

[51] In the present case, s 8 of 12.6 came into play because the evaluation team was unable to reach agreement.

[52] While both sides acknowledged the importance of the *Common Procedures Manual*, both Dr. Graham and Dr. Bishop acknowledged that it provides guidelines, but there was also some flexibility in the evaluation process.

VII. THE ISSUE

[53] The issue before the Court, as Assessor, is whether, in accordance with s 56(1) of the Act, the compensation awarded by the Minister in this case was unreasonable, and whether in accordance with s 57(1) of the Act, the Court, as Assessor, should confirm or vary the Minister's disposition or refer the matter back to the Minister for such further action as the Court, as Assessor, should direct.

VIII. MR. WEHRKAMP'S ROLE

[54] Mr. Wehrkamp's role in the appeal process is somewhat ambivalent. He was appointed as the industry expert evaluator under s 12.3 of the *Common Procedures Manual* at which time he must have been "acceptable to the CFIA" under s 12.3.2(4) and "free of any conflict of interest" under s 12.3.2(6). Mr. Wehrkamp has not put himself forward as an "expert witness" in the

appeal, but he is both a witness and the advocate for the Appellant. Indeed, the evidence shows that he immediately took up the Appellant's cause after Dr. Graham made his recommendations. 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. Dr. Graham and Dr. Bishop were also involved in the compensation evaluation (Dr. Graham as the Chairperson and Dr. Bishop as the CFIA expert), but Dr. Graham and Dr. Bishop have only given evidence as witnesses in the appeal process. They are not acting as advocates for CFIA although, inevitably, in giving evidence they were being asked to justify their previous decisions.

[55] Neither of the Appellant's two owners, Mr. Bentley Brown and Mr. Keith Conacher, were called as witnesses. This means that they could not be cross-examined under oath on their refusal to produce the receipts and invoices that Dr. Graham repeatedly asked for.

Mr. Wehrkamp has provided an explanation (the receipts were not available or relevant), but irrelevancy does not prevent them from being produced. Dr. Graham and/or the Court could have decided the issue of relevance themselves, and Mr. Wehrkamp's position on this issue could have been tested.

[56] 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, and Dr. Graham in particular.

IX. ARGUMENTS

A. *Appellant*

[57] Essentially, the Appellant argues that CFIA failed to recognize and value its primary hunt business. WHGR says that the evidence before Dr. Graham was that the order of revenue from its elk business was hunt, velvet and meat sales, so that the Appellant is primarily a hunt business, even though it also has velvet and meat revenues.

[58] CFIA failed to take into account that the Appellant was rebuilding its elk herd following the 2009 depopulation (when 550 elk were destroyed) and that only half that number of elk were destroyed in 2014 because the rebuilding process was still under way. This meant that the Appellant was retaining genetically superior – and therefore more valuable – bulls as part of the rebuilding process. This is why the Appellant was selling hunt-ready animals acquired from other producers. The Appellant was not marketing its own hunt-ready animals because they were required for breeding purposes and so were not actively marketed. Only those bulls that were six years or older were hunt-ready and available for sale as hunt animals or to other hunt properties. Even though the bulls at the WHGR were of hunt or breeding quality, the Appellant was not in a position to sell hunt-ready or breeding bulls because the whole herd was at 50 percent capacity and was still being rebuilt after the 2009 depopulation.

[59] In rebuilding the herd following the 2009 depopulation, the Appellant acquired groups of bulls from different producers [block-purchase]. Block-purchases involve a single, agreed-to-price, for a group of animals of mixed ages and mixed genetic value. These animals were then subjected to a fairly aggressive culling process each year so that only the better – and therefore more valuable – animals were retained and used for velvet sales and the rebuilding of the herd. Fifty-five bulls had been culled in 2013 as part of this culling process and had been sold for meat.

[60] In its evaluation, CFIA failed to understand and/or take into account the enhancements in value that the rebuilding process had produced in those animals that were destroyed in 2014. Through culling, animals that fell below the ranch standard were sold for meat each year and the bulls retained were those expected to become hunt bulls at six years of age.

[61] CFIA insisted upon purchase receipts for the animals left in the herd as an indicator of genetic and market value. But purchase receipts would not – and could not – provide a reasonable indication of the animals retained in the herd after culling. This is because block-purchasing involves the acquisition of animals of a different quality and value for a fixed, global price, and those animals that do not meet the standard required to build the value of the herd over time are culled each year.

[62] The Appellant points to the solid evidence produced to show that values in the elk industry for meat, velvet and hunt animals have appreciated considerably over the past five

years. This shows that purchase prices from prior years could not reflect the 2014 value of an elk herd that has been significantly culled to improve the value of remaining animals.

[63] CFIA based its valuation upon a lack of receipts and failed to use other established practices to value the remaining 2014 herd. No visual inspection of animals was carried out prior to destruction. Dr. Graham was also provided with the age and farm-source of all bulls purchased, as well as the velvet weights of bulls by age and with a five-year average of the number and size of bulls hunted each year. CFIA also had in its possession the movement permits for all bulls transported and so knew how many hunt-ready bulls were moved to WHGR. Dr. Graham also knew that 55 bulls (i.e. 20% of the bulls purchased) had been culled. Yet these indicators were not taken into account in the valuation, and Dr. Graham based his valuation upon meat values.

[64] CFIA's own expert evaluator, Dr. Bishop, accepted that age is a major consideration in the evaluation process and produced an evaluation that came within 2 percent of the Appellant's own evaluation. Yet Dr. Graham rejected Dr. Bishop's evaluation and did not allow sufficient age bands to fairly assess and differentiate values to take age into account.

[65] Dr. Graham lacked the experience and industry knowledge to produce a fair and reasonable evaluation. For example, he was not aware that six years is an industry standard for the definition of a mature bull; he is not familiar with the basic anatomy of elk and how antlers grow and develop; and, he did not visually inspect the bulls that were destroyed. Dr. Bishop, on the other hand, did have extensive experience working with cervids (particularly elk) and he had

participated in up to fifteen assessments/depopulations. Yet his valuation was rejected by Dr. Graham. In fact, Dr. Graham devalued the evaluations of both experts by 49% without providing any reasonable rationale or evidentiary basis for doing so.

[66] The Appellant has only been able to re-stock its bull herd to 42 percent of the 2014 capacity. Bulls are available, but the compensation provided in this case was not sufficient to meet the market values for replacement bulls.

[67] As regards the velvet aspects of the evaluation, the actual price of an elk velvet antler in 2014 was \$40 per lb. Yet Dr. Graham used \$34 per lb in his determination of current value, which resulted in an undervaluation for velvet in the amount of \$24,000.

B. *Respondent*

[68] The Respondent argues that the Appellant was awarded a total of \$476,343.00. This amount was arrived at based on a number of considerations that included but were not limited to: replacement values, claims of genetic quality, age, restricted movement status and use of the animal.

[69] The valuation of the elk included the consideration of the industry's scoring system of the antlers – SCI. The antlers had not yet grown in for the season at the time of the depopulation, so the SCI scoring system was of use in only a general way.

[70] The valuation of the Appellant's bull elk was further based on the consideration of relevant information provided by: the Appellant, the reports submitted to Dr. Graham, the Chair, and each of the expert evaluators. Further information was obtained through the independent efforts of the Chair.

[71] The valuation of the elk was further made difficult by the dearth of documentation provided by the Appellant that would have assisted in the determination process.

[72] The compensation awarded to the Appellant was not unreasonable. Pursuant to s 51 of the Act, the Appellant received a total of \$476,343.00 in compensation for the March 2014 depopulation of their bull elk. The valuation of the Appellant's bull elk was based on the replacement value, claims of genetic quality, age, restricted movement status and use of the animal. The Chair also took into consideration the relevant information provided by the Appellant, the reports submitted by each of the evaluators, the general application of the SCI scoring system and information obtained through the independent efforts of the Chair.

[73] The Appellant has not shown that the compensation awarded was unreasonable. The valuation of the elk and the compensation awarded was based on the information that was available and reflected the fair market value of the animals at the time of depopulation.

X. EVIDENCE

A. *Appellant's Witnesses*

Mr. Randy Wehrkamp – Highlights

(a) *General*

[74] The principal witness for the Appellant was Mr. Randy Wehrkamp. Mr. Wehrkamp is the industry expert who participated in the evaluation process on behalf of the Appellant. He is also an elk farmer in his own right with his own farm at Tisdale. He has represented and been part of eight different elk compensation assessments, four of them prior to this one in 2014.

(b) *The Elk Industry in Saskatchewan*

[75] Mr. Wehrkamp describes the elk industry in Saskatchewan as a relatively “new industry” that has been around for “20, 25 years in Saskatchewan and Canada.” It is different from other livestock sectors in several significant ways and CFIA, which has “expertise...in traditional market” does not understand the elk or cervid industry. This hampers their ability to determine fair market value for destroyed elk.

[76] He says that the “cervid industry acts on a private treaty sales basis only” and this creates a challenge for non-industry people because producers are secretive and don't like to produce documentation about their businesses.

[77] WHGR underwent a depopulation of their whole elk herd in 2009. This was a low point for the industry because it immediately followed the general depressed conditions of 2008. Consumers were worried and “hunters from across the world weren’t traveling to Canada because the 2008 financial situation dictated that they stay at home. Their [i.e. the Appellant’s] markets were – their businesses were suffering.”

[78] The elk industry has “three markets primarily,” which are meat, velvet and hunt. Ninety percent “of the greater majority of producers who got into the elk industry got into the ... started raising elk to grow bulls for the purpose of removing the antlers and selling what we refer to as velvet....Velvet simply refers to the outer covering on the antler.”

[79] Meat production “in the case of the majority of farms in Saskatchewan, [is] simply the method that is used to cull animals from a herd.”

[80] As regards documentation, “most of the information that is required by CFIA is very difficult to extract from hard records. They’re just...they’re not there. The industry is too young.”

[81] Velvet prices have increased significantly in recent years. In 2009, velvet prices were “\$7 to \$8 a pound, maybe \$10 if you were lucky.” “Velvet in 2014 sold for \$40 to \$45 per pound and it has gone up another 20 percent from 2014.”

[82] Meat prices “have also gone up” in the same vein, increasing by 50 percent during the four year period prior to the WHGR depopulation in 2014: “In 2014 meat was selling as high as \$3.90 a pound....”

[83] 2014 was a good year for the elk industry: “We were in an upturn. We had four years of continued increased value for all of our products, including hunt bulls were going up in value.”

[84] Hunt bulls are particularly valuable because they are used for breeding and are then sold as part of the hunt operation. Prices for young bulls “tend to be lower than prices for mature bulls.” This is because “Buying top end young bulls for breeding purposes allows you the opportunity to use that animal as a breeding bull and then, value added, if you wish, into the hunt operation.” Also, in the elk industry “bulls at a younger age grow bigger antlers as they get older, and their value increases. That is one of the unique aspects of this industry that we struggle to...to educate folks to.”

(c) *The Nature of the Appellant’s Elk Business*

[85] One of the concerns that arises from the hearing of this matter is that no one who either owns WHGR or works directly with the business was called as a witness by the Appellant. This creates problems for the Court as an Assessor. Although this is not a formal Court proceeding, the problems associated with hearsay evidence still exist. Because it is second-hand and the source does not provide it under oath, it cannot be fully tested. On many matters before me, Mr. Wehrkamp was able to provide direct evidence because he was part of the evaluation process. But in other areas (the WHGR farm background, for instance), he could only tell me

what he has been told by those who own and work on WHGR, who are not under oath so their information cannot be tested. This issue should be kept in mind by any producer who appeals an evaluation. In the present case, it is not particularly problematic. According to Mr. Wehrkamp, however, no one in the elk industry likes to produce information. But without relevant information, no assessment is possible. If elk producers wish to make claims on the public purse for compensation then they have to realize that, unlike the private elk industry (according to Mr. Wehrkamp), complete transparency is a fundamental requirement. Producers cannot have it both ways. The *Common Procedures Manual* makes this very clear. Any producer who thinks they can make a claim on the public purse without providing CFIA what it needs to verify the amount of the claim is simply being naïve. The same applies when appeals are made.

[86] Hearsay evidence is not automatically inadmissible, but I am uncomfortable with the fact that WHGR has not provided direct evidence on background aspects of its business that could have been tested by cross-examination. No explanation was offered for not calling direct evidence on some points. On the other hand, most of what Mr. Wehrkamp has to say about WHGR's business was not questioned by CFIA and no objections were raised on hearsay matters. I am assuming, then, that Mr. Wehrkamp's evidence on this appeal is not controversial in any material respect.

[87] Mr. Wehrkamp testified that WHGR "is one of the largest and most established farms in this industry."

[88] He also says that:

Early in their history and establishment of the farm, they made the decision to ... to expand from a simple raising of animals to a hunt operation, providing hunting experiences for hunters from all over the world to travel, for the opportunity to hunt tremendous trophy animals on a hunt property that is not only stunningly beautiful but is large and is recognized internationally as one of the premium hunting grounds in Western Canada.

[89] As a consequence, WHGR “has long been known as a producer of tremendous genetics going back 20 years to when there was a boom...in the elk industry,” and “it was to their advantage to produce large bulls that they would then move...to their hunt areas.”

[90] In 2009, as a result of a CWD identification, WHGR’s “entire herd was destroyed.” Compensation discussions went well and “compensation was paid in the neighbourhood of \$5,300 ... for the hunt bulls on average for 102 bulls.” WHGR regarded this as fair compensation.

[91] The primary business of WHGR is the hunt business, although it does sell velvet, and also sells meat from those animals that are part of the annual cull.

[92] In 2013, WHGR had \$91,000 in meat sales, \$120,000 in velvet sales, and \$275,000 in hunt sales. So primarily, Mr. Wehrkamp says, it is a hunt business.

[93] CFIA agreed that the average total hunt sales for the five years preceding 2014 was 31 hunts.

[94] Mr. Wehrkamp described how hunt sales are handled through a broker. WHGR agrees to provide a bull through the broker. The money is all through the broker. The hunter hunts the bull and pays the broker. At the end of the season – or at intervals – the broker sends a cheque to WHGR but “it doesn’t specify the - - traditionally the broker is under no obligation to provide this level of detail to the hunt farm.”

[95] Meat production is “simply the method that is used to cull animals from the herd.”

[96] Mr. Wehrkamp says that, based on the revenue generated, it is clear that WHGR “is not a meat farm. It is a hunt farm. It is a velvet farm, and the meat process is used to cull surplus animals and animals of lesser quality.”

[97] Following the 2009 depopulation, WHGR was forced to source animals from a variety of farms. They could not get all animals from a common farm and so, “in an effort to move forward as quickly as they could to restock and get the herd numbers back up, they purchased animals over a period of years from a variety of farms.”

[98] The animals were “block-purchased mainly from producers who were distressed, who were - - had large numbers of animals that wanted to... sell animals.”

[99] WHGR purchased 17 elk bulls on April 3, 2014 during the evaluation proceedings and provided receipts because “by this time, it was painfully obvious that the only consideration that

CFIA was prepared to make was consideration for meat sales.” These bulls were purchased “at \$4,264 a piece” and there were twelve 2007 bulls, which would make them 7-years-old in 2014.

[100] Mr. Wehrkamp says that the culling process used at WHGR was of extreme importance in increasing the value of the animals acquired after the 2009 depopulation. This means that “of the animals that were accumulated from the period of the depopulation...2009 to 2013, 15 percent of those animals were culled as low producers and animals that did not meet the needs of the farm. Quite simply put, the animals that remain then have greater value than the original herd....”

[101] Apart from the 901W Stinson bull, and the 17 elk bulls purchased in 2014, WHGR would not provide CFIA with purchase receipts from the animals purchased after 2009 because, in WHGR’s view, those receipts were irrelevant to the 2014 evaluation because of the annual culling process. However, Mr. Wehrkamp confirms his understanding that these animals were purchased by WHGR “for close to meat prices.”

[102] WHGR was compensated for 266 bulls in total.

[103] Mr. Wehrkamp says that WHGR “probably ...may have” received receipts for the animals that were purchased.

[104] WHGR had receipts from velvet sales but did not provide them.

[105] Mr. Wehrkamp emphasizes that a purchase receipt for a block-purchase “does not by itself have any indication...of whether the bull is a meat bull, a hunt bull or velvet bull. It’s impossible to determine”:

These bulls were bought without antlers on their head, and when you buy a block of animals...you are going to have some poor bulls, you’ll have some average bulls and you’ll have some superior bulls. The information - - to provide a purchase receipt that cannot substantiate what is being requested is a fool’s business.

[106] A receipt for a block-purchase “shows an average price, a block price, and therefore it’s irrelevant to the discussion of what the bull is worth two and three years after the animal’s been on the farm...and... as the bull ages, their value increases. What value does that receipt have?”

(d) *The Evaluation Process*

[107] Mr. Wehrkamp says that CFIA failed to understand that WHGR is a hunt/velvet business and not a meat business.

[108] The initial meeting involving Mr. Brown and Mr. Conacher, as owners, Mr. Wehrkamp, Dr. Bishop as the CFIA expert, and Dr. Graham (who chaired the evaluation process) took place on March 5, 2014. Mr. Wehrkamp describes that meeting as follows:

MR. WEHRKAMP: Somewhere along the way, personnel changed, and really that’s the only thing that we can identify, personnel changed, and at the March 5th meeting, we went into the meeting with the expectation that this is what we would be doing. We would be sitting down, discussing, presenting. Mr. Brown had just returned from a holiday 48 hours before, but we still went ahead with the meeting because we felt at that point there was an opportunity to get the process started. We were going to provide

information. We were going to discuss, and similar to the 2009 case, it would be resolved fairly quickly and we would move on.

Much to our surprise and greater disappointment, that isn't what happened. The March 5th meeting was an exercise in frustration for the producers. Dr. Graham frankly seemed disengaged. We presented him with questions. We asked him particular pieces of information. Did he understand the elk industry? No, he did not. He readily admitted he did not understand the elk industry. We asked him, Do you understand how antlers are scored and how they're graded? Are you familiar with the competition processes that occur that help dictate that? No, he didn't understand that. Do you understand genetics? Well, yeah, he understood genetics because he's a cattleman. Well, that was a start. Well, did you understand the elk genetics? Can you tell us some of the better bulls? Can you tell us some of the producers that - - that produce superior animals? Well, not really. He identified myself as one, I believe, but when we - - he was unable to really identify any producers. He was unable to demonstrate any knowledge frankly of the industry other than the fact that he was a CFIA vet and had worked for CFIA for a number of years and had been involved with some elk farms. It was very disappointing for us, very disappointing.

Dr. Bishop, who was CFIA's expert, was much more engaged. He asked questions. In fact, when we were looking at the value of animals, one of the key points that we made was a two-year-old bull is worth less than a three-year-old bull. A four-year-old is worth more than a three-year-old bull. A five-year-old bull is worth more than a four-year-old bull and so on until you reach about the age of six. At the age of six, these bulls are kind of - - some get a little bit bigger, but they're kind of what they're going to be. You know pretty close to what they're going to be.

(Transcript of hearing, pp 50-52)

[109] Mr. Wehrkamp took his initial hand-written report to the meeting of March 5, 2014 for discussions purposes. This is how he describes the reaction:

MR. WEHRKAMP: We readily admit and agreed with CFIA that not all elk are created equal. Some are great bulls, some are poor bulls, and there is a reasonableness applied to genetics for those that understand livestock reproductivity - - reproduction and also the transference of the genetic ability to grow antlers similar to

beef in what an animal can be expected out of certain bloodlines. There are no guarantees. That's why you have a cull program to go with it because you purchase a block of animals. You cull off your bottom percent. So we grouped the animals originally, and we said these farms where these animals were sourced and we show three, Friedel, Lost Trail and Slade.

JUSTICE: But there were other farms. There weren't just three farms.

MR. WEHRKAMP: That's right, and then we showed the medium-productivity farms, McAllister, Tambelini and Hope, and average productivity, Cool, Simon, Dixon and Perkins.

JUSTICE: So that's the - - that's the whole group of farms there.

MR. WEHRKAMP: That's correct, Sir.

JUSTICE: Okay. All right.

MR. WEHRKAMP: At least the - - the absolute majority of the animals are identified from those farms. There are a few other individual animals that were purchased, but these are the animals that were purchased in block and are - - that we're dealing with here.

So we grouped the farms that way, and then what we did is we said, okay, well, what could we expect from the animals? So we put a value on the different categories on the high, medium and average productivity, so we put a value on those, and then we also said, well, you know, at what point - - this is a hunt business, so at what point do bulls become hunt bulls? On average what is reasonable to expect? Well, we know that the antler competitions basically say animals six years of age, older are considered mature, so this is not a farm opinion. This is not an industry expert opinion. It is a well-documented case and situation of information that industry has said - - states that after that age, these bulls are mature. There is no competition by age. It doesn't matter if your bull is 7 or 12. They all are of the same category.

JUSTICE: And was that cutoff accepted by CFIA?

MR. WEHRKAMP: Dr. Bishop felt it made good sense. We - - to our understanding absolutely that was agreed to by Dr. Bishop. Dr. Graham, in fairness, did not agree. He was in - - passive. He just really didn't say very much and didn't want to discuss any aspect of the valuation, but Dr. Bishop, who was their industry

expert, agreed at some point you have to say there's a cutoff. He said - - and choose (*sic*) the age, but industry's already acknowledged that at that age moving forward, those bulls are considered mature, and they are then able and reasonably would be put into the hunt area and they would be hunted. Not all would necessarily go in there, but basically that's what happens is that these bulls are now considered mature and they are considered hunt bulls. There was agreement. Dr. Bishop agreed.

(Transcript of hearing, pp 53-55)

[110] There were many email exchanges and follow-up discussions after March 5, 2014, and Mr. Wehrkamp produced his final report of March 10, 2014 which recommended a total compensation figure of \$1,106,101.00.

[111] Throughout the process, Mr. Wehrkamp says that Dr. Graham repeatedly asked for receipts for the block-purchased animals but none were provided because WHGR considered them to be irrelevant.

[112] In the absence of receipts, WHGR continued to provide information to CFIA which they thought was relevant.

[113] Dr. Bishop produced his expert report of March 26, 2014, which identified a total figure close to Mr. Wehrkamp's.

[114] Dr. Graham rejected both expert evaluations and produced his own evaluation of \$476,343.00 in his Valuation Report of May 2, 2014. Dr. Graham's recommendation was reviewed within CFIA and accepted by the Minister.

[115] In response to Dr. Graham's report, Mr. Wehrkamp pointed out to CFIA that:

CFIA has chosen to disregard the work of their industry expert, ignore a generally agreed to process on valuing the hunt bulls, failed to respond to reasonable questions, and have made numerous errors that were identified by WHGF in the CFIA assessment... The Valuation used by CFIA appears to be based on "because I can" rather than salient facts and information. It was obvious throughout the process that Dr. Graham did not understand the hunt industry and operation of WHGF. On different occasions he stated "I don't understand why..." and rather than defer to one of the industry experts available to him for a response he has chosen his own conclusions, unfounded as they may be.

[116] This did not change the Minister's mind.

(e) *Problems with the CFIA Evaluation*

[117] Mr. Wehrkamp's evidence on the evaluation done by Dr. Graham is that the process was flawed so that CFIA undercompensated WHGR in excess of \$500,000.00.

[118] He says that Dr. Graham made the mistake of treating WHGR as a meat farm, when it primarily is a hunt business.

[119] Dr. Graham agreed that 31 hunts on average were sold in the 5 years prior to 2014: "So 31 hunts were agreed to as the ranch number of hunts that were sold on an annual basis." And the prices were in U.S. dollars. The figures show that "the hunt operation provides substantial income to the farm greatly exceeding the value of the meat."

[120] WHGR readily “agreed with CFIA that not all elk are created equal. Some are great bulls, some are poor bulls.... There are no guarantees. That is why you have a cull program to go with it because you purchase a block of animals. You cull of the bottom 10 percent.”

[121] However, Mr. Wehrkamp says “there is a reasonableness applied to genetics for those that understand livestock reproductivity - - reproduction and also the transference of the genetic ability to grow antlers similar to beef in what an animal can be expected out of certain bloodlines.”

[122] Following the 2009 depopulation, WHGR purchased blocks of bulls from different farms and went through the culling process. For purposes of the evaluation, WHGR grouped animals according to source and then indicated which of the source farms were known for their “high productivity,” “medium productivity,” and “average productivity.”

[123] WHGR grouped the farms and then “we said, okay, well, what could we expect from the animals? So we put a value on the different categories on the high, medium and average productivity... and then we also said, well, you know, at what point - - this is a hunt business, so at what point do bulls become hunt bulls?”:

On average what is reasonable to expect? Well, we know that the antler competitions basically say animals six years of age, older are considered mature, so this is not a farm opinion. This is not an industry expert opinion. It is a well-documented case and situation of information that industry has said - - states that after that age, these bulls are mature...

[124] Mr. Wehrkamp says that the six-year cut-off was accepted by Dr. Bishop, but not Dr. Graham, at the March 5, 2014 meeting:

Dr. Bishop felt it made good sense. We - - to our understanding absolutely that was agreed to by Dr. Bishop. Dr. Graham, in fairness, did not agree. He was in - - passive. He just really didn't say very much and didn't want to discuss any aspect of the valuation, but Dr. Bishop, who was their industry expert, agreed at some point you have to say there's a cutoff. He said - - and choose (*sic*) the age, but industry's already acknowledged that at that age moving forward, those bulls are considered mature, and they are then able and reasonably would be put into the hunt area and they would be hunted. Not all would necessarily go in there, but basically that's what happens is that these bulls are now considered mature and they are considered hunt bulls. There was agreement. Dr. Bishop agreed.

[125] Mr. Wehrkamp says that Dr. Graham's failure to accept this age classification is a major problem with his evaluation:

One of the key elements and one of the key issues we have with the CFIA evaluation is the fact that Dr. Graham did not accurately break the animal groups down sufficiently to demonstrate the value of the bull by age, and that's documented in - - in his report....

[126] Other "key issues" put forward by WHGR for valuation purposes were:

- a. What the market was doing;
- b. Velvet production as an indicator of genetic quality; and
- c. Information from a variety of producers as to what amount they would sell animals for based on the age of the animal.

[127] Mr. Wehrkamp says that all of this information was ignored by CFIA:

MR. WEHRKAMP: ...To our - - from our perspective, these were completely ignored by the Canadian Food Inspection Agency. No consideration at all was given to this. They were

completely disregarded. In fact, in the e-mail by Ken Schmidt in -- to Dr. Graham -- and I can pull that one fairly quickly for you, and that would be in section 122 of Ms. Bird's documents. He talks about discounting -- discounting the report because no receipts had been provided. Pardon me. I think 118 is actually the -- that particular e-mail, and interestingly enough, there's a handwritten note, and I can't tell who it's written by, but it says, No receipts were provided. That's not correct. Receipts were provided. Price lists were provided by the producer, and, in fact, Canadian Food Inspection Agency provided price lists too, but they provided -- oh, wait a minute, there was no price lists that were provided. What they provided was a statement from one farm who operates a hunt operation in the eastern part of Saskatchewan. We didn't see any -- we requested information. We requested documentation. We didn't see any documentation that supports that particular statement. What document has less value from our perspective than providing the actual receipts that we provided and the actual price list of animals that are for sale. In fact, the second -- CFIA provided two references of farms to support their case of what the valuation is. One was Darcy Lepowick, and that's referenced in here, in the documents. The second was a reference to the Karakachuk farm at Yorkton that has not sold animals for three years, nor have they purchased animals for three years.

JUSTICE: At that time.

MR. WEHRKAMP: At that time, correct. So I'm --

JUSTICE: Which farm was that?

MR. WEHRKAMP: The Karakachuk farm, Don Karakachuk farm at Yorkton. I'm curious to how CFIA can use a farm that has not purchased animals or sold animals as a reference point...

(Transcript of hearing, pp 61-62)

[128] WHGR also provided information on replacement animals that they purchased at the material time in 2014:

MR. WEHRKAMP: The other -- the other aspect or -- and I think in determining fair market value and what we -- what that means because it really means -- fair market value really means what is the replacement cost of this animal, correct? In March of 2014, I would like the Court to understand that bulls are not for

sale because they are growing a new set of antlers. You can't move them without damaging the antlers and severely injuring the bull, so it's very difficult to buy bulls at that point in the year because normally people would, if they're going to grow them into the hunt market, would want to grow the full set of antlers. If they're going to sell them as commercial bulls, if you wish, for a velvet herd or something in that vein, they would normally wait until May, June when the antlers are removed and then sell what we refer to in the industry as slicks, meaning the antlers have been removed from the bulls and they are - - they don't have antlers. They just have little buttons on their heads.

We pushed and looked, and by we, I mean Willow Hollow Game Ranch did, to find animals that they could purchase during that period of time that were of like quality. They found one group of animals at Manfred Klettberg farm, and that is shown as an actual receipt, and that would be in your tab number --

JUSTICE: Sorry, I didn't catch the number.

MR. WEHRKAMP: I'll give you the number.

JUSTICE: Oh, okay.

MR. WEHRKAMP: Well, actually it's in a couple different places, but it's actually in tab number 119 of Ms. Bird's, the Respondent's documentation. So certainly feel free to use that.

JUSTICE: Klettberg. Okay. Yes.

MR. WEHRKAMP: Willow Hollow purchased 17 elk bulls on April 3rd, 2014, during the period of negotiations because by this time, it was painfully obvious that the only consideration that CFIA was prepared to make was consideration for meat animals. They seemed to have disregarded all of the documentation that we had provided, all of the industry information that we provided, and they were solely focused on meat. Well, we're going to pay you meat price unless you can show us that they're worth more money. How do we show you they're worth money? Well, you have to have receipts. Well, that's fair, we don't have any issue with that. What is fair market value? Well, fair market value is what it would cost to replace that bull and that particular group of bulls. How do we do that? You have to buy bulls. You have to have an actual sale to actually demonstrate fair market value, understanding that bulls are not for sale during those months of - - unless you want to pay ridiculous, unfair, unreasonable amounts of money, you don't buy those bulls at that period of time.

Willow Hollow searched out and was able to search out one small group of bulls, 17 elk bulls that they purchased but did not pick up until after they were velveted at \$4,264 apiece, and you'll see in there that by age, there were 12 2007 bulls, which would make those -- well, 2014 those would be seven-year-old bulls.

JUSTICE: And -- sorry, and what was -- what was the average price that you just gave me?

MR. WEHRKAMP: \$4,264. So that being the case, is that not -- and our contention is is that not a reasonable and the most accurate way of determining market value by purchasing a bull? So we have -- the producers provided estimates from a number of farms. They provided one actual receipt of what it's going to cost to replace part of their herd, but that seems to be ignored in the entire exercise. In fact, I don't think I could find a reference to Dr. -- to the Klettberg receipt anywhere, and there may be. There's a tremendous amount of information here, but if it was, there was certainly no consideration. It seemed to be ignored.

(Transcript of hearing, pp 64-66)

[129] Information on the elk market was also provided to CFIA:

MR. WEHRKAMP: Velvet price is tripling -- or not tripling, up 120 percent. Meat price is up that. That's done nothing but affect the price of replacement stock. In 2014 the industry was excited. We were on an upturn. We had four years of continued increased value for all of our products including hunt bulls were going up in value. We sell hunt bulls. Our operation sells hunt bulls. We've given you receipts. We've shown values, and we've made it clear -- and I'll state it again values are up 15 to 20 percent from 2013, and this is a 2014 exercise. These bulls were being replaced not in the 2013 market but in the 2014 market.

We shared information -- and we'll talk -- again provide a witness that will substantiate. We shared information with CFIA and told them the projections for 2014 are 40 plus dollars per pound for velvet. That means the price is going to go up for your animals. That means that the price is higher. That means that your compensation needs to reflect it, and yet there seemed to be little, if any, consideration given to that. We have an up market.

(Transcript of hearing, p 69)

[130] Of central concern when it comes to the CFIA evaluation was Dr. Graham's failure to take into account the culling process that enhanced the value of animals that had been acquired through block-purchases:

MR. WEHRKAMP: The CFIA, when assessing the value of the herd, looked at the culled animals that were culled in 2013, and there's a record of all of the movement permits that were specific to that. Pardon me. I'll shut this off. Section 11 in my notes is basically the 2002 - - 213 to 215 AWAPCO reports, which is the new generation co-op where the elk were slaughtered. I think it's extremely important for the Court to understand and it was equally important for CFIA to understand, although they've refused to acknowledge it, was that of the animals that were accumulated from the period of the depop. in 2000 - - or—2009 to 2013, 15 percent of those animals were culled as low producers and animals that did not meet the needs of the farm. Quite simply put, the animals that remain then have greater value than the original herd, and just as - - as an example for the Court, the example, if you buy 100 animals, there are some good ones, most of them are average, and there's some great ones, and if you pay \$1,000 apiece for them, for the purposes of the argument, and you sell the bottom poor ones, you bought them at a package price.

JUSTICE: Yes, the block purchase.

MR. WEHRKAMP: The block purchase, and this is - - this is the contention and part of the reason why Willow Hollow game farm did not want to provide purchase receipts because CFIA does not recognize and would not recognize in our discussions any consideration for culling. In fact, the note that I referenced earlier clearly states by CFIA that they refused to recognize the culling concept as an increased value for the remaining animals. It is beyond ridiculous, that statement frankly, because it is a common practice and a necessary practice in the livestock sector.

So the bottom animals had already been culled from the herd when CFIA applied their valuation and looked at the culled animals and said, well, you're selling animals for meat, so therefore you're a meat farm, when, in fact, what the farm was doing was moving to increase the value of the animals on the farm. It's logical. It's common sense. It's tragic that that wasn't acknowledged.

(Transcript of hearing, pp 72-74)

[131] Mr. Wehrkamp says that even on the basis of meat evaluation, Dr. Graham was not accurate:

MR. WEHRKAMP: ... there's notes in there of -- from Dr. Graham, well, we decided to value -- well, it's about 200 animals, and we're going to do about \$7 per kilogram. Neither number is accurate. It wasn't about 200 animals. There was a fixed number of animals that we were valuing, and it wasn't about \$7 that was the starting point for compensation. The market price, which is common knowledge and researched by CFIA, was \$7.15 cents a kilogram, and yet the complete lack of attention to detail frankly is insulting to the producer. That CFIA would have the disregard to not even take the time to use accurate information is hurtful as well as inaccurate and does nothing to do -- to lend any level of confidence to the fact of CFIA's ability to fairly assess and determine value.

(Transcript of hearing, pp 74-75)

[132] Mr. Wehrkamp goes into significant detail as to how bulls should be valued and contrasts this with Dr. Graham's approach:

MR. WEHRKAMP: I've already talked about the handwritten presentation. That was completed in a matter of just a very short time because again, folks were just returning from vacation and there was a great desire to get the process started. We talked in that report about genetics, and we've talked about the importance of genetics. We've talked about the importance of everyone on the -- understanding genetics, and we've talked about understanding what average numbers are and what product -- what production is and where farms rate on their ability to produce velvet, which is an indicator but not a conclusive indicator or a single indicator of the bull's ability to grow antler for the hunt market. They are two different markets.

We submitted a second report which talks about other issues that we had during the -- during the March 5th meeting, Dr. Graham continually asking why would anybody pay \$8,000 for a young bull.

JUSTICE: Which tab are you looking at now?

MR. WEHRKAMP: Tab 6, please.

JUSTICE: Tab 6. Okay.

MR. WEHRKAMP: The first page, third paragraph: (as read)

We are particularly distressed over Dr. Graham's continued reference to higher prices paid for breeding elk of quality. He repeatedly asked, Why would anyone pay \$8,000 plus for younger bulls.

The answer is simple economics. These bulls are then used for breeding and then resold into their hunt operation or moved into the hunt operation at significantly increased prices. The receipts that are provided by myself will clearly indicate that prices for younger bulls tend to be lower than prices for mature bulls. It makes some sense. Buying top-end young bulls for breeding purposes allows you the opportunity to use that animal as a breeding bull and then value added, if you wish, into the hunt operation. It's good management practices, and yet the people who are sitting as our assessors and making the determination are unable to understand that particular concept.

This is not the cattle industry. You buy a bull for - - for the - - to use in the beef industry, he serves a single purpose in life, breeding. He is then slaughtered. His value decreases as he gets older. In the elk business, bulls at a young age grow bigger antlers as they get older, and their value increases. That is one of the unique aspects of this industry that we struggle to - - to educate folks with.

So looking, then, at continuing on in that section, I just want to spend a bit of time on - - we extracted velvet weights on bulls. We've moved onto the next page, the first chart entitled Willow Hollow Game Farm 2013 Velvet Records. We've shown the average velvet weights as best we could determine or as best as Willow Hollow could determine from their records. It's the only place this information is available. You'll see that five-year-olds, four-year-olds, three-year-olds are indicated by pounds. Two-year-olds were hard antlers, which is not an uncommon practice. Young bulls are often left in hard antler to see an antler design and what they might look like 'cause the bulls grow a like design - - they get bigger, but the design of the antler remains fairly consistent as they age. So no two-year-olds were velveted in 2000 - - in 2013.

Industry average. This is, from our perspective, a best guess because that information is not readily available. It is based on conversations with other producers, industry knowledge and that's really all we can provide you. We can't provide you with a list of

100 producers. That information is proprietary. They will not release it, so that is our best guess. We tried to then show you what we felt was a reasonable difference in the farm's weighted average versus industry averages and what that meant compared to the industry. We'll be the first to admit there's some variance here because it's a non-substantiated number, so we can move the numbers around a little bit, but the point being that at the very least, the Willow Hollow game animals were producing average-plus pounds per animal.

The second page is titled Mature Bull Valuation Part 1. So what we did is we thought we had agreement with Dr. Bishop that six years was the cut line for mature bulls, and what we did then is we went back into the records of Willow Hollow and said, okay, of the 31 hunts more or less that you are selling on an annualized basis - - and let's remember that in 2009 they had hundreds of bulls on the farm and they were rebuilding a relatively young herd, so they're recovering from a low economic period. They have a young herd of animals. It would be and seems to me to be somewhat unreasonable - - and reasonableness being the key issue here. It is somewhat unreasonable to assume that Willow Hollow would have a maximum number of hunts from 2010 to 2013 given that their farm was depopulated in 2009, but, again, CFIA chose in their wisdom to apply that average for that period of time.

So what we did is we said, okay, of the hunts that you sold, how many and what percentage of the hunts were within what category or what size. So you'll see the category. Now, that means 450 inches is the score of the bull, 440 to 449 and so on and so forth. So the number of bulls, what we did, if you went over to the third column, on the five year average these are the percentages or number of hunts that would have occurred on Willow Hollow game farm for that period of time. We then applied to the number of bulls that were involved in this category - - 151 of them, we applied that percentage to determine how many hunts, moving forward from that group of bulls, would be sold within each category, and then we placed a value on those bulls and came up with a replacement cost.

Instead CFIA said, well, you sold 31 hunts so we're going to give you hunt value for 31 bulls. Well, that could be, I guess, for 2014. What about 2015 and '16? What about all the mature bulls that had already been culled to have the top bulls on the farm that were slaughtered? What is the replacement value for them? This is a five-year moving-forward number. If there's 150 bulls and if you assume, then, that Dr. Graham's numbers of 31 bulls per year are -

- is going to be the move-forward number of hunts, that would be the next five years of hunts.

The bulls were on the farm ready to be hunted. We applied reasonableness in the determination of what percentage of bulls fall into which category and valued accordingly. It's a reasonable approach. It's fair, and it provided at least a reference point instead of saying you have 150 bulls but only 30 of them are hunt bulls. How do you know and how can CFIA substantiate that? They can't, and frankly there needs to be a formula applied and a reasonableness to that structure that would allow for that to occur. We believe this was an excellent example.

We then went through and we listed the other bulls by age on that page, and in the Part 2, we applied a discounted value from our earlier valuation to the bulls to determine what, in fact, this group of bulls would be valued at. You add the two numbers together, and you get what we - -what was the requested compensation, 1.1 million dollars and change.

There is structure to this process. There is reasonableness to this process. It is a defensible process. It is supported with would be. There is an actual receipt of what a block of bulls were purchased for, and, for the record, of those 17 bulls purchased from Klettberg, some of those have been culled. It is a reasonable process to arrive at.

The final page basically shows three different farms, price list valuations, and you'll see Iron River, Bruce Friedel. Bruce Friedel is recognized - - and CFIA would probably, I hope, agree with this, that Bruce Friedel is an industry leader and has some of the best bulls in the world. We removed -- he wouldn't provide his price list, and, in fairness, that group of bulls may have been superior, so we took them out completely. We averaged the prices to determine what, in fact, would be the prices that we used to determine fair market value. I see nothing of that that can even come close from the efforts put forward by CFIA to substantiate their numbers. This was a reasonable process. It was a fair process. It was discounted from the original proposal and ignored.

The entire report that Dr. Graham submitted and I received or the farm received is in section 10. It is basically one page in length, and, yes, there's a number of other documents that were available that indicate by animal, and they're attached and referenced in both of our submitted court documents on what the value of each bull is, but this is a summary of what was provided. 4.15 percent of the mature - - this is the last sentence: (as read)

4.15 percent of the mature herd has been assigned trophy status. Approximately 31 hunts per year for the past five years of approximately 200 in the mature herd.

So 4.1 percent, 8 bulls, 9 bulls of the 200 mature bulls are hunt bulls. Not only is that inaccurate, it borders on ridiculous, and it's completely unsubstantiated and it's nothing more than an opinion that has no grounds and cannot be supported. Velvet - - the points to review, point, Velvet sales play a significant part in the herd income. Agreed. (as read)

Dr. Bishop's assigned value of \$4,800 for the hunt herd is premised on the fact that the entire herd is made up of trophy bulls.

Well, there's more - - bulls in that herd that are worth more than 4,800, and there's bulls that are worth less. We applied a formula that recognized, based on previous hunts that is substantiated, on the value of the bulls based on what the hunts have been. The goal of Willow Hollow game farm or Willow Hollow Game Ranch is not to be buying bulls on a one-off basis. The goal of Willow Hollow game farm is to build a herd of their own animals so that they don't have to buy animals from producers like myself. It's simple economics, good management. If they pay me \$20,000 for a bull, that's \$20,000 less income for them. Why would they buy a bull from me if they can grow that bull? They've culled the bottom of their herd. They've got a mature group of bulls.

We didn't dispute the 31 hunts per year. That's - - those are the real numbers. We applied the same number moving forward, even though we're moving into an up economic time and even though the number of opportunities and the number of hunt farms are probably declining in Saskatchewan. They - - we agreed. We'll use 31 moving forward, 31 hunts per year. That's five years. Five years is the same number that they used on the -- on the reverse average to come up with 31. Let's use 31 on the move-forward average. It seems to me to be fair, it seems to me to be reasonable, and it seems to me that that addresses the full herd of mature bulls, and at the same time the farm will have increasing numbers of bulls moving into the mature herd, replacing those bulls that have been shot or hunted, and it's a -- what a wonderful industry. You can grow - - you can keep your bulls for six to eight years until they're ready for the hunt - - hunt business and, at the same time, generate revenue through velvet sales for that entire period of time. It's a great way - - it's a great industry, and that's why we're starting to see producers - - more producers come back to the industry and, in

fact, new producers enter the industry because it is that type of industry. It brings a different value, a different look to the entire livestock sector. It is something different. It is not - - you don't do this with beef. You don't do it with any other livestock sector outside of the cervid industry that I'm aware of, and yet the opinion is this is a meat business based on personal experience and the lack of knowledge of the industry.

(Transcript of hearing, pp 78-86)

[133] Mr. Wehrkamp also addresses Dr. Bishop's assessment:

I should spend a moment on Dr. Bishop's assessment, which is section 5 I believe. Whoops. When we received Dr. Bishop's report, and initially we did - - we had to ask for it. There was no exchange of information, limited communication through this process, but we asked for it, and CFIA shared it. In fact, CFIA shared -- weren't required to, but when questioned and challenged with the access to privacy and information act, they - - in the openness and transparency perspective, they did share some additional information with us, and we appreciated that.

When we looked at this report, we said, m'mmm, okay, it makes sense. There's a valuation by age that makes sense that we can live with, that makes reasonable valuations and can be applied to this particular farm.

(Transcript of hearing, pp 86-87)

[134] On cross-examination, Mr. Wehrkamp confirmed that WHGR was compensated for 266 bulls in total.

[135] Mr. Wehrkamp also confirmed that WHGR did not provide receipts for the elk that had been block-purchased from various farms and that the valuation figures provided for the block-purchased animals came from other farms.

[136] Mr. Wehrkamp also conceded that when an actual receipt was provided for 901W – the Stinson bull – CFIA provided the maximum value of \$8,000 allowed under the *Compensation for Destroyed Animals Regulations*.

[137] Mr. Wehrkamp also conceded that certain pieces of information had made a difference to Dr. Graham's calculations:

Q So March 25th we have him suggesting assigning a value of \$4,000 to a hunt bull. On April 3rd, I'm going to suggest perhaps about a week later, CFIA receives an invoice from Klettberg Farms for a sale of Willow Hollow – to Willow Hollow for some elk averaging \$4,250, and on May 2nd his final report has increased that amount to \$4,500, correct?

A Mhmm.

Q So we could possibly -- now, you said this morning that you didn't think that the -- that Klettberg sale had actually made any difference, but is it possible that it did?

A I would like - - it may have. Yes, it's possible.

(Transcript of hearing, p 132)

[138] Mr. Wehrkamp also clarified what he had meant by velvet prices:

JUSTICE: Are you telling us that the explanation you have given to us now about the majority of the antler as opposed to the rest of the antler, that was not something that was made available to CFIA?

A No, absolutely. I mean in our discussions, we would not have used \$40 as an average price paid for antler to CFIA. Our discussions with CFIA would have been clear. The price for antler was 27, \$28 a pound, and we referenced \$28. Some producers received 27 or - -

JUSTICE: Okay.

A So that information would have absolutely been shared with CFIA, and the purpose of giving you the range is to highlight

the simple fact that for the first time in 16 years, a price of \$40 was paid per pound for velvet, which is significant. That simply means that there's been an upward trend in the market and we're starting to achieve levels of profitability that I spoke in my -- of in my testimony this morning.

Q MS. BIRD: So the only information that was provided on velvet prices was the information that was provided in your report and what was provided by the elk --

A Alberta Elk Commission.

Q Alberta Elk Commission.

A Correct.

Q And what did Dr. Graham value the velvet at in his final report?

A \$30.

Q \$30?

A I believe so. That's the number that --

Q So if we flip to your tab 2, page 81, we have a reference on the first page -- it was not a one-page report, correct? It was a two-page report?

A I'll just need a moment to --

Q Oh.

A -- search through my --

Q Sorry. Imagine if we hadn't numbered them.

A Yes. Thank you again. Okay. I have it.

Q So you're there, so at paragraph 4 -- no, paragraph 3 -- and I think I see the confusion here -- Dr. Graham references information he received from Dr. McLane of CFIA's Battleford district office for the 2013 prices at \$30 per pound, but if you go down to the next paragraph and one, two, three -- let's say the fourth line: (as read)

Since velvet should average at least \$700 per bull for 2014, 20 pounds at \$35 per pound.

So he did actually assign a value of \$35 per pound, correct?

A Correct.

Q And Dr. Graham asked for evidence of actual 2013 Willow Hollow sales for velvet, correct?

A Correct.

Q And the actual sales of the velvet were not provided, correct? The averages were. We saw those attached to your report, but the actual sales, the amounts were not provided, correct?

A It's kind of six of one, half a dozen of the other, but yes.

(Transcript of hearing, pp 148-150)

[139] Mr. Wehrkamp also reiterated why WHGR considered receipts for the block-purchases to be irrelevant:

A Correct. The reason - - but at the same time, if I may expand on that answer, the purchase receipt does not by itself have any indication, provide - any indication of whether the bull is a meat bull, a hunt bull or velvet bull. It's impossible to determine. These bulls were bought without antlers on their head, and when you buy a block of animals, I explained this morning that you are going to have some poor bulls, you'll have some average bulls and you'll have some superior bulls. The information - - to provide a purchase receipt that cannot substantiate what is being requested is a fool's business.

...

(Transcript of hearing, p 156)

A Don't use the numbers as a reference point, but if you have a bull that cuts 30 pounds, that's a superior bull. He's probably - - and if he's six years of age or older, he's going to the hunt - - hunt area because he's a mature bull that has value. The bottom bulls that are not performing are the slaughter bulls, and those are the bulls that we have stated that were culled from the farm, that were culled from the blocks of purchase which completely devalues the purchase price because the purchase price on the receipt for whatever dollar value it might be is based on 100 bulls. When you take away 10 or 15 percent of the lowest-performing bulls and sell

them for meat, whatever the meat market might be, they're gone. What you are left with are your 20-pound or 15-pound bulls, your top-performing bulls. Those bulls have greater value than the purchase price that would be shown on the receipt. The receipt therefore has no value to the exercise of determining what the value is three years after those animals have arrived on the farm and a third of some of them -- some of those blocks of bulls -- up to 50 percent of some of those blocks of bulls have gone for meat, and they are left with a small number of the superior bulls.

Therefore, the receipt for the purchase price is irrelevant to what the value of the bull is three years later, and if it would -- and trust me. Absolutely if there was any indication that you could draw from a receipt for 50 bulls for a single price, we would provide it. Willow Hollow would be happy to provide it, but in that group of bulls, there was purchases. Some bulls may have been valued at 8,000 or \$10,000. Some bulls probably barely made meat value, but the receipt doesn't show that. It shows an average price, a block price, and therefore it's irrelevant to the discussion of what the bull is worth two and three years after the animal's been on the farm. It's one or two or three years older and we've already agreed, I think, that as the bull ages, their value increases. What value does that receipt have?

...

(Transcript of hearing, pp 158-159)

A That was for -- that was to provide context to -- to the exercise. Never once did we have -- or have we said that every bull is worth \$9,000, if that were the average price. All we've said was here is a list of receipts within a very small industry and a very small market of a producer who is selling animals to bring into context that these animals do have value more than meat. Were they specific to Willow Hollow? Only a couple were, and we've already agreed that --

(Transcript of hearing, p 160)

[140] Mr. Wehrkamp also confirmed that these issues had been made clear to CFIA:

JUSTICE: The explanation you've given us about the difference between the sale of individual animals and the block purchase and its significance, did you have that discussion with CFIA?

A Absolutely. We've tried repeatedly to explain the process of how that works. There's - - there seemed to be - - and in all honestly, I believe that Dr. Bishop understood the concept of what we were talking about, and I believe that when he did his valuation, he took that into consideration, but earlier this morning I referenced a document where there is a handwritten note that says cull animals are - - that the cull animals and any adjustment to value because of cull animals doesn't make sense or won't be considered. I'd have to re-pull that document. I think I provided it to you.

JUSTICE: I remember it, yes.

A Which is absolutely in error from a live - - that's not an elk question or an elk statement. That is a livestock statement. It's absolutely in error, and when we're faced with a challenge of providing receipts on a block of animals and a good percentage of those at the bottom-producing animals are gone, we fail to see how that receipt will bring any benefit, any clarity, any reasonableness and any fairness to the award of compensation. That's why they weren't shared.

(Transcript of hearing, pp 161-162)

Mr. Blaine Weber – Highlights

(a) *Background and Experience*

[141] Mr. Blaine Weber is from Lanigan, Saskatchewan and has been an elk producer for 18 years. He is also involved with a new generation co-op called Norelko formed by 70 elk producers. Mr. Weber is on the board of directors and a principal in the velvet buying process aspect of the co-op's business.

[142] He says that over the last 5 years, Norelko has purchased between 180,000-200,000 pounds of velvet and in 2015 has purchased about 30 percent of the velvet produced in Western Canada. He says he is knowledgeable when it comes to pricing antlers.

(b) *Market Information*

[143] Mr. Weber says that in 2015 the lowest price for velvet (there are a couple of different grades) was \$48.00 per pound and the highest price was \$53.50 per pound. In 2014, the average was around \$40.00 per pound, in 2013 the average was \$27.00 per pound, and in 2012 the average was \$20 per pound. So there has been a significant increase in the value of velvet over the last several years.

[144] Mr. Weber also brokers elk for meat and the values there have also increased significantly:

A We were paying to the producer seven years ago when I started about \$1.10, a dollar and a quarter per pound of a hot hanging carcass weight. In the last three years, we've gone from about \$3 per pound hanging carcass weight to - - I just shipped about three weeks ago that the buyer paid - - delivered to the plant he paid 4.35 a pound, so we've gone up.

Q To the producer?

A To the producer.

Q Wow.

JUSTICE: That was in 2015?

A Yes.

JUSTICE: Okay. What about 2014?

A About probably in the neighbourhood of 4.10, about 4 - - 3.85, somewhere in there.

(Transcript of hearing, pp 167-168)

[145] As for the price of hunt bulls, Mr. Weber testified as follows:

Q When meat prices go up by 50 -- by 100 percent, more than 100 percent over five years, velvet is approaching, as you said I think, 200 percent over a period of time, what happens to the price of animals?

A Well, that doesn't even take into consideration where the hunt market has gone. The trophy market has added a real pressure on pricing of bulls. Your average bull, five years ago we could buy it for meat at fifteen to two grand, probably somewhere in there, and there was just a load of bulls shipped to a hunt preserve out of Alberta that had never been grown out that brought \$4,800 U.S. at the farm gate.

Q So 4,800 U.S. in today's sad but true world would be about \$6,000.

A Yeah, and that's for a group of bulls that had been unproven.

Q So no special genetics.

A No, never been grown out. We don't even know what they'll grow.

Q Wow.

A And so our big problem is supply. At the height of the -- when I got in in '97, about two or three years later, the herd -- 90 percent of the captive elk are in Saskatchewan and Alberta. We were somewhere in the neighbourhood of probably 85,000 animals between the two provinces. The records are supposed to be -- I don't quite believe the government numbers that we're getting off the programs, but from my experience in trying to access meat and velvet and talking to a lot of the producers, I don't think the combined herd would top 20,000 in those two provinces now, so we're down 75 percent on total numbers, which is pushing -- really pushing the availability of price.

Q Obviously that has an effect on animals that are for sale. You mentioned already that you're having more of a challenge accessing meat animals and animals -- you also buy -- do you also buy bulls for -- buy some and sell some animals yourself?

A Mostly through the meat market if we come on a herd that's distressed or the guy's getting out, he's done. We're in the same position as every other livestock industry. We're all 55 years old or better, and it doesn't seem like -- there's just guys that don't want to continue, so if they don't have avenues to let them out,

they end up going to the meat market, of course. If you see a group of bulls, then there's an opportunity to maybe turn them into the hunt industry or a producer that's keyed on that industry.

Q I just want to clarify one thing, and then we're going to move off this topic. The value of hunt bulls is obviously, then, going which direction?

A Up. I did a deal myself personally to buy out my partners two years ago. I sold a group of unproven bulls, 25 bulls for \$50,000. It was -- I probably sold them a little cheaper than what I could have got for them, but he was willing to pay me upfront and I had a two-year delivery period, okay? I want to keep some of my genetics, so this year to fill that order, I had to go out and buy some bulls to fill that, and my average price to replace those bulls was \$3,400 each --

Q Okay. Okay. Thanks.

A -- as opposed to the 2,000.

Q Okay. Okay. Good. Well, I think we've spent enough time on market evaluation and what's happening. That confirms some of the information we discussed earlier before you arrived with us. I want to talk a little bit about hunt bulls. The Court is aware that let's see. How should -- when would a bull normally be considered a hunt bull, at what age?

A Well, it's changed over with the development of genetics. We're getting bigger bulls at younger ages now. Prior to that we were probably looking at a seven or an eight-year-old bull as being a prime hunt bull. That's probably moved down to maybe five, maybe six years old anyways probably, but you're looking at a six-to-seven-year-old bull before you really consider growing it up to hunt I think.

Q Yeah. Okay. Fair enough. Okay, and what about incremental -- let's talk about the growth of bulls. Bulls grow -- are they bigger every year? Do the antlers get bigger? If they're two-year-old, three, four, five, do the antlers get bigger every year?

A Yeah, as a rule they do to a certain age, and then they will start to decline in my experience.

(Transcript of hearing, pp 168-171)

[146] Mr. Weber was asked to comment on the price lists of the producers that WHGR used to value replacement animals:

MR. WEHRKAMP: Yes, what I'm going to present the witness is the price list of the producers that were used to establish a valuation on the Willow Hollow game farm as replacement animals and ask Mr. Weber to comment on the validity of the price list provided by --

JUSTICE: Yes, and that occurs at tab -- is it tab 2?

MR. WEHRKAMP: 7.

JUSTICE: Okay.

MR. WEHRKAMP: You have four pieces of information. The first that you're looking at now is the Alberta Commission annual report on what they believe to be fair market value of the industry. You then have three additional estimates, if you wish, that were solicited from farms in Saskatchewan that would potentially be able to supply Willow Hollow with average type plus average-plus genetics. I'd like you to just spend a moment to look at them, and if you want to comment on them individually, you'll notice that one's higher than the other. Two are more or less the same, and then there's the Alberta one. If you would like to provide any comments on any individually or an opinion as to the validity of those prices that are quoted there.

A Well, they seem fairly in line, but as -- the one that I would say, as we continue on here, it's kind of the rules nobody expected the sale I talked about in Alberta for unproven bulls to be what it was, so to replace bulls now, I'm not sure, and we're dealing with a point in time I guess, whatever, but it -- yeah, they're -- they're within range.

Q So did I understand you to say that based on the point of time, they're relevant, but based on today's replacement cost or market value, they are --

A On a whole they would be low.

Q They would be low. Okay. Thank you.

(Transcript of hearing, pp 172-173)

[147] As regard the culling process and its impact on values, Mr. Webber testified as follows:

Q Let me just - - let me ask you the question, then, can you explain what culling means and if that's an applicable term to the livestock industry?

A Oh, for sure. It means getting rid of the less desirable stock either due to age or inferior genetics or just physical qualities that don't fit the program.

Q What is a reasonable number, broadly speaking, in the livestock sector that you would cull on an annual basis?

A Oh, minimum 10 to 20 percent.

Q Okay. What is the value, then - - if you cull off 10 to 20 percent annually, what happens to the value of the animals that are left?

A Well, if you're going to keep something longer, obviously you've got to feed it, so your basic upkeep costs would have to be considered into how long you're keeping it, and the -- if you're doing your job right, the value of the animal you're keeping should increase.

Q If you cull off the bottom animals, keep the better animals, the overall value of the herd --

JUSTICE: You're leading again.

Q MR. WEHRKAMP: I'm sorry. I thought - -

A The value of the herd should go up, yes.

(Transcript of hearing, pp 173-174)

[148] Mr. Weber conceded on cross-examination that he had not been involved in the WHGR valuation, but he has sold elk to WHGR and he gave the following evidence regarding receipts:

Q Right. So what my next question would be would be did you provide receipts for - - when you sold the animals to Willow Hollow did you provide receipts or invoices?

A It's usually done on the permit. There will be a copy of the permit that has the pricing done on it.

Q On the cervid movement permit?

A Sometimes we use that. I'm - - I can't 100 percent tell you for sure.

Q But they would have something in their records in relation to how much they would have purchased from you - -

A Yeah, should have.

Q - - that told them how much - -

A Should have. I would say one of us will have. We'll have a cancelled cheque, if nothing else.

(Transcript of hearing, pp 182-183)

Mr. Terry Moorman – Highlights

(a) *Experience*

[149] WHGR's third witness was Mr. Terry Moorman who has been farming elk for about "20, 25 years" and is now a "full-time elk producer/farmer":

A I've been farming for about - - elk for about 20, 25 years. Basically I've been concentrating, I guess, on a velvet herd and upgraded genetics I think around 2013 for the sole purpose of increasing production, getting better animals 'cause the markets across the board - - probably you heard this three or four times already today - - are all showing drastic improvement due to a lack of animals, so your supply and demand markets across the board are considerably better.

Q That would be for velvet?

A Velvet is the leading purpose we get into these animals, and hunt is another big one. I would like to impress strenuously this is not a meat market, which we are led to believe and compared to the beef industry. We are not. It's an excellent culling procedure.

Q Thank you. So meat, then, really you've got - - you mentioned you've got velvet and hunt. That's the primary markets?

A Right.

Q And meat is the culled market.

A Right.

Q Okay.

A My goal was for a velvet establishment, and coming off of 10 years of low prices, BSE, CWD, those markets really weren't there earlier and with the shortage and the price increase, a drastic swing across the board, like I said.

(Transcript of hearing, pp 185-186)

(b) *Depopulation*

[150] Mr. Moorman's elk farm was also depopulated in 2014 as a result of CWD. He is not happy with the way he has been treated by CFIA over his claim for compensation:

A -- unfortunate situation of getting caught in the CWD web and got my bulls depopulated, which is a very trying experience. You would think dealing with this, you should be dealing with people who are versed in the industry. It took very little time to realize a severe lack of knowledge. You can't compare elk with beef animals. They are not in the same category. You cannot base a total herd of velvet-producing animals are worth so much a pound. Where's the built-in value for velvet? Where's the built-in value for hunt? There is none. I did not upgrade genetics. I paid \$3,500 for breeding cows. I paid \$16,000 for an elite top-class bull. I guess if I was breeding them for meat, I would have went out and spent 16, \$1,500. I could have got every bit as good a meat animal. I'm not concentrating on that, and I wasn't interested.

I don't -- through these conversations, it gets referred back to the meat prices all the time. It's a redundant point. This is not a meat industry first.

Q Okay. So let's -- thank you, Mr. Moorman. We've heard lots of testimony about what's happening in the elk industry. Can you just in a very few words give us your perspective on the numbers of animals that are available in industry. What's happening to the overall population?

A Well, like I said, through the BSC, CWD, the herds are down, I don't know, 25 percent of what it used to be, and I would have an easy solution for this whole matter. If my animals are worth let's say \$2,000 like Dr. Graham considers they're worth meat price, simple, replace them. You cannot go to a farm right now and buy them with a limited amount. You just can't source that many animals.

(Transcript of hearing, pp 186-187)

[151] Mr. Moorman says he has had problems in dealing with CFIA when attending an evaluation meeting in Saskatoon at which Dr. Graham was present:

Q Right. Thank you. I just want to spend a moment on your experience with CFIA. September 4th you attended a meeting in Saskatoon. Some attended - - I believe there was an attendee by telephone conference?

A Mhmm.

Q A Dr. Dunn, was it not, I believe?

A Yeah.

Q I was there.

A Yes.

Q Dr. Graham was there?

A Yes.

Q Yourself, your wife.

A Right.

Q Was there anybody else there?

A Initially the - - no, I don't think so.

Q I don't - -

A No.

Q Okay. Could you -- how did the conversation go and what -
- I'll just ask you how did the conversation go? What happened?

What statements were made? What led you to believe in great confidence that you would be treated fairly or otherwise?

A I didn't think I was going to be treated fairly because right off the bat in the conversation, the -- it was referred back to beef industry all the time. Well, it's not the beef industry, and every second or third conversation that you'd have, the statement kept coming up, I don't understand, I don't understand. Well, that doesn't lead me to really believe that we're going to have a really intelligent two-way conversation here, and then we got talking about my herd a little bit, you know, paid \$16,000 for it, a lead breeding bull, and Dr. Greg Graham, he looked at us directly in the eye and said, Why would you pay a penny more than meat price for an elk, I don't understand. Well, I'm sort of at a loss right there. How do you explain that one? I guess I wanted to give somebody 14 more thousand than I normally had to pay. I don't know how to answer that.

Q Have you replaced that bull?

A Oh, yeah. Unfortunately I replaced him with another high-genetic one, and I had to pay 20,000 for it.

Q Why would you pay \$20,000 for a bull when you paid \$16,000 for a superior bull what, three years earlier, did you say?

A Right. The markets were -- just reflected a higher value of markets.

Q The bulls were of equal quality?

A Well, and as I would say, yeah. Yes.

Q So the increase in what you paid are singularly based on market adjustment.

A Market adjustment, right.

Q And you purchased that replacement bull when? Which year is close enough.

A 2014.

Q Okay. 2014. The year that your herd was depopulated.

A Right, after I lost my breeding bull.

(Transcript of hearing, pp 189-191)

(c) *Age and Value*

[152] As regards the age when bulls are ready for the hunt market, Mr. Moorman had the following to say:

Q Okay. Fair enough. What about hunt bulls? When's a bull a mature bull? When does a bull - - what would be a reasonable age for a bull to enter the hunt market?

A Five, six years, and then I guess you're going to get an alteration on that depending on your genetics, type of bull, quality.

Q But generally a bull that - - and let's pick the number six - - of six years you would consider from your - - from your knowledge and experience of 20 years in the industry - -

A Mmhmm.

Q - - that bull would be considered a mature bull and be appropriate for the hunt market.

A Correct.

(Transcript of hearing, pp 188-189)

[153] Mr. Moorman also confirmed that bulls do increase in value as they get older to a certain point.

[154] In cross-examination, Mr. Moorman conceded he had never sold elk to WHGR and that he had not participated in the compensation process for WHGR. He says that when he sells elk, he issues receipts.

[155] Mr. Moorman also conceded that he has filed his own appeal of the compensation he received from CFIA as a result of the 2014 depopulation on his farm.

B. *Respondent's Witnesses*

Dr. Graham's Evidence – Highlights

(a) *Background and Experience*

[156] Dr. Graham is a veterinarian who has worked for the CFIA animal health division in Saskatoon for the past 23 years. He was appointed as the chairperson to value WHGR's depopulated bull elk herd in 2014.

[157] Dr. Graham has been involved extensively with different animals but, prior to WHGR's evaluation, he has only had one previous experience with valuing elk when he chaired the team that evaluated the Forjay Farms herd in 2013. After his experience with WHGR, he also chaired the team that evaluated Mr. Moorman's herd, which is also under appeal.

[158] Dr. Graham confirmed Mr. Wehrkamp's account of the recent evolution of the elk industry in Saskatchewan and concluded as follows:

...The industry, from what I see, has evolved into a meat industry. The prices, as indicated yesterday, have been going up. Velvet is recovering. It's getting closer to that \$40 a pound. So between the meat and the velvet, you're getting your -- your returns, and if you're fortunate enough to have animals that are considered trophy or hunt quality, you have that additional option to market them near the end of their natural economic cycle.

(Transcript of hearing, p 221)

(b) *The WHGR Evaluation*

[159] The agenda prepared for the March 5, 2014 meeting appears as Exhibit A-1, Tab 2, pages 16 and 17, but Dr. Graham conceded that he did not provide a written copy until after the meeting. However, he says that he conducted the meeting in accordance with the agenda. He says that at the meeting, he went over the parameters of the legislation and the approach to compensation.

[160] He explains why he thought receipts were important:

A I thought they were important 'cause it just gives you an idea what - - what these animals are. It profiles, you know, basically whether they're hunt animals, whether they're meat/velvet animals, breeding animals. By the - - the receipt basically tells you, you know, basically what you're getting and what you paid for. I had to have a base to start from. I mean an elk is an elk is an elk is an elk if you see five in a pen, sure, but there's different uses for those particular elks. If you have some history, you have some background, dollar production, some velvet weights, velvet sales, progeny sales if it's a cow, some idea, you know, what that particular animal is and what value could be assigned to it.

Q So you - - you required this information so that you could properly get to a starting point or - -

A Yeah, a starting point.

(Transcript of hearing, pp 228-229)

...

A Well, any other compensation I've been involved in the past, whether it was talking about horses or sheep or whether it was injuries in cervids, whitetail deer, all testing on premises, I always start with receipts. I mean you've got to have some idea of what the animal is, basically what its current value is. That's where I'd like to start, and I was - - I asked for that, as I said, initially when I went through the agenda.

(Transcript of hearing, p 230)

[161] He also explained the importance of the *Common Procedures Manual*, but indicated that he regards it as a “guideline”:

A The Common Procedures Manual has a number of different things in it, common procedures that are - - are commonly done within the scope of our business, our day-to-day business in animal health, and compensation is one of the components, so that manual - - because compensation does come up pretty regularly if we discover a reportable disease and we have to, you know, declare a premise infected and, as such, order - - issue a destruction order and animals or things have to be removed or destroyed, and we pay compensation for such. So this just lays out how - - how it works. I’m talking - - okay. I’m just - - are you talking about Common Procedures Manual, but I’m talking about this component of it, being the section 12 basically just goes through, indicating what’s involved and how the process works.

Q Are you required to strictly adhere to the Common Procedure Manual?

A It’s - - It’s a guideline. If you read through it, you know, it’s - - it gives you some ideas that are pretty closed in. Others are a little more -- you know, a little more latitude.

(Transcript of hearing, pp 229-230)

[162] Dr. Graham also acknowledged that Mr. Wehrkamp went through his presentation at the March 5, 2014 meeting.

[163] To prepare himself for the WHGR evaluation, Dr. Graham affirms that he looked at recent awards of compensation for like animals (i.e. Forjay Farms where receipts had been provided).

[164] Dr. Graham also talked with Dr. Alex McIsaac, CFIA's regional disease surveillance specialist for the province of Saskatchewan. He says that Dr. McIsaac provided him with recent values that had been paid for cervids, specifically whitetail deer.

[165] Dr. Graham says he looked elsewhere because he was "having difficulty" with the values that WHGR was putting forward:

[W]hat I was looking for wasn't what they were providing. Randy [Mr. Wehrkamp] was providing me receipts from his own premises...And basically I didn't see the relevance of what his animals were selling to as respect to what animals on Willow Hollow were.

[166] Dr. Graham also reviewed the receipts that were provided by WHGR for replacement animals purchased after the depopulation.

[167] Dr. Graham says that he was aware of the kind of business that WHGR was running:

A It was basically a breeding - - a breeding farm, and they did tell me that, you know, they had been depopulated in 2009 and they wanted to get back into the elk business 'cause they had put a lot of infrastructure into the business. They were focusing on, you know, the hunts. They spent some money, and they wanted - - you know, that's where their interests were and that's where their living was, and they wanted to get back in, so since 2009 they had been buying females and males, bringing them in, and it made sense. They were basically culling the low end. When I say the low - - yeah, the low end, and the ones that weren't either going to make it as a velvet bull - - I'm talking about the males now - - they'd send them to slaughter. The ones that had some value that they could, you know, basically keep them for a year or two or four. As long as it was making economic sense, they'd keep them, get some velvet sales from them, and if they developed into a hunt where the animal they can sell as a hunt, they'd end up on a hunt farm.

The females did the same, bought females from about 10 producers. That's what I was given to believe, culled them as well. They kept the better ones. The low end went to the market, and they were trying to breed up so they wouldn't have to buy these hunt bulls. It made more economic sense. It made more money if you could produce them. At least you can control what you had each year as opposed to competing with various other hunt ranches in the province for the same amount of stock, so, yeah, the business plan made sense to me.

(Transcript of hearing, pp 236-237)

[168] Dr. Graham also looked at the cervid movement permits that had been issued to WHGR:

Q -- what types were Willow Hollow -- were being issued to Willow Hollow or to consignors who were transporting onto Willow Hollow?

A Well, there were mature males where some permits were just basically straight -- a permit with males. Other permits were basically females. Some had mixtures of females, males. There were some permits that were basically hunt-ready animals to go to hunt that particular year basically issued August, September somewhere, so they would go direct to the hunt farm I assumed to be hunted that year because they were consigned from hunt -- or people that raised hunt-ready animals.

JUSTICE: Excuse me. The permit itself doesn't tell us anything about the animal, does it?

A Well, they'll have general classifications. They'll call them -- I think what I recall, they'll either put hunting or breeding, and that's the ones I remember.

(Transcript of hearing, p 239)

...

Q Okay, but overall in a general overview, so we have three cervid movement permits, one for hunting, one for breeding, and these are the classifications, of course, that have been assigned and the information that's been received by the producer, but we have hunting, breeding and slaughter.

A Correct.

Q So big picture, what does that give you as a picture of what the operation is? And does -- sorry. I'll just ask one question at a time. What does that provide you with information in relation to what your understanding is?

A Well, basically they have animals that end up eventually at slaughter. There's animals that possibly moving into breeding is -- or breeding or velvet, velvet -- meat -- velvet/meat and the hunt would indicate that potentially going to be hunt animals.

Q So is that a fluid of a static type of operation that you're seeing through those documents?

A Well my impression of it was fluid in the sense it was ongoing. You had all three components going on at one time. You'd be buying new ones. Some of the ones that you bought previously weren't, you know, meeting the standard you were looking for to upgrade your herd, so you'd send them off. Some of them were actually better than what you thought. You put them on the hunt farm, you know, if you could find a sale, so it was a dynamic ongoing.

Q And so does that confirm what you understood about the operation overall going into the compensation process?

A You know, what was from like Randy's overview from that first meeting, correct.

(Transcript of hearing, pp 241-242)

[169] Dr. Graham was also aware that WHGR had been depopulated in 2009, but he was not involved with either the 2009 or the 2014 depopulations. He was aware that, in 2014, although all of the bulls were destroyed, only five animals tested positive. The depopulation documents confirm the age and sex of the animals.

[170] After Dr. Graham produced his Valuation Report, and before the Minister made a final decision, the report was reviewed by the regional director of CFIA who was aware that WHGR was not happy with Dr. Graham's evaluation.

[171] Dr. Graham confirmed the amount paid out on SNOR 901W:

A That was SNOR 901W. That bull originated for Randy Wehrkamp's premise, and the receipt was provided. I think it was ninety- two fifty for the receipt, so we can max out at eight, so we gave them the \$8,000.

(Transcript of hearing, p 259)

[172] Dr. Graham goes into considerable detail as to how he arrived at his final evaluation. This evidence is central to the dispute and needs to be examined carefully:

Q So your initial value for meat was sourced from AWAPCO, which we understood from Mr. Wehrkamp yesterday was - - and I'm not actually certain we confirmed this, but where is AWAPCO?

A AWAPCO's located -- it's the Alberta Wapiti Products Co-operative. I think it's located in Leduc or - - but they basically lease out the slaughter facilities from Bouvry meats in Fort Macleod.

Q Okay, and you had initially assigned a value, I believe, at \$7 per kilogram?

A That's correct.

Q And then you had assigned - - in terms of hunt bulls for 2012 or bulls assigned in 2012 are 2011 values there as well?

A Correct.

Q And what was your meat value that - - or your velvet value, sorry - - if we go, one, two, three, four, five -- the sixth paragraph in, your velvet value that you had initially come up with was approximately \$30 per pound?

A That's correct.

Q That's what it says? Okay, and then if we go down two more paragraphs, what were you valuing there?

A On the same page?

Q Yes.

A 47?

Q Yeah, page 47.

A Right.

Q It starts off with, One-third of the hunt herd.

A Correct.

Q And what were you initially valuing the potential trophy caliber of the animals at?

A At \$4,000, 370 and better. That would be the SCI scoring system.

Q Okay, and that last sentence before, Thanks, on that page, what does that - - what does that say there?

A (As read)

We are open to discussing these numbers if you need further clarification or supporting documentation to present.

Q And after March 25th, as we understood from yesterday, Willow Hollow provided an additional invoice, correct, or is that your - - is that also your understanding, that they had provided an additional invoice?

A Invoice for - - I'm not --

Q Oh, my apologies, for animals that they had purchased after --

A Oh, correct.

Q -- they were depopulated.

A They had bought some animals - - my - - looked to me that they were buying animals to start - - more than likely supply the hunt farm for the year.

Q And where did that invoice or receipt come from?

A Manfred Klettberg.

Q And do you recall how much the animals were purchased for?

A Seventy-two five.

Q On -- and on average -- now, I did some math, Mr. Wehrkamp, yesterday, and it turns out that you were right, so it was about forty-two sixty-four.

A Was it?

Q It was.

A Maybe I just rounded it off.

Q I think \$14 isn't going to make or break this, but, you know, in the interest of being accurate, I want to be sure, so --

A I apologize for that mistake.

Q That's all right, but -- but it was -- we're talking about between 42 and \$4,300 --

A Yeah.

Q -- was the average price --

A Correct.

Q -- of the animals that they had purchased, and so then in your final report, which Mr. Wehrkamp had gone over yesterday, what did you end up assigning as a final value to those bulls?

A What tab is that again, Sarah?

Q That would be your final report.

A Correct.

Q You know, we can refer to the -- because, of course, we have many copies, but we can certainly refer to the one in tab --

A I can -- I think I can recall.

Q Well, for the Court's purposes --

JUSTICE: Yeah.

A Oh, sorry.

Q MS. BIRD: -- maybe what we'll do we'll take a look of tab 122 of

A That's the big book.

Q Tab, yeah, 122, the smaller binder of Exhibit R-1.

A Correct.

Q And this would be on page 3 of this tab, page 3 and 4 actually, and I simply am referring to this version of the report. It is the same as the others. The difference is that the type is larger. So what in the end did you assign to value the -- the hunt, the trophy hunt bulls?

A 4,500 I believe.

Q Pardon me?

A I believe that was \$4,500.

Q \$4,500.

A Correct.

Q And what did you end up valuing velvet at?

A The velvet I gave an average of \$700 per bull basically using a 20-pound average at \$35-a-pound, so the velvet/meat bulls, I gave a \$700 value to the velvet and I gave a meat average value of \$1,675 per bull.

Q Okay. So in discussing your -- while we're discussing your report, in terms of those hunt trophy prices that -- or values that you were assigning, did you take into account the Klettberg Farm invoice that was provided on April 3rd in determining your final assignment?

A Yes, I did.

Q And, in fact, you said in your e-mail that you would willingly do so, correct --

A Correct.

Q -- that you would look at other information? So in terms of -- and other information that you would have applied to the valuation of the hunt bulls, the trophy hunt I'll refer to them as, did you take any other information into account?

A Yes, I did. I used Mr. Wehrkamp's -- he provided some information from -- for 2014 for, you know, what people had sold

hunt-quality bulls were looking for with the different scales of -- of scoring, took that into account, and I had to make a decision where I wanted to put the trophy bulls, an average score 'cause, you know, what was I going to choose, so I thought a 400-inch bull was between 350, it was between 450, and the hunts I think that they had done the previous five years, the majority of the bulls that were hunted out were in that range, so I thought 400 would catch you know, would be a fair value to start with.

JUSTICE: Just -- can I just -- for the purposes of clarification, you told us that you took the Klettberg accounts -- sorry, Klettberg receipt --

A Correct.

JUSTICE: --into account, and Mr. Wehrkamp's information for his 2014 sales. In what ways did you take them into account? What -- what did you do with those? What difference did they make in your calculation?

A Well, you know, they talked about, you know -- basically everything was geared, you know, to have as many hunts as possible 'cause that's the top of the food chain in terms of value and return, so they had been depopulated, their males, so basically they needed -- you know, they've been long term in the business. They want to maintain those relationships, so they had to get animals onto that hunt farm that year, so basically they get a receipt for 17 animals, and that averages out the forty-two fifty, you know, that to me, you know, those were indicative of hunt bulls. That's what I basically assumed.

JUSTICE: Okay. So it was a very influential receipt for you.

A Yeah, it played a role, correct.

JUSTICE: Okay, and Mr. Wehrkamp's information, how did that interact with the Klettberg receipt?

A Well, I -- as -- I had chosen 400. That was a basically, you know, in-the-middle-of-the-road score.

JUSTICE: Yeah.

A And I basically went to the different hunt farms or farms that provided hunt bulls that he had provided and basically found out an average, what I felt was an average of -- I think it was three -- three farms, what that average price was, and so I picked 4,500

'cause that's what I thought, as well as taking into account the one that that was for forty-two fifty.

JUSTICE: Okay. Thank you.

Q MS. BIRD: And so to just expand on what Justice Russell was asking you, when you were reviewing the information at tab 7 of the black binder -- and I, of course, am asking you to correct me if I'm -- I'm incorrect here as well, but -- so if you look at tab 7 at page 2, and that is Mr. Wehrkamp's 2013 price list, and we already know that the Klettberg Farm animals were coming in-between 42 and \$4,300 in 2014. That's what they were purchased for, and you're looking at that receipt and then you're looking here, and what are you finding off of Mr. Wehrkamp's?

A Well, it's 213 -- 2013 price list.

Q Right. Right, but where are you finding that range of animal to sit?

A From the 391 to 410, it was 4,500.

Q And did you review the other information in this tab such as Elk Valley Ranches or Cosha Farm Elk Ranch in terms of the SCI scoring as well?

A Cosha Farms, between 380 to 400 was 4,500.

Q And Elk Valley Ranch prices?

A Well, not -- not so much because he just gave them by the -- by the years, year of age.

Q Well, I think he also provided the SCI scores as well.

A Oh, did he? Okay.

Q Yeah. So did you feel you were in the --

A Oh, I see. Right.

Q -- range there as well?

A Yeah. He had 390 to 410 was 4,700.

Q But-you knew that they had already repopulated at least for 17 of those animals --

A Correct.

Q -- at less than \$4,500 each.

A Correct.

Q Right. Okay.

...

JUSTICE: Go ahead whenever you're ready.

Q MS. BIRD: Thank you. So we -- we've spoken to the hunt values that you assigned and the way that you approached assigning the values. What of velvet? You said in your earlier report that you -- or your e-mail that you were valuing it at -- and we discussed this earlier -- at \$30 per pounds?

A Right.

Q And then in your final report, you said that you valued it at \$35 per pound.

A Right.

Q So can you tell us how you -- how you valued velvet?

A Well, Randy -- or Mr. Wehrkamp had indicated a 10 to 15 percent increase was expected for 2014, so I basically, you know, give a 15 percent bump to the \$30 and basically rounded it out to 35.

Q Did you base any of these numbers off of your previous compensation experience?

A The previous compensation I had allowed for \$30.

Q And per pound?

A Per pound of velvet, correct.

Q And we know that Mr. Wehrkamp and Willow Hollow had provided average weights of velvet that had been sold in 2013. We had looked at that earlier. Did you take that into account in the valuation of the velvet?

A Basically what they provided was average weights for age groups --

Q Okay.

A -- not prices.

Q Did you ask for further information on the prices?

A No, I don't believe I did. There was that Alberta Elk Commission. I believe I looked at that.

Q Oh. Sorry. I- - perhaps you didn't understand the question. Did you ask Willow Hollow or Mr. Wehrkamp for further information related to prices or sales of receipts or - -

A Oh, I see what you mean. When I was at the initial meeting, I mean I asked for receipts and basically indicated live animals, velvet, meat, whatever was available.

Q Okay, and after the initial compensation meeting and you've received the final report of Mr. Wehrkamp with the information that was provided, the invoices and the receipts relevant to SNOR 901W and the other accompanying documents, did you ask for any further information?

A I continued to ask for receipts - -

Q Okay.

A - - throughout my conversations, and to me I had to have that as a starting point.

Q And why was that important? I mean we - - you did speak to that a bit earlier.

A Yeah, just to profile, you know, what the animals were, what their value was, you know, as close to the current year as possible but going back three years.

Q And you made that known to Willow Hollow and the representative?

A I believe they - - as many as times as I repeated it, they were aware of it.

Q If you look at -- and if you look at Exhibit A-1, which is the black binder - -

A Mmhmm.

Q -- and you look at tab 2, and we see pages 27, 28 to - - or just want to make sure - - 27 to 28, and that e-mail thread that's

going --that's an e-mail thread going back and forth between you and Mr. Wehrkamp, correct?

A Correct.

Q Okay, and so in that e-mail thread are you asking for more information? So in the --let's say the e-mail that's date -- or time stamped 10:38 on page 27.

A Could you please repeat that?

Q The e-mail that's about midway through -- down the page.

A Okay. The middle of the page?

Q Yeah, in the middle of the page.

A Right.

Q It's time-stamped 10:38 a.m.

A Okay.

Q And in that e-mail are you requesting additional information and explaining why that is relevant information?

JUSTICE: Well, it pretty well speaks for itself.

MS. BIRD: I think so.

JUSTICE: Could it be read any other way, Dr. Graham?

A No.

MS. BIRD: Okay. Thank you. I apologize. I'm also trying to make sure that we maintain a --

JUSTICE: Sure. I understand.

Q MS. BIRD: -- record as well, and so you've taken into account certain things about the velvet and the valuation of the velvet. Did you seek any other -- in your report you suggest that where else did you receive or attempt to obtain information related to the velvet prices?

A Velvet prices or velvet sales?

Q Or velvet sales.

A I had a conversation with Dr. McLane of the Battleford district office that I was looking for receipts.

Q Okay.

A 'Cause - - 'cause I know that velvet is basically sold overseas, and export certification is required.

Q Right.

A And if they're in the velvet business, I'm sure they sell theirs through the same buyer as everyone else in the province, so -

Q So - - pardon me?

A So an export document would be required, whether it was for the entire assembly at another district or whether it was being made here. I didn't know that, and Dr. McLane volunteered that information to me - -

Q Okay.

A - - that they had sold 4,000 pounds, I believe, in 2013.

Q And what did you - -

JUSTICE: So he gave you this information verbally?

A Verbally.

JUSTICE: All right.

Q MS. BIRD: And what did you understand from Dr. McLane they had purchased it for per pound or sold it for per pound?

A He didn't have that information at all.

Q If you could just take a look at your report there, you said that it was 4,000 pounds at how many dollars per pound? And I appreciate it's been perhaps a year and a half since the report was written.

A This is still 027 or my report?

Q This is your - - your report. I apologize. That's at - -

A It's 4,000 pounds, I believe, at \$30 a pound, for \$120,000.

Q Okay, and so you sought out that additional information -- or actually you said that Dr. McLane had volunteered the information, but did you seek out any other information other than the information that was provided by Willow Hollow?

A Well, like I said, my initial meeting, I've seen other situations where people have sold velvet. They get a piece of paper with the weight of the velvet on it, and so there's obviously paperwork provided.

Q And in review of Willow Hollow's information did you also -- if we look at A-1, tab 7 -- that's the black binder again, Dr. Graham -- the very first page, that's the Alberta Elk Commission. Did you review that information that had been provided by Willow Hollow as well in terms of what they said about velvet and the prices?

A Well, I expect I had looked at it, correct.

Q But you reviewed all of the information that was provided by the Appellant.

A Well, regards to -- there was never a receipt for the total weight sold. They provided this, and Randy talked about it at our initial meeting, about velvet, I believe, and how it increased quite significantly over the last number of years.

Q And can you -- based on the information that Willow Hollow did provide in terms of the average weights that was attached to Dr. -- Mr. Wehrkamp's report on March 10th, can you value or assign a fair market price for velvet based on just average weights for individual -- or not even for the individual animal but for the average year of that bull?

A You could get a -- I think a good estimate if you --

Q Just based on Mr. Wehrkamp's information, like just based on the average weight of the information -- like of the average weight of the velvet?

A Well, if you knew approximately how many animals were contributing to that -- the velvet produced that year.

Q Did you have that information?

A Well, I basically got the information from the slaughter figures that were sent of the animals that were depopulated. There was 266, I believe, animals that could have contributed to the

velvet. I believe I went from three years and up, and I think that approximately it was 200 plus, in around 200, 200 -- 200 animals, divided that into the 4,000 or into the 4,000 pounds, so it came out to about 20 pounds, which was comparable to what Mr. Wehrkamp had provided me in terms of averages- they had that year, so it was in the ballpark.

Q In terms of your meat prices or your meat values that you assigned, you had said in that initial e-mail -- I think we had looked at that -- it was going to be approximately \$7 per kilogram, and you were -- and you had stated that you obtained prices from where, from --

A AWAPCO.

Q AWAPCO? Okay, and that were their 2013 prices at AWAPCO; do you recall?

A I did phone them. Do you have what tab my report is under?

Q That would be tab 122. Page 3 and 4, that's your report, and that's Exhibit R-1, but if we're looking at AWAPCO prices for 2013 --

A Right.

Q -- I think we can also -- and specifically for Willow Hollow, you can also find that information at Exhibit A-1, which is the black binder, and we are in tab 2, page number -- page numbers I should say pages 64 through to 68, and if you look at page 64, there's an e-mail there, and the e-mail is from Bentley Brown to Randy Wehrkamp, and attached to the next page and for the next pages on, those are Willow Hollow Game Ranch's 2013 AWAPCO prices that they received, correct, from pages 65, 66 and 67?

A Correct.

Q And at page 68, what year was that? That's 2011 prices, and so 2011 prices are 7.10, is that your understanding, \$7.10 per kilogram for the hot hanging weight? That's at page 60 --

A That's what it says, correct.

Q Okay, and so you ended up assigning a value of how much in your final report? And that's again tab 122.

A It looks like I've just assigned a slaughter value relative to the date of slaughter, which was around March, I believe, 13th and 14th of 40 - - of '14.

Q Okay.

A Yeah, 14th to the 27th of 2014. I could divide that out and determine, you know, but whatever - - I did talk to Cindy and asked her what meat prices were for that particular day.

Q And so how much did you assign per kilogram?

A Well, I know I assigned sixteen seventy-five per bull.

Q Well - -

A So how -- in brackets it says, AWAPCO slaughtered average value from March 13th and 27th slaughter dates. So I - - basically I went through the returns that were filled in, I guess, or I accessed - - I'd almost have to sit back and think on this, how I got those values. I know I did talk to Cindy. I got an average value of weight and multiplied the weight by - - the average dressed meat, multiplied that by whatever Cindy provided and came up with the sixteen seventy-five and added that to the \$700 for the velvet, coming up with a composite value of twenty-three seventy-five for a velvet/meat bull.

Q Okay, and did you - - did you determine - - you said that you determined it according to AWAPCO's prices for 2013?

A I did.

Q And you would confirm that.

A I did.

Q So would you - - if we were to base - - and I'm not going to try to do math here. If we were going to do the math, does seven fifteen sound like --

A Oh, it was at least seven fifteen.

Q Okay.

A Yeah.

Q So you were providing the AWAPCO prices for 2013. Were you also taking into account that previous compensation you did with Forjay as well?

A I did the same thing with them. I basically phoned Cindy, got that information, multiplied by the average weight -- or dressed weight and come up with a slaughter value --

Q Okay.

A -- dollar-wise. I added it to the velvet and got a value for a velvet/meat bull.

(Transcript of hearing, pp 267-284)

[173] Dr. Graham also explains in detail why he could not accept WHGR's information on valuation:

Q Now, the -- the way in which that Mr. Wehrkamp and Willow Hollow have set out the way in which they think that the valuation should have occurred and what we know of the information that was provided in terms of the price lists as well as those invoices and receipts as well as then any other accompanying documentation related to it, is it possible -- given the amounts that were being asked for and claimed by the Appellant, Willow Hollow, is it possible to reach those numbers simply on the information that was provided?

A I couldn't -- I could not do it.

Q What did you require more of, if anything?

A It all started with the profiling of what we had for the herd, the whole profile, how an elk on one premise is not an elk on another.

Q Okay.

A You can show me some sales that you have been selling hunt bulls on a regular basis, invoices to prove it. Sure, they're hunt bulls, and you can basically assign a proportionate number of animals as hunt bulls on a farm. If you've got no receipts for a hunt bull, how could you assign a hunt value to it?

Q And, in fact, when you were provided with receipts that were specific to the animal, you assigned, for - - for example, for SNOR, which is the - -

A Right.

Q Right. So for SNOR 901W, you did assign a maximum value.

A I did.

Q Okay, and if you had received some type of documentation going forward in relation to the animals that were depopulated, could you have possibly, you know, looked at the way that Willow Hollow was valuing their animals, and if there was accompanying documentation related to the animals specifically could you have done more in terms of the values that they were asking for?

A Not without receipts.

Q But I'm saying that if you had invoices, if you had - -

A For sales off the farm?

Q Correct, or for hunts or for anything really more than what you did receive, could you have gotten closer to what they were asking for?

A Could have. I mean I could have been more specific on the proportion of animals on the farm that were basically, you know, hunt quality.

Q Okay.

A And the receipts would give me some indication, you know, what the wholesale value of that hunt bull was and then from that determine what was left for hunt velvet bulls, and basically how I did it was just meat plus velvet. That was pretty straightforward.

Q So I'm just going to touch lightly on Dr. Bishop's report, and you received Dr. Bishop's - -

JUSTICE: Just before you do that, if you're going in that direction - - this may come out later. Mr. Wehrkamp explained to us yesterday that those receipts were not available, I think, principally because of the block purchase arrangements that had been entered into when the animals were bought, and so you

wouldn't have receipts for individual animals, and he felt that that had been explained to you. Was that -- were you told that?

A At that time, no.

JUSTICE: Okay. So you don't -- you knew nothing about the block purchase arrangements that had --

A Well, later on in the discussion maybe with a -- one of the telephone calls with Mr. Wehrkamp or maybe even in one of the e-mails -- I can't recall -- that basically animals were purchased through a broker --

JUSTICE: Okay.

A -- and that as such, the receipts weren't available.

JUSTICE: Okay.

A Those are the hunt bulls --

JUSTICE: Right.

A -- for sale --

JUSTICE: Yeah.

A -- not so much the hunt bulls for purchase.

JUSTICE: Right.

A That's what I was looking for, the purchase prices of bulls. The sales was -- well, it was part of it because when you sell a hunt, it's a retail.

JUSTICE: Yes. Okay.

A I was looking for purchase, the wholesale prices.

JUSTICE: Okay, and so, yeah, we're talking about the remaining animals after the others are hunted out, right?

A Correct.

JUSTICE: And so he told us that, look, we can't give you receipts for those because they were part of a block purchase. You know, there's no -- there's no -- an animal, I guess, doesn't have an individual identity.

A It wasn't a block purchase. It was a block sale.

JUSTICE: Block sale.

A Yeah, it was a retail sale. I was looking for the block purchase of the bulls --

JUSTICE: Okay.

A -- that were eventually going to be sold through the broker.

JUSTICE: I see. Okay. All right, but you knew about -- before you actually did your final report, you -- you were then -- you'd had this exchange with Mr. Wehrkamp.

A I was aware that the hunts retailed were through the broker.

JUSTICE: All right. Okay. Thank you.

Q MS. BIRD: And perhaps just to follow up from Justice Russell, but in terms of we had received evidence from Mr. Weber yesterday in relation to a group of animals that had been sold to Willow Hollow, and several -- or a number of those had been found to have been also depopulated, so, for example, if you had been provided with even the receipt of sale or purchase of those animals -- because it did happen so -- so quickly between, but had you been -- had you received that type of information could you have cross-referenced all of the animals that you could with those that had been depopulated on that cervid movement permit?

A Right.

Q Cross-referenced that and come to some picture or idea of the class of animals that they were purchasing even in that one --

A You could have because the purchase indicated, I believe, was 34 male animals January of -- end of January 2013. If you take the identifiers on the cervid movement permit, you can go to the kill sheets or the kill sheets as well as the animals were identified prior to leaving the premise to go to slaughter, so you had basically duplicate sheets of information, cross-reference what was killed against the cervid movement permit, you can -- you could -- you could determine how many were on the farm. Well, if there was 34 and you found 15 that were part of the depopulation, well, 19 are left. Well, out of the 19 that are left, what happened to them? Well, some of them could have gone to the hunt farm. Some of them could have been, you know, basically sent to slaughter. So you have -- basically you have your hunt. You have your

slaughter. Some could have been kept -- even kept for velvet, but they would have been part of the depopulation, and that's why they may have been kept, so give you some idea, you know, of the composite makeup of possibly the herd - -

Q Okay.

A -- with that particular - - and there was another one there as well basically the same month, end of January of 2013, basically all males, and no receipt was available for that one.

JUSTICE: But you're talking about the cross-referencing that could have been done. Did you do that cross-referencing?

A I did some cross-referencing against the compensations. Well, we pay against the compensation sheets that basically compensated for the animals that were destroyed, and I did, I cross-referenced, reconciliated the cervid movement permit, some of the animals with both permits and found from both permits animals were ordered destroyed.

JUSTICE: And you did that cross-referencing, and what did it tell you in terms of your valuation approach?

A Well, basically the ones that weren't there obviously within the year, my assumption is they - - probably some could have gone to slaughter.

JUSTICE: Right. Okay.

A Some could have gone to the hunt farm, and the rest that were still there, more than likely if they were still there, if they were viable as a slaughtered animal - - not a slaughter animal, as a velvet bull, they would have kept it until maybe it developed into a hunt bull, and at that time they could have moved it. If not, the velvet production didn't warrant keeping it around, then they would have sent it to slaughter at that time, so it's a continuing dynamic.

JUSTICE: Yes. Well, that was - - that dynamic was taken into account in your evaluation.

A Well, other than the sense I knew there was a percentage of each, and that's what I was trying to determine, percentage of each.

JUSTICE: Right.

A That's why I asked for the - - you know, a profile. The profile you get through the reconciliation of the permits with the compensation forms, but you can also get - - the receipts will give you an indication too as well.

(Transcript of hearing, pp 284-291)

[174] Dr. Graham explains why he rejected Dr. Bishop's evaluation contained in Dr. Bishop's report:

A I read it, but he had a qualifier at the end of the report. Basically there was no - - the numbers he used was basically reference to what was -- from Randy, I believe, and, you know, but they weren't substantiated by receipts to really validate them, I guess, and the receipts were probably contrary and maybe discredit his report.

Q And his report is at tab 122 of R-1, and that's at page 6 through to 11, and I apologize if you went over this. So you did consider some of the information within but also with an understanding of his -- his qualifiers in relation to --

A Correct.

Q -- the information?

A Yeah, the - - I did.

Q Okay. All right, because it certainly - - and we'll - - we'll get into this report a little more down the road, but in reviewing the report, what was -- what was your initial reaction to it or your initial thoughts on - - on the - - the assistance that this report could provide to you?

A Well, I was just a little uncertain how some of these values were attained, you know, starting with 2001 moving all the way down to 2010. At that time I think Clarence was basically saying all I know is in that herd were hunt quality and breaking down - - if that was the case, if there was proof to such being the case, this is how he would have valued according to ages, saying that the older you are, the more likely you are a hunt pull and a better quality, but at that - -

Q Sorry. Justice Russell, did you have --

JUSTICE: No, I'm just looking at the significant points of review, number 2, where you say: (as read)

Dr. Bishop's assigned value of 4,800 is premised on the fact that the entire herd was made of trophy bulls.

Do you see that, Dr. Graham?

A Which page?

JUSTICE: It's on the second page, I think, significant points of review.

A My report or his report?

JUSTICE: Well, you're commenting upon his report, I think, and you've signed this -- this is May -- your May 2nd, 2014, report. It's the -- in the -- it's on the -- if you have it open, at tab 122.

A 122?

JUSTICE: Yes.

A Okay. Okay.

JUSTICE: Then if you turn the page --

A Okay.

JUSTICE: -- you've got significant points of review.

A Okay.

JUSTICE: Paragraph number 2.

A Okay. Yeah. (as read)

Dr. Bishop's assigned value of \$4,800 for the hunt herd is premised on the fact that the entire herd is made up of trophy bulls. I asked Willow Hollow, Mr. Wehrkamp at least three separate times for receipts or documentation to validate that this is the case.

So that's basically, you know -- that is -- that report was based on -- the fact that they were all hunt trophy bulls, and that's -- that's where I disagreed.

JUSTICE: And your reasons for thinking the entire -- he used trophy bull for the entire herd was what again? You came to that conclusion because of what?

A The values he had assigned.

(Transcript of hearing, pp 291-294)

[175] In cross-examination, Dr. Graham confirmed that he had “Minimal experience when it comes to compensation” prior to the WHGR evaluation. He also confirmed that CFIA had not provided him with any training in evaluations.

[176] He confirmed that the written agenda for the March 5, 2014 meeting was not provided until March 11, 2014.

[177] As regards the information of values provided by WHGR from source farms, the following exchange is important:

Q Okay. Is it also correct that the genetics are in some ways exclusive to certain farms?

A I would expect so.

Q So it would be fair, then, to assume when we indicated on that report that there were genetics from farms that were of higher value, mid-range and average or lower value that those farms that we indicated, such as the Friedel farm, would be of superior genetics.

A You had listed -- you had listed them three columns, highly productive, medium and average.

Q Correct.

A It was your assessment, Randy.

Q Exactly. The question --

MS. BIRD: Perhaps it would be helpful to have at least the pages in front of Dr. Graham.

JUSTICE: Okay. Let's -- that might help. Should we look -- can you identify where it is?

MR. WEHRKAMP: Sure, absolutely. That is tab 4 in the black binder. The purpose of the question is because the key -- one of the key elements --

JUSTICE: Let him just -- this is on page 2, right?

MR. WEHRKAMP: Correct.

JUSTICE: Yes, that list.

Q MR. WEHRKAMP: Have you found it, Dr. Graham?

A I do.

Q Okay.

A I have, yes.

Q The purpose of the question is because if you're going to determine market value, replacement value, fair compensation, whatever phrase you would like because they are somewhat synonymous, is there not a requirement, then, to have an understanding of genetics of certain animals and groups of animals, regardless of whether they're block purchased or individually purchased?

A That would help.

Q Okay. So what ownership does CFIA have in obtaining this information?

A Similar to what you said yesterday, you have an industry, private treaty. No one knows what the other's doing. There's lots of information. You don't have it. The government don't have it. So you come to me and say, yeah, this is what it is. You've got highly productive, medium, average. 'Cause you're saying so?

Q The -- in the case of this particular document, those are bulls -- those are producers that have vast experience. They have competed in antler competitions. They've done exceptionally well, and, in fairness, we would absolutely agree that not all elk are

created equal. So the purpose of the exercise is to actually share information with CFIA - -

A Right.

Q - - to assist in the process.

A Right.

Q It's as simple as that.

A Yeah, I understand.

(Transcript of hearing, pp 304-306)

[178] In cross-examination, Dr. Graham also rejects the accusation that he mischaracterised the business of WHGR:

A Well, reading from my report at tab -- your tab 122 -- our 122, the report says Willow Hollow game farm elk herd consists of a meat, velvet and a hunt component, so that's basically how I assessed them at.

Q So first meat, second velvet and --

A No.

Q -- third hunt?

A Basically that's what I was trying to strive for, some -- you know, some ability to be able to divide it meat/velvet plus hunt.

Q Would it not make sense to list the primary aspect of the business first rather - -

A To be honest - -

Q Is that not normally how it would be done?

A That's the way I listed it. I'm not sure I did it -- I guess I could have listed it the other way. Does that mean the hunt was the primary component? I think eventually long term if they could have every animal bought specifications to the hunt bull and sold, that would have been great. I understand that, but to get there, not all those bulls are going to get there, Randy. The ones that don't,

the velvet, you keep them. The ones that don't even velvet, you get rid of. It's a continuing dynamic.

Q The --

JUSTICE: Just let me follow up on that. So at the time of your evaluation, Dr. Graham, you couldn't ascribe a primary purpose to Willow Hollow? I mean you knew it did three different -- three things.

A Correct.

JUSTICE: But in your own mind, you didn't give primacy to any of those?

A Not from what they had provided me. They gave me a game plan, which is basically they wanted to get to where they were before 'cause hunts, you know, that's their -- I assume they wanted to get to, but they'd only been back in business since '09, so that's six years, so they were buying, culling, buying, culling, buying, culling, trying to get -- you have to remember there's females involved in this as well. They wanted to get to a point where they didn't have to buy hunt bulls that they could no longer access or they could produce them. That would increase the economic advantage if you could produce them as opposed to having to buy them.

JUSTICE: I mean Mr. Wehrkamp's evidence was that, you know, you basically characterized Willow Hollow as a meat farm.

A Not at all.

Q MR. WEHRKAMP: And yet the valuations, we would suggest, reflect that.

A It's -- if you had provided me more evidence that there were more hunts coming off, you would have got a greater component to the hunt, less to the meat, and the overall composite value would have been higher.

Q We provided you with information that there was about \$275,000 in hunt sales in 2013. We provided -- you had information that --

A When was --

Q -- there was \$120,000 --

JUSTICE: Once again, perhaps could we take a look at where that was provided and so that it jogs Dr. Graham's memory?

MR. WEHRKAMP: That was verbally provided by Bentley Brown at - - at the meeting.

JUSTICE: I see. Okay.

Q MR. WEHRKAMP: Documentation of - - of the hunts that were sold were also reported in tab number 6, which in the charted area we referenced - - Dr. Graham, have you found it?

A Yeah, mature bull value -- valuation.

Q Mmhmm. So we provided you with information on the size of the bulls that were killed - -

A Correct.

Q -- were hunted.

A Right.

Q We provided you with a fair market value -- valuation of the bulls at that time.

A Correct.

Q We provided you then with a percentage of hunts by category or size.

A Right.

Q And we've extrapolated a number of bulls that were there. By your own testimony - - that's clear?

A The top part at the top, historical five-year average, number of bulls, percentage of hunts, out of the five-year average value of the bulls as part of the hunt, total replacement cost. Is that what you're talking about?

Q That's the line. Actually I just stopped at the - - one, two, three - - fourth column, which is the value of bulls as part of the hunt, and the values that are shown there are actually the values relative to CFIA compensation, not to the total value of the hunt.

A Okay.

Q But you're - - you're clear with all of that?

A I think I understand what it's saying.

Q So there is information on the number of hunts. It's already agreed that there was on average 31 hunts per year.

A Correct.

Q 30.8 I guess is the true average.

A Yeah.

Q By your own testimony -- and we've acknowledged and agreed that \$120,000 more or less velvet sales in dollars were sold annually.

A Right. 2013.

Q Correct.

A That's all I can talk to.

Q Correct. And we know that in 2013, \$90,000 or less were sold in meat sales, around \$90,000, correct?

A Out of -- you're saying that it was verbally brought up at that meeting. I don't recall that, but --

Q That information is provided by the 2013 receipts for meat that are in this booklet as well. I believe that'll be tab 11, which basically totals the cull program, and the reason they're included is --

JUSTICE: Let's just -- let's go to tab 11 and see if Dr. Graham is aware of this information or was aware of this information.

A To be honest, I'm not sure if I was.

Q MR. WEHRKAMP: Okay.

A I'm not sure.

Q Okay.

A Yeah.

Q That -- that's fine if you're not sure, but the point is, then, that this represents the animals that were culled in 2013, and the total sales represent about \$90,000. So the value of meat sales is really the smallest value, the least income for the farm.

A On that particular year.

JUSTICE But did you know that?

A That \$90,000, no, I didn't know that value.

MR. WEHRKAMP: Okay.

JUSTICE: These figures, the tab 11 figures that you've given us from AWAPCO, that was part of some package that you provided?

MR. WEHRKAMP: These documents were not provided in hard copy to Dr. Graham.

JUSTICE: Okay. So how was the information conveyed to him? I mean in your evidence - - you can't give evidence now, but in your evidence how did you tell us that the information about the meat, the \$90,000 was conveyed to him?

MR. WEHRKAMP: It was conveyed to him at the March 5th meeting.

JUSTICE: Verbally. Yeah. All right. I'll take a look at that.

Q MR. WEHRKAMP: Thank you. The point is that for valuation, from a business perspective the commodity that produces the largest income by logic and common business practice is considered the primary business, the primary aspect of the business in any invoice, regardless of whether it's cervids or if you're selling cars or fixing cars. Is that a logical statement?

A You'd have to repeat that again, Randy.

Q Okay. Sure. I'd be happy to. If you have a business that has various commodities that you deal with and sell - -

A Mhmm.

Q -- the aspect that sells or has the greatest revenue to the business would be considered both by CRA and common business knowledge practice to be the primary aspect of the business.

A At that time.

Q Correct. So we've heard testimony that, in fact, sales were in the hunt aspect of it, and the information was provided at our - -

at the initial meeting on March 5th on what the volumes were. That information was provided to you, agreed, at least verbally?

A If it was, I have no recollection of it.

(Transcript of hearing, pp 307-313)

[179] Another important exchange occurred when Dr. Graham conceded that he did not take the information on cervid movement permits into account:

Q You've mentioned that you needed the receipts to determine what type of bull, velvet, meat or hunt, was being purchased on the receipt. You've indicated that if you were to get a receipt for a block of animals that you would be able to determine that.

A I think you could get a - - get a general idea what you were getting if you basically have a receipt, the invoice stapled to it where it itemized, you know, what you're getting age-wise, sex-wise and a total at the bottom.

Q But we're really concerned with bulls - -

A In this particular - -

Q - - in this compensation.

A Yeah.

Q On a block receipt, on a block purchase - - let me explain what a block purchase is. A block purchase is a farm going to another farm and buying that group of bulls. It's not an individualized list. Agreed?

A I understand that, correct.

MS. BIRD: I just want to make sure that we're clear that - - and I can't recall exactly what -- to the word that Mr. Wehrkamp provided in testimony, but I want to be sure that the questions are going in terms of questions rather than at first I thought maybe he was attempting to put some more evidence in.

JUSTICE: Well - -

MS. BIRD: It was a statement, and - -

JUSTICE: Well, as you can see - -

MS. BIRD: Yes, but then he answered - -

JUSTICE: - - that wasn't the case. He's just asking him whether he agrees.

MS. BIRD: Yeah.

JUSTICE: He can do that. Go ahead.

Q MR. WEHRKAMP: So if that's the case, if you have -- whether it's a receipt or not, if I tell you today that I just purchased 100 bulls, what did I purchase?

A Well, you would have to have a cervid movement permit, Randy.

Q What does the permit tell you?

A It tells you the age. It tells you the sex.

Q You have those, do you not?

A We do.

Q So you had that information. You had all of the cervid movement permits for the Brown Willow Hollow game farm.

A Correct.

Q So you had that information already.

A Correct.

Q Okay. The only thing -- so you knew the animals that were purchased by Willow Hollow --

A Correct.

Q -- you knew where they came from. You knew how old they were. You knew what sex they were.

A We did.

Q You knew if they were indicated as breeding or hunt.

A Well, working for the government, I know quite often when it comes to breeding, hunt or slaughter -- and I've seen it in my

own office -- people don't get that classification necessarily correct.

Q So there's a problem -- there's a possibility of error is what you've saying.

A The reality is is the situation when you get -- let's say 34 males. You bring them in. You determine what you get. You determine -- break them up. If they're going to look like they're going to have potential, you keep them for velvet, like I was saying. If they're even better, you keep them as a hunt bull. The ones that aren't so good you send to slaughter.

Q So if you -- if you have that information, which you've agreed that you do, you then have the information that you indicated earlier that you need to make a determination of whether or not they're hunt or at least a good portion to indicate whether or not they're hunt --

A But you need the receipt to go with it, Randy, 'cause if you've got a -- let's say 34 and 20 of them are hunt-quality bulls, well, 24 -- or, yeah, 24 grand, that's 80 grand, but if they're not worth a lot and they're all meat bulls, well, they're not 80 grand. It's considerably less. So you have some idea what you've got as a composite.

Q But you also have -- but -- fair enough, but you also had and have indicated you needed the information that's on the movement permits to assist in your determination. That was the key element of -- of your assessment. You have that information.

A Well, the information is there, but if you have it -- and you should have it. Any businessman, what he should be -- I've seen them, you know, write paid in full, and they'll write down on that receipt how much was paid and they'll break it down according how many of each, call it breeding bull, call it a hunt bull, call it a velvet bull, depending on what classification, that's the value they put against it, and it's totalled at the bottom.

Q I'm not even sure of how to respond to that statement because it's --

JUSTICE: The information on the cervid movement forms, did you, in fact -- and the classification that was given, did you, in fact, take that into account or did you say, well, you know, you can't trust this and so you left it out of --

A Well, I knew those permits were there.

JUSTICE: Yes.

A And I knew animals within the last year were coming on, but the animals had been coming on for the previous six, and they - you know, as I described earlier, some were basically kept for a year to see where they were, sent to slaughter. Other ones are younger, looking good and they kept as a velvet bull, so it was a continuing process.

JUSTICE: Yes.

A But, yeah, the receipts would have given me some idea.

JUSTICE: You know, I realize you would have wanted the receipts, but it's being suggested to you that you had all the information you needed and you could have taken the cervid transfers into account. Could you or couldn't you? Was that information you could have used or did use?

A No, I didn't because a hunt is a general term. All a hunt is meaning you come to an agreement with someone that wants -- with someone that's willing to hunt a bull that you're able to provide at a certain price. Now, whether that's a 500-inch bull or it's a 250-inch bull, you come up with an agreement.

JUSTICE: All right. So that really played no role in your calculation.

A No, it didn't.

(Transcript of hearing, pp 317-321)

[180] On hunt evaluations, the following exchange is important:

Q Okay. What's a 400-inch bull worth on the hunt?

A Retail or wholesale?

Q Wholesale. We'll go with retail. We have -- we have the retail numbers. We've already discussed those.

A Yeah, we talked about it earlier today. I think I -- I said I chose 400.

Q Mmhmm.

A And I - - I assigned 4,500 bucks to it.

Q Why would you not - - just following up on that particular question, why would you use an average when you have - - the farm's records was provided to you - -

A Correct.

Q -- of what the 31 hunts averaged and that they were over - - you had that specific information on the farm. It was shared with you.

A Well, what tab is that under?

Q That's the evaluator's report, tab number - - one would think you would remember - - I would remember this. Tab number 6. It's your bull valuation, the third page.

A The one that we were talking about earlier.

Q Correct.

A So we've got 151. Can I stand, Your Honour?

JUSTICE: Of course. Yes, go ahead.

A 151 bulls, so I take it divide by 5, that gives you basically your 31 bulls; is that correct?

Q MR. WEHRKAMP: Correct.

A Okay. So these bulls are the ones that were basically hunted out over the previous five years.

Q Correct.

A And the scores, you know, that they were scored at and the total of 151, and then you gave a percentage of - - what percentage of the overall made up those scores. Down at the bottom, you have number of bulls by age. Those are the ones that were left on the farm that were part of the depopulation, correct?

Q Well, let's just focus, if we would, on the top portion and leave --

A Okay.

Q -- the total number of bulls for a minute because we'll get to that.

A Good enough. So what you're saying is these are the bulls that you hunted over the previous five years. I feel like I'm cross-examining now.

Q Frankly so do I.

A Anyhow, how would those values for the previous five years have got anything to do with the bulls that were depopulated?

Q They have everything to do with that, but firstly, would you agree that this is a reasonable chart that gives us clear picture of the past five years.

A It gives a clear picture of the bulls you hunted off the last five years.

Q That's exactly what I'm asking. Thank you.

A Okay.

Q And yet you chose to use a valuation for a 400-inch bull.

A Yeah, I keep coming back to the point. What you -- the past doesn't have nothing -- you keep buying them. It's not like you were in the -- in the -- like the Willow Hollow was in business for 11 or 12 years with the same cows, they knew what they were coming up each year, they had that same genetics, they created the genetics, there was more consistency. Here you were buying -- you were culling, buying, culling. That consistency wasn't there from year to year, so how can you say since you've got the last five years, the next five years is going to be the same? You can't.

Q It could be more.

A It could be more, it could be less, so I took in-between and took 400.

Q It seems to me that accuracy is determined by using historical information that's available and projecting into the future.

A If the historical information is correct.

Q Okay.

A That information is correct, but it --

Q Okay. Thank you.

A -- but you can't over -- if you're not -- if you're not -- it's correct if everything else is equal. In this case everything else wasn't equal.

Q I can't -- I don't want to debate that same point --

A Okay.

Q -- with you. We have historical and just I'm -- just to conclude this portion, let me recap what I've heard I believe. Have five years of actual data that isn't being applied moving forward, but we're using an arbitrarily-chosen score of 400 as an average. Is that what you said? Yes or no. That's --

A That's what I -- I did, correct.

(Transcript of hearing, pp 322-325)

[181] On the key issue of when a bull should be considered mature enough for the hunt market, the following exchange is important:

Q At what stage do you consider a bull to be mature and mature and appropriate, then, for the hunt market?

A Well, whenever he gets the -- I guess whenever he gets the measurements that would allow him to be considered a hunt bull.

Q And what is the minimum measurement that you would use?

A Myself? Well, you can hunt -- like I was saying, you can hunt any bull you like as long as you get -- you know, they get so far down on the scale, I mean it's not much over meat price, so why bother?

Q Why -- is that a decision for you to make or is that a decision for Willow Hollow to make?

A I'm not making the decision. I'm just saying that --

Q Well, you're asking the question why would you bother, and --

A No, I'm just saying --

Q -- I would simply like you to answer the question why you would bother.

A You asked the question of the determination of what I considered what age a hunt bull would be.

Q Correct.

A But whatever age you can get a bull that's someone's willing to buy.

Q Okay. So CFIA, you have determined as the representative and the chair and completing the report that is what age? You've applied in your report -- you've indicated that you are applying to -- and compensating how many bulls for -- considered mature and appropriate for the hunt market?

A 15 percent of 200 I think it was.

Q Okay. That's about 31 bulls for the purposes --

A Correct.

Q So you did recognize the previous years, and you are taking into consideration, even though --

A Well, it's -- that's pretty specific, the number of hunts. I mean you can't -- you can count the hunts each year, but you're basically saying what we did over the five years was basically what's going to happen coming up, but what you keep forgetting, Randy, that each year they weren't able to supply from the ones they were buying to put into the hunt farm for their sales, so they had to go out and buy hunt-ready bulls, so that basically gave them the complement to put in the -- put in the hunt farm. They didn't really come out of -- they did come out of the 31, but they went in what you already had. You had to buy them and put them into the hunt.

Q And you can confirm that? You're confident in that statement?

A I've got the --

Q For all of the hunt bulls?

A I think I could.

Q For all of the bulls that were hunted, you're confident.

A I've got a couple of them for sure.

Q Okay. You're absolutely right. We agree with you, Dr. Graham, that some bulls are purchased off the farm, but those are select bulls. Those are usually the large bulls, and they represent a very small percentage of the bulls that are hunted.

A I understand that.

(Transcript of hearing, pp 326-329)

[182] A significant difference of viewpoint was expressed by Dr. Graham over the importance and the mathematics of culling WHGR's herd of elk over time:

Q MR. WEHRKAMP: ... I'd like to spend a little bit of time talking about sort of farm management practices and culling of animals. You're aware - - are you aware that Willow Hollow culls animals annually?

A I am.

Q I think we agreed this morning that they purchase blocks of bulls, bring them home, cull the meat animals and keep the animals that are left as either velvet or hunt.

A Mmhmm. Correct.

Q Good. Is that a practice that you're familiar with that you would agree to, that culling is a normal practice of the livestock industry, particularly in this case the elk?

A Correct.

Q Do you - - if you buy - - and I'll give you the example and ask you to -- to comment because we discussed this yesterday. If you buy a block of animals for a volume price, a single price, not individualized, take out bottom 27 percent because that's what was culled from the Willow Hollow herd in the year prior to, in 2013, 27 percent, so if you take out 27 percent - -

A Mmhmm.

Q -- of the animals, does that have an impact on the value of the remaining animals?

A Correct.

Q It would.

A It would.

Q So the values would do what, go which way?

A The ones that are left.

Q Would they increase or decrease?

A In theory they should increase.

Q Okay. Thank you. Are you -- I'd like to draw the -- your attention to this booklet, the small one. If you have it, section 118, which is -- while you're looking for it -- a three-page documented -- document which was directed to yourself, an e-mail from myself.

A Mhmm.

Q And on the bottom there's a handwritten note that says, No receipts considered, meat/velvet. I think it says, Annualized cost of maintenance and a question mark, and below that it says, Fail to see where culling increases values of remaining animals. Is that your handwriting?

A It is. So you see -- okay.

Q But you just stated to us --

A Correct.

Q -- that it would have a positive impact, and here the statement is you fail to see where culling would have any positive impact.

A I'll explain that.

Q Please do.

A You're culling off a certain percentage of animals each year. You bring animals in. Some go to meat. Some remain in the -- the herd as velvet. Some go to hunt, but once they're there, you bring some more in, so overall the average stays the same, Randy,

'cause you keep moving in, coming back out, moving in, coming back out 'cause each year -- you're taking off so many, but to keep supplying the hunt herd, you may have to bring more back in, so overall the average doesn't change.

Q I would suggest you need to check your math. If you have 100 bulls -- and let me give it as an example. If you have 100 bulls.

A Correct.

Q 25 go out.

A Correct.

Q That's 25 percent of your herd.

A Correct.

Q You have 75 left. If you bring in another hundred --

A Correct.

Q -- and cull out the 25 percent of that herd --

A Correct.

Q -- that -- that changes the percentage. It doesn't remain at 25 percent on cull basis. Then you're culling a lesser number. It does -- it --

A If you're at a continuous operation and you want to keep the hundred -- in this case with the Willow Hollow, in the compensation they were bringing in three-year-olds and two-year-olds. These are the ones -- the first bunch that have come off their farm from the breeding program. They're coming in. You're not sure what you got. So you -- you -- the previous year you've done some culling. You bring in the ones following in behind which were part of the depopulation. You don't know what value they are 'cause they've only come in as two and three-year-olds, so the overall average doesn't change.

Q I suggest your math is still wrong. I don't understand how that can be correct.

A No, it's not wrong. I thought about it last night actually.

Q Fair enough. That'll be a point that we agree to differ on, then.

A Okay.

Q If you -- we've already given the example. I don't have to give it any more, but of the animals that remain after the initial culled -- culled animals, right, that 75, following along with the example for simplicity sake if we could --

A Correct.

Q -- that single group would be worth more money than you stated. The value would increase of those 75 animals.

A 75 animals are left. Each individual animal would have -- would be considered a better animal 'cause you got rid of the poorer ones.

Q Exactly. Thank you. Now, when we talk about hunt bulls --

A Correct.

(Transcript of hearing, pp 337-341)

[183] Dr. Graham also provided his view of the significance of a 6-year-old bull:

Q -- we look at -- and you stated just before lunch that hunt bulls are sold on the basis of score --

A Correct.

Q -- not age.

A Well, it all depends on what age to get to that score, yes.

Q That's -- that's right. You're correct.

A Yeah.

Q But the key point is score.

A That's my understanding how it works, correct.

Q Okay. So I'm curious, then, to know, when we look at testimony from yesterday which indicated that the antler competitions recognize an age as a mature age. We had a

discussion, I believe -- and I'll ask you to confirm this, with -- on March 5th with Dr. Bishop and yourself at Willow Hollow where we presented the same information to you -- to you and Dr. Bishop at that point, and Dr. Bishop agreed that six years was a reasonable age to cut off as a mature bull. Do you recall that?

A I recall that.

Q Okay. So Dr. Bishop and yourself left. As your industry expert, he left with the understanding -- an agreed-upon understanding with Willow Hollow game farm, that that was the cutoff point for bulls as mature.

A That's what he had come to an agreement with you, correct.

Q Okay. Is that how he based his report?

A I'd have to check the report, but he based values against year of age. I think he -- I think that's correct.

Q Okay. Thank you, and in turn when we were requested -- because of that agreement, when the farm was requested to contact other farms and source valuations, you'll note in the documents that have already been reviewed and if you need to look at them again, they would be part of tab 6 in your black binder, which is the receipts or the -- the replacement cost of bulls.

A Which page was that, Randy?

Q Just one moment. I'm not quite there myself. Pardon me. That actually is not tab 6. That would be tab 7, not tab 6. You'll notice on both the -- on all of the -- on the Cosha Farm, the Elk Valley Ranch farm and the Northwinds Farm that only ages in replacement animals were shown to five years of age, and that was based on the agreement that was reached at Willow Hollow on March 5th with the industry expert representing CFIA and, we would assume, yourself.

A No. You may have had agreement with Clarence, but it wasn't with me.

Q Okay. Would that not have been an opportunity to share that information at the start of the process rather than let the farm continue for a process that lasted until May 2nd when you have a different requirement than what was agreed between the industry expert and the farm's expert as a reasonable way to proceed?

A Well, what Clarence wanted was values of hunt bulls, which you're talking about starts at six years of age - -

Q Correct.

A - - which is fine. You provided those. That's if they're hunt bulls. Our disparity here is how many are hunt bulls. That's where the disagreement is.

Q So my question, then, to you is what is it, what knowledge, expertise do you bring to this process that exceeds the knowledge of the industry expert for yourself, the industry expert for the farm and the farm owners who have operated that farm for 30 years?

A What you're saying is the older you get, you keep growing and getting older, sooner or later you're going to be a hunt bull. That's not the case. Some of them just never make it. You know that.

Q All bulls make hunt bulls. All bulls make hunt bulls.

A As long as you have someone willing to grade. You don't - - all bulls don't get to 400 inches. That doesn't happen. Even I know that.

Q We are not - - a majority of the hunts are sold for bulls under 400 - -

A Correct.

Q -- 400 inches. You're absolutely correct in the sense that all bulls - - if I heard you correctly that all bulls make hunt bulls. They just may not be big hunt bulls, but all bulls - - is that correct?

A If there - - any bull that you want out there, you can put it. You can call - -

Q So in theory - -

A - - it a hunt bull.

Q So in theory all bulls will make hunt bulls.

A No. All bulls could be sold as hunt bulls if someone's willing to pay a price for it.

Q So tell me the definition of a hunt bull, please.

A A hunt bull is where you can have someone agree to pay you a certain amount of money to hunt a bull.

Q Okay. Is there a minimum requirement by score?

A It varies with the guy and the money he's got.

Q So the answer is no. Is that -- is it -- I need a yes or no answer to that question. Is there a minimum score that constitutes a hunt bull?

A Not that I'm aware of.

Q So the answer is no. So in other terms, all bulls make hunt bulls would be a correct statement.

A All bulls can make hunt bulls at varying prices with scores and inches on the racks.

Q Thank you. That was -- that's a key point because what we're looking at here is valuation by category of bull, and earlier in your testimony, that's not what you said. You said that some are velvet bulls and some will only be velvet bulls and some will only be meat bulls. The bottom is gone.

Q What's left is the upper end of that group of bulls.

A Correct.

Q That group of bulls -- a bull that is six years old --

A Mmhmm.

Q -- if that's a reasonable age -- and it was agreed at one point that that was a reasonable age --

A Correct.

Q -- to be a hunt bull, a bull that's four or five will grow to be a six-year-old bull.

A Correct.

Q In the case of your valuation, what you said and applied to this was 31 bulls --

A Correct.

Q -- based on the previous year were categorized as hunt bulls. There was no allowance in your valuation for the category of bulls that were growing in that would make -- that are five years old, that are six years old. You chose arbitrarily 31 as a number, and our challenge is an explanation as to why that constitutes a reasonable number when, in fact, the only number that that is based on is the hunt from the previous year --

A Correct.

Q -- the number of hunts per previous year. It has no correlation to the actual bulls that were on the farm. You've made a number of assumptions --

A Correct.

Q -- and that's all they are. Agreed?

A They're not assumptions.

Q In --

A The reality is you could take all those hundred bulls or whatever they were, Randy, move them down to the hunt premise, okay? Call them hunt bulls. Call them what you like. Will they be hunted out as hunt bulls? If, you know, a guy's got 30 -- or \$2,500 and you're willing to take 2,500, he'll hunt it, take it out at \$2,500.

Q I'm not sure you're in a position to -- to qualify -- I guess I would ask you what your qualifications are to determine that that bull is a \$2,500 bull.

A Well, he wouldn't be much worth more than worth more than a meat/velvet bull. Take a look at some of these things out. Less than 300, some bulls, those prices are right down to meat prices.

Q But you can't give me any and you can't substantiate your report in any other way than your assumptions and a report from Darcy Lepowick.

A I'm not taking Darcy Lepowick into account. You'll have to talk to Clarence about that. That's not my --

Q Okay. Okay. Fair. The point being that all bulls make hunt bulls. Not only is it 31 bulls of the 260 odd bulls --

A Why don't we just - - it's all semantics. Let's call it hunt/trophy. Anything can be a hunt bull. If someone's willing to pay for it, great, but realistically they want the ones that are called trophy bulls that are a little higher up the scale and they'll pay bigger money for.

Q So bigger bulls are worth more money and smaller bulls are worth less money, but they're all still hunt bulls, and to the individual who shoots or hunts that individual bull, regardless of score is it not their trophy?

A Correct. If that's what they want to do and they're willing to pay for it, that's fine, but what we're trying to determine today is how many bulls are hunt bulls and what price you want to put on them. It's just basically a percentage of the herd. That's what this is all about.

(Transcript of hearing, pp 341-347)

[184] As Deputy Assessor, I asked Dr. Graham how he had come to the conclusion that all of the animals acquired by WHGR following the 2009 depopulation (other than those specifically identified as otherwise) had been purchased at meat prices, and what he saw as the essential disagreement over values in this case:

JUSTICE: Thank you very much. I just have a couple of questions myself, Dr. Graham. In the black binder at tab 2 page 81, I'm looking at your second report - -

A Correct.

JUSTICE: the third paragraph down, which begins, Willow Hollow game farms, etc. You say: (as read)

The herd started in 2009 with the purchase of females and males from at least 10 producers. WHGF has provided no purchase receipts during this entire compensation process - -

These are the words I'm interested in: (as read)

- - but did indicate they were purchased at meat prices.

A Correct.

JUSTICE: Where is that -- how was that indicated?

A We started that meeting on March the 5th, '14, at 10:00 in the morning. At 2:30 we were still discussing it, and basically I had no receipts. At two or three different times I asked, you know, I needed receipts, and Mr. Brown there basically indicated, We had receipts but they're mixed in with the tax filings, tax papers, it would take some time to get them. I said, I've got the time, and with that, nothing more was said, and I left -- I left the house. After 4 1/2 hours it wasn't going any further.

JUSTICE: But you say they -- they did indicate that they were purchased at meat prices.

A Yes. Mr. Brown basically said. He said, They're mix -- the receipts are mixed in with the tax filings. I said, Well, I've got the time. He said basically he said they were all bought at meat prices.

JUSTICE: Okay, and you -- you used that information in your evaluation?

A You bet I did.

JUSTICE: Okay. So that was the basis of your assumption --

A Right.

JUSTICE: -- about meat prices. Okay. So just in terms of summary for my benefit here, what do you see as the material differences between the Appellant's valuation and your valuation? What does it come down to?

A The difference is the percentage of animals that are being deemed as, you know, actually hunt bulls that are actually being hunted out and the ones that I deemed basically aren't hunt quality, and basically they basically assigned hunt-quality values to every animal that was on the place other than the two and three-year-olds.

JUSTICE: Right, and that's the difference with Mr. -- Dr. Bishop's report too.

A Right.

(Transcript of hearing, pp 350-352)

Dr. Bishop's Evidence – Highlights

(a) *Background and Experience*

[185] Dr. Bishop is the provincial rabies risk veterinarian with Saskatchewan Agriculture. He is employed by CFIA on “as-required contract.” He has worked in different positions within CFIA between 1981-2012. He has worked with a variety of animals and has considerable experience with elk operations:

A Well, I've been exposed to many of them and for pretty intense periods of time in a lot of them. There's quite a range of producers in terms of their backgrounds and the knowledge they have of their animals. It's been quite nice to see the progression of the whole industry both in knowledge, equipment and handling, improvement of the animals. You know, there's -- there's some really dedicated people to the industry.

Q And the industry has been around for about how long?

A It was in the eighties that -- that it really got going, toward the end of the eighties, early nineties.

Q So that's right around the time that you're -- you're starting up in Yorkton.

A Well, in '81 I started, yes.

Q Okay. So elk operations, and if we're talking specifically about an elk farm, what do you understand is involved in an elk operation?

A Well, there's a lot of similarities with other livestock, and obviously some of them have to be breeding operations to create more elk. People have different revenue streams based on what their resources are and what their desires are. If they have land suitable for hunting, they -- they may choose to include a hunt operation, which diversifies their income. They -- they may simply raise them for their meat and velvet, meat tending to be the final obviously income from the animal. People sell breeding stock if they have good enough animals and a good enough reputation. It depends on the health of the industry as to how each segment does.

The elk prices go up and down. International trade restrictions can greatly influence the value of the animals. We've been involved in sending animals to Korea, antler to Asian destinations. You know, we've seen most of the industry, embryo collection in the early years even, not so much now, semen collection.

(Transcript of hearing, pp 357-359)

[186] Dr. Bishop has been engaged in depopulation evaluations of a number of different species, including elk. He has done this as a sole evaluator in some cases and he has also taken part in several team evaluation efforts.

[187] He has been involved in depopulating elk "seven or eight times." He has been a sole evaluator for elk "five or six times" and "at least twice" as part of a team, all prior to the WHGR evaluation, in which he participated as the CFIA expert. He has, in the past, chaired elk evaluations.

[188] Dr. Bishop was also involved in the Forjay Farms evaluation in 2013 that was chaired by Dr. Graham. He believes that the Forjay Farms evaluation was completed about 4 months earlier than the WHGR evaluation.

[189] Dr. Bishop regards the *Common Procedures Manual* as "a guideline to - - to ensure that key points are captured in the method of evaluating animals for compensation."

(b) *The WHGR Evaluation*

[190] Dr. Bishop gave evidence about the difficulties of acquiring relevant information in Saskatchewan and how he approached the process in relation to Forjay Farms:

Q Okay. Do you know when the award, the final award for compensation happened on Forjay?

A No, I don't. In preparation for that I had inquired of industry people for actual sales numbers, and then I got some. It -- the hunt farms that only can show you how many dollars they've received for a hunt is not really an accurate measurement of the animals' value.

Q So the information that you receive in terms of outside of what is available to you through your own research and on your own system, does that come from some other source? Are you able to access any other -- like are you able to access Canada Revenue Agency records and determine perhaps what they've been selling their animals for or making?

A No, there's no such other method. It's -- there's no livestock market reports to read. Even published figures from provincial bodies don't tell you that they're actually based on sales. They're -- they could well be based on a group of people's prices, which can be different than what the sale prices are.

Q So that doesn't exist in Saskatchewan?

A No, it doesn't.

Q Does it exist in Alberta?

A There is such a document, yes.

(Transcript of hearing, pp 369-370)

[191] He also described his expectations going into the WHGR evaluation:

Q MS. BIRD: So going into the Willow Hollow compensation process -- and you're aware that they've purchased a hundred animals in the past year. What does that tell you just as a preliminary source of information? What are your thoughts related

to that information when you're going into that first compensation meeting?

A My thoughts was that this is going to be relatively easy because we will have quite accurate proof of what this animal cost or this one and this one, and we can have a discussion about what changes we might have seen in the past year. It's been a year since those animals were purchased or six months or whatever, and we could fine-tune those figures based on -- on proof of which direction the industry might be going in values and -- and that we should be able to arrive at a very fair level of compensation.

Q And had you had similar experiences to that prior to in your other evaluations?

A Yes, I have. I have had a number of situations where the documentation provided showed what the animals had been purchased for and what similar animals from the same herd had been sold for, so it was fairly easy to arrive at -- at what appeared to be very accurate figures.

(Transcript of hearing, pp 370-371)

[192] Dr. Bishop describes the material aspects of the March 5, 2014 meeting as follows:

A From CFIA we -- we mostly were -- well, we had an agenda that was gone through, and documents that were required to be presented to them were -- were done so, and we -- it was spoken about how the process should work, and we didn't really get a lot of other opportunity to present information. This was -- we were looking to gather information so that evaluations could be made.

Q Did you -- sorry. Oh, I was going to just follow up on that with had you gone into the meeting with a determination in terms of the approach that CFIA was going to take in the valuation?

A To the degree that -- that we were asking for proof of values, receipts, invoices, that sort of thing.

Q Was there any other flexibility as -- as you went? Was there any -- like aside from the proof, as you said, was it, you know, this is -- was CFIA telling Willow Hollow this is the way it's going to be?

A I don't think it was really so much as telling as requesting that kind of information. We didn't get to do all that much talking. Randy Wehrkamp did a lot of talking about the handwritten document that he had, the five-or-six-page one that outlined why he and I presume the owners of the ranch felt that their animals should be valued at a certain amount.

Q So was there any agreement at the meeting with respect to values to be assigned?

A I think that I agreed that I was pretty close on -- on what a hunt-ready animal would be. We were -- maybe not an exact, but it was within several hundred dollars per animal, that, you know, it wasn't that I was at half the value or twice the value that they were talking.

Q So after the March 5th meeting -- so -- well, before I get there, but how -- how did it end, the meeting? How did it end?

A You know, I don't recall that much more than I agreed more or less with what they were saying for a hunt-ready bull.

Q And that was based on what information?

A Previous history, price lists from other individuals. The price of a hunt-ready bull is something that can be documented because there are purchases that -- and sales for -- for that class of an animal, just as we could determine the meat price on a given day or a given month.

Q So coming out of that meeting -- and you've received the information from the -- the Willow Hollow folks, and you've gone in with a positive view of how things could go. You're provided with a -- an initial -- as it appears, an initial valuation that was provided and claims and assertions related to the animals themselves. Are you leaving with the same positive feeling?

(Transcript of hearing, pp 372-374)

[193] Dr. Bishop produced his report on March 26, 2014:

Q Okay. Thanks. So prior to March 26th what kind of information was provided by -- by Willow Hollow that you relied on in making your report?

A I don't recall that there was a whole lot more information provided. The requested invoices or receipts for the large number of animals that were purchased in the recent past in the herd history were not provided, and, you know, I spent a few pages here talking about general values of hunt animals, but in the end, I really couldn't do a decent job on this report. I was disappointed that -- that there was a failure to produce the documents that would have made the valuation accurate and fair.

(Transcript of hearing, p 375)

[194] Dr. Bishop spoke at some length about the problems he had in trying to complete a meaningful report in this case:

Q So did you -- so you had done a comparison between the Willow Hollow and the Janzen herd, correct, for -- it looks like the velvet weights?

A Yes, and basically the -- the Janzen herd had better weights of velvet, but something not to get too hung up on on velvet weights is that although it can be an indication on the animal's value, it also can be an indication of how good the operator is too because nutrition is very important in maximizing the genetic potential of the antler growth, and so the same animal and the same genetics on different farms might have different results, so take them with a grain of salt is what I'm saying.

Q And in terms of the Janzen or the Forjay Farm evaluation, do you recall what was assigned to velvet?

A No, I don't.

Q Okay, and did you assign any values to velvet in your report?

A No, I didn't. I had so little information that I really couldn't complete my report. I mean I could have said, okay, slaughter animals are this much, but in the end, we have a much more accurate picture of what those slaughter animals are worth. We have the actual weights from their slaughter, and we can multiply that by a reasonable price, not the price that -- necessarily that CFIA gets because it's a tradition that when animals are ordered slaughter, the slaughter plant lowers the price, so the actual receipts that -- on these animals isn't reflective of a normal

transaction through -- through a slaughter plant. The weights, however, should be accurate.

Q And we actually see that, don't we, with this, in particular?

A Yes, we do.

Q Do you know how much velvet was actually the price that was assigned?

A The velvet or the meat?

Q Oh, sorry, the meat.

A The meat.

Q My apologies.

A Yeah. I would have to look at Dr. Graham's report.

Q No, in terms of the 2014 prices that were assigned from the slaughterhouse.

A Not off the top of my head, but I believe it was more like \$4 a kilogram rather than 7 or 7.50 or whatever.

Q So the slaughterhouse does that, so in terms of -- if we go to R-1 tab 43, so what we -- oh, sorry.

A Yeah, \$4.50 a kilogram.

Q So that's -- so in terms of what these animals would have gotten for 2014, you can't really rely on that, can you?

A Not on the price per kilogram, no.

Q So you have to rely on other --

A Other sales in or around that time should be much more indicative of a fair value. Slaughter plants do this because there may be extra testing, there may be extra cleanup, and they do it because they can.

Q So in making your report what did you base your numbers on? What -- what was the information that you were using to apply to this report?

A Based on purchase receipts from people like Darcy Lepowick and looking at the documentation that was supplied to us

in generalities on what was said to be similar animals, a little difficult because purchases that were made of hunt-ready animals in this situation, because of the rebuilding, a lot of those animals were shot off, which is why they were purchased, so the other animals weren't necessarily purchased at the same price, and there's not necessarily a link in their quality because they were purchased for different reasons.

Q So you said that you were relying on the receipts or information that was provided by Willow Hollow. Were you still applying the same kind of approach, I suppose, as you had gone into the compensation meeting with?

A No. I was unable to really do the evaluation properly because it should be based on what actual sales and purchases are of the animals involved.

Q Now, you -- if we review Mr. Wehrkamp's report, his March 10th valuation, and your report and the valuation that you ended up assigning to the animals, would you agree that they are fairly close?

A Yes, they were.

Q So I guess I'm seeking some clarity for myself and for the Court too, but you've said that you couldn't value properly, but you -- you came fairly close to Willow Hollow's assertions, so were you still going along on the premise that you were accepting their prices as well?

A I don't think that the issue was so much the exact price of the animals. If we were relatively close on them, the key question is how many of these animals should be valued or what portion of them or, you know, put it in that way, and how many should be valued according to criteria such as velvet and weight. I guess that I like to look at things in extremes and then see if that clarifies things, so if this was strictly a -- a velvet and meat property, 600 animals, well, then it would seem reasonable to look at velvet prices and look at meat price and go from there, but then what if this ranch or this farm had one -- had one hunt a year? Do they all become hunt animals, then, and you up the value by \$2,000 apiece or do you say, well, you hunt one a year, so one of them should be valued as a hunt animal? And I think that's more the approach that Dr. Graham took when he did his final report, and to me it makes sense, and in the lack of other documentation, I think it is as fair as what he could have made it.

Q So I --

JUSTICE: Excuse me.

MS. BIRD: Yeah.

JUSTICE: You're commenting here upon Dr. Graham's report, correct?

A Correct.

JUSTICE: Does that mean that you are now revising your own findings in light of what you've learnt about Dr. Graham and his report?

A In my report I really didn't complete my report.

JUSTICE: But you did come up with some values.

A I came up with some values that were not that far off Dr. Graham's, but the question is how many animals do we apply that value to, and I was unable to come up with enough information to make that judgement.

JUSTICE: But you did recommend a figure for compensation.

A I did, but I did not say times 265 or anything like that.

JUSTICE: Okay. Okay. Thank you.

Q MS. BIRD: So had you had the full wealth of information that had been provided to Dr. Graham with the understanding that no further information would be provided would your values or would your report have changed much?

A I guess if I really believed at the time that that was it, then, yes, I would have had to have done something like Dr. Graham did and made a judgement as to how many animals then should we value as hunt animals and how many then would be at a lesser amount.

Q And did you state your concerns in your report?

A Yes, I do.

Q And what were they?

A That there was just a lack of information about purchase prices. There was a presumption that the bulk of the purchased

animals were similar in value to the animals that were purchased primarily for hunting right away and little to back up that assertion that they were of equal value.

Q So had Willow Hollow provided some substantiating documentation in some form in relation to the claims that they were making would it then -- to the other side, would you have maintained the value -- the values that you had reached in your report?

A With further information I certainly may have modified it. It's become apparent now that animals were purchased soon after that were said to be of a similar quality to the hunt animals that they had, and --

Q Are you speaking about the Klettberg Farm --

A Yes.

Q -- purchase?

A So that figure would have had some relevance for a portion of the herd.

Q And that information was provided to CFIA after you issued your report.

A That's my understanding, yes.

Q And were you asked to update your report?

A No, I wasn't.

(Transcript of hearing, pp 376-382)

[195] Dr. Bishop confirms that Dr. Graham may have been inaccurate in his Valuation Report in assuming that Dr. Bishop had assigned a \$4,800 value to the hunt herd premised on the fact that the entire herd was made up of trophy bulls:

JUSTICE: I wonder if I could put this question to you, Dr. Bishop. In his own report of May 2nd, 2014, Dr. Graham comments upon your report. You may or may not be aware of this, and if you're not aware of it, I'll turn it up for you. He says in his points for review that: (as read)

Dr. Bishop's assigned value of \$4,800 to the hunt herd is premised on the fact that the entire herd is made up of trophy bulls.

Is that accurate?

A Yes.

JUSTICE: You -- that was your premise, the entire herd was made up of trophy bulls?

A I had no proof either way.

JUSTICE: But was that your premise, then? If you had no proof either way, why would you assume they were all made up of trophy bulls?

A Then I guess it was not my premise because, as I said earlier, I did not say times 265 or whatever the number was.

JUSTICE: So you're saying that Dr. Graham is being inaccurate when he says that?

A That may well be, yes.

(Transcript of hearing, pp 382-383)

[196] Dr. Bishop is of the view that the chairperson does not have to accept valuation reports provided by the experts involved in the evaluation:

Q -- for -- for a depopulation. What is, then -- I suppose the obvious question is, then, is it necessarily going to be that every evaluation report is going to be accepted by the chair or is there -- I suppose to clarify, is there -- is there a chance that there's going to be some disagreement even?

A Yes, there certainly can be. The chair has the final say and has to consider all of the evidence that's there or isn't there and make a decision based on both what's been presented but, as well, noting the deficiencies in what's presented. Dr. Graham did receive e-mails through the course of this that showed that perhaps a fair number of these animals were purchased at about meat price, so he would use that information in making this decision.

(Transcript of hearing, pp 384-385)

[197] In cross-examination, Dr. Bishop confirmed that an elk six years and older would be considered a mature bull:

A I believe it's six and older.

Q So it's -- not only is it a farm opinion that that's a reasonable age, it's your opinion and certainly the opinion of industry that that's a reasonable point to expect bulls of that age are hunt-ready.

A Correct.

(Transcript of hearing, p 389)

[198] As regards the recent rise in elk values, Dr. Bishop confirmed as follows:

Q Okay. Thanks. You commented earlier just on what's happening with the prices since 2009. Was any of that information shared with you that may have been submitted by the industry expert to Dr. Graham?

A I believe that was, yes.

Q Okay, and those prices are all on -- or what's happening to the prices?

A There's been a steady increase.

Q Okay. Okay. Earlier -- I think I'm allowed to say earlier testimony has basically shown prices increasing 122-plus percent during the period of time for -- for elk, as an example.

JUSTICE: Do you agree with that?

A Well, it depends on what period of time we're talking about.

Q MR. WEHRKAMP: The testimony was based on a five-year period.

A I recall that testimony.

Q Pardon me?

A I recall the testimony, and it seems reasonable, yes.

(Transcript of hearing, pp 389-390)

[199] Dr. Bishop also confirmed the major valuation problem referred to in his report:

Q And the farm operators gave you a perspective on what's happening in the total dollar of hunt sales and what type of bulls they've been hunting, correct?

A They did, but as I put in my notes, the remaining animals on the property were not necessarily of the same quality as what had been hunted off for the past number of years. There was no proof provided to that.

(Transcript of hearing, p 390)

[200] When it was pointed out to him that the valuation in his report was within 10 percent of the WHGR valuation, Dr. Bishop explained as follows:

Q But you didn't -- you did not see the industry expert's second report on valuation.

A I don't believe so.

Q Okay.

A I am not sure at this point.

Q So the farm completed their own valuation. You, acting independently without access to the report that the farm completed, completed your valuation, and it was within 10 percent. Agreed?

A Not entirely. I was not able to determine how many of the animals should be valued as hunt-ready animals.

Q Well, I'm just going by your March 26th report, which highlights the values of animals that would be representative or, in fact, specific to the farm. So the fact that this report is submitted and there's -- I understand that you did not have all of the information, but you had information. You completed a report based on valuation. You submitted it to Dr. Graham. It's then Dr. Graham's -- I'm just trying to describe process here. Then it's Dr. Graham's responsibility to -- to review your report and consider it as the report from the industry expert. Yes? No?

A Yes, and I do recall Dr. Graham clarifying that this -- these values would be for the portion of the herd that would be the hunt-ready portion.

Q And earlier you've made reference to the fact that Willow Hollow is a hunt farm, hunt operation. Agreed?

A I said that's what they call themselves.

Q Mhmm. So as I understand it, you were given on March 5th the information that was available. Pertinent information was shared with Dr. Graham. Some, but you're not sure how much, was shared with you. You completed the report to the best of your ability, correct, based on the information you had?

A I highlighted the lack of information that was --

Q Agreed, but it was --

A -- that was there.

Q To the best of your ability, you completed that report based on the information you had.

A I did not actually complete the report because I could not.

Q But was it not --

A I was operating within a vacuum of information, and I'm presuming that you read the Common Procedures Manual on evaluating and noted that receipts and invoices are --

(Transcript of hearing, pp 392-394)

XI. ANALYSIS

[201] The Appellant made it clear at the March 5, 2014 meeting that "genetic value" was central to the valuation process. Mr. Wehrkamp's hand-written submissions had the following to say on point:

To assist in determining the value of bulls the genetic value must be first considered. This point is validated by previous sales and demonstrated production results validated by antler competition. It

is critical that the herd be replaced with equivalent genetics and potential. This is a key point stated 4.4 Market Value (Common Procedures Manual).

[202] Genetic value was difficult to establish in this case because these were not antler scores and most hunt sales reflected the values of “hunt-ready” bulls that had been purchased for the hunt, and so were not necessarily indicative of the genetic value of those animals that remained in the herd. In addition, the Appellant refused to produce any receipts or invoices for the purchase of any of the remaining animals in the herd except for SNOR 901W, a bull which was awarded the maximum compensation of \$8,000. There were no live animal sales except for hunts.

[203] At the March 5, 2014 meeting and following, the Appellant attempted to fill the information gap left by the failure to produce receipts in various ways.

[204] As Mr. Wehrkamp’s written submissions of March 5, 2014 show, he divided the herd into “highly productive,” “medium productive,” “average productive.” Because the purchases since 2009 had been made from various farms, he assigned each farm a productivity value “based on the productivity of the farm’s genetics and marketability of each farms elk.” He then went on to rank bulls in the Appellant’s herd in accordance with their farm of origin, and used age as a further indicator of value.

[205] From CFIA’s perspective, Dr. Graham feels that he provided a reasonable evaluation given the shortage of information he had to work with. Ms. Bird, counsel for CFIA, summarized the CFIA perspective at the hearing before me in Battleford when she said:

MS. BIRD: ...Given the dearth of information that was provided that was directly related to the animals that were depopulated, the ability for CFIA to value the animals was, we submit, made unnecessarily more difficult. I understand from this - - from Dr. Graham's evidence today that he understood the seriousness of these types of compensation processes. He understood that this is people's livelihoods. He understood that, you know, depending really on the farm, they -- some of them, you know, take a more passionate approach and others, you know, in terms of their depopulations, you know, they -- some of them are involved, some of them aren't, you know, but he did approach this compensation with a level of -- I think he expressed -- he perhaps didn't say the word, but I'll say it -- of compassion, and he did not go forward with a -- you know, an all or nothing approach. What he arrived at and based on the information he reviewed, based on the information that, as it came in, he was willing to adjust his values I think shows that Dr. Graham was really doing his best.

...

MS. BIRD: Yeah, absolutely. So the CFIA approached the valuation of the Appellant's elk in consideration of a number of factors that included but was not limited to the information that was provided by the Appellants, replacement values, the claims of the Appellant in relation to their genetics and the age and use of the animal and the information, as I said, that included comparable prices from other farms and, of course, through CFIA's own independent efforts. It wasn't an easy task. CFIA did their best to assign fair market values that would ultimately result in the Minister's award of compensation, and, as such, we submit that the award of compensation was reasonable. Unless you have any further questions --

(Transcript of hearing, pp 430-432)

[206] Both sides agree that valuing these elk was not an easy task. What is of concern, however, is the \$500,000.00 discrepancy in their respective valuations. Reasonable people can disagree, but this discrepancy suggests that one side got it seriously wrong.

[207] When I asked Dr. Graham what he saw as the material differences between the Appellant's evaluations and his own, he answered as follows:

JUSTICE: -- about meat prices. Okay. So just in terms of summary for my benefit here, what do you see as the material differences between the Appellant's valuation and your valuation? What does it come down to?

A The difference is the percentage of animals that are being deemed as, you know, actually hunt bulls that are actually being hunted out and the ones that I deemed basically aren't hunt quality, and basically they basically assigned hunt-quality values to every animal that was on the place other than the two and three-year-olds.

JUSTICE: Right, and that's the difference with Mr. -- Dr. Bischof's report too.

A Right.

(Transcript of hearing, p 352)

[208] The values at issue relate to animals purchased by WHGR following the 2009 depopulation, and were part of their efforts to rebuild their elk herd. Dr. Graham revealed in his testimony that he was well aware of this plan:

Q And what type of business did you understand that they were running?

A It was basically a breeding -- a breeding farm, and they did tell me that, you know, they had been depopulated in 2009 and they wanted to get back into the elk business 'cause they had put a lot of infrastructure into the business. They were focusing on, you know, the hunts. They spent some money, and they wanted -- you know, that's where their interests were and that's where their living was, and they wanted to get back in, so since 2009 they had been buying females and males, bringing them in, and it made sense. They were basically culling the low end. When I say the low -- yeah, the low end, and the ones that weren't either going to make it as a velvet bull -- I'm talking about the males now -- they'd send them to slaughter. The ones that had some value that they could, you know, basically keep them for a year or two or

four. As long as it was making economic sense, they'd keep them, get some velvet sales from them, and if they developed into a hunt where the animal they can sell as a hunt, they'd end up on a hunt farm. The females did the same, bought females from about 10 producers. That's what I was given to believe, culled them as well. They kept the better ones. The low end went to the market, and they were trying to breed up so they wouldn't have to buy these hunt bulls. It made more economic sense. It made more money if you could produce them. At least you can control what you had each year as opposed to competing with various other hunt ranches in the province for the same amount of stock, so, yeah, the business plan made sense to me.

(Transcript of hearing, pp 236-237)

[209] The evidence is clear that a significant aspect of this rebuilding process involved "block purchases" of elk from other farms. I understand this to mean from Mr. Wehrkamp's evidence that a block price was paid for a group of animals that could be expected to be of varying quality as individuals. Hence, no individual animal in the group could be ascribed a value based upon the block-purchase price at the time of acquisition. These block-purchased groups were then subjected to fairly aggressive annual culling so that poor producers were eliminated from the herd and, over time, the overall value of the herd and the remaining individual animals would improve.

[210] It is immediately apparent that this annual, cyclical culling process from block-purchased animals presents a significant evaluation problem when another depopulation occurs (as it did here in 2014) and the whole elk herd is destroyed. It is a problem because, without a physical inspection of the animals concerned (which did not occur here), there is no receipt or invoice available for individual animals (or even groups of animals of like quality) that can be used as an indicator of quality and value for each animal at the time of purchase.

[211] In their evidence, neither Dr. Graham or Dr. Bishop gave any indication that they had ever had to deal with this particular valuation problem before. Nor did they indicate that they had consulted with anyone who had dealt with it, or had gone to any authoritative source that could be used to address elk values when block-purchased animals are destroyed some years after they were purchased. Nor is there any evidence to suggest that rebuilding an elk herd in the way WHGR did is unusual or outside of industry norms. As Dr. Graham testified, “the business plan made sense to me.” So there is no evidence to suggest that CFIA, in this case, was confronting an unusual business situation or one that does not fit within industry norms. Yet, their evidence reveals that Dr. Graham and Dr. Bishop had a difficult time in providing an evaluation in these circumstances and that what Dr. Graham finally produced in his report, and what was finally endorsed by the Minister, was nowhere near the industry perspective and, from the point of view of WHGR, resulted in a \$500,000.00 shortfall in compensation.

[212] Much has been said in this dispute about the importance of receipts, and throughout the valuation process, Dr. Graham repeatedly asked for receipts for the animals acquired by way of block-purchase. As he says in his report, he wanted the purchase receipts “to substantiate that the existing herd is as valuable as the trophy animals already hunted off.” So Dr. Graham’s position was that purchase receipts could be used to establish the value of the elk in the herd that had not been hunted off. However, there is no explanation in Dr. Graham’s report as to how a purchase receipt for a block of animals that does not ascribe a value to any particular animal (or group within the block) could then be used as an indicator of value for animals that are destroyed years later. Nor does Dr. Graham explain this issue in his oral evidence. He remains convinced that only receipts would have given him the evidence he needed, but he does not explain how this

could help if purchases are made in blocks of animals of different ages and quality for which no individual purchase price can be identified.

[213] The evidence from WHGR is that the block-purchases contained animals of different ages and quality, and that the poor producers were, under the farm's culling program, eliminated and sold for meat. This way of increasing the value of the remaining herd "made good sense" to Dr. Graham, as he told us at the hearing in Battleford. On the other hand, Dr. Graham also gave the following evidence at the hearing:

Q MR. WEHRKAMP: Thank you, Justice Russell. I guess continuing on from before lunch, Dr. Graham, I'd like to spend a little bit of time talking about sort of farm management practices and culling of animals. You're aware -- are you aware that Willow Hollow culls animals annually?

A I am.

Q I think we agreed this morning that they purchase blocks of bulls, bring them home, cull the meat animals and keep the animals that are left as either velvet or hunt.

A Mhmm. Correct.

Q Good. Is that a practice that you're familiar with that you would agree to, that culling is a normal practice of the livestock industry, particularly in this case the elk?

A Correct.

Q Do you -- if you buy -- and I'll give you the example and ask you to -- to comment because we discussed this yesterday. If you buy a block of animals for a volume price, a single price, not individualized, take out the bottom 27 percent because that's what was culled from the Willow Hollow herd in the year prior to, in 2013, 27 percent, so if you take out 27 percent --

A Mhmm.

Q -- of the animals, does that have an impact on the value of the remaining animals?

A Correct.

Q It would.

A It would.

Q So the values would do what, go which way?

A The ones that are left.

Q Would they increase or decrease?

A In theory they should increase.

Q Okay. Thank you. Are you -- I'd like to draw the -- your attention to this booklet, the small one. If you have it, section 118, which is -- while you're looking for it -- a three-page documented - document which was directed to yourself, an e-mail from myself.

A Mhmm.

Q And on the bottom there's a handwritten note that says, No receipts considered, meat/velvet. I think it says, Annualized cost of maintenance and a question mark, and below that it says, Fail to see where culling increases values of remaining animals. Is that your handwriting?

A It is. So you see -- okay.

Q But you just stated to us --

A Correct.

Q -- that it would have a positive impact, and here the statement is you fail to see where culling would have any positive impact.

A I'll explain that.

Q Please do.

A You're culling off a certain percentage of animals each year. You bring animals in. Some go to meat. Some remain in the - the herd as velvet. Some go to hunt, but once they're there, you bring some more in, so overall the average says the same, Randy, 'cause you keep moving in, coming back out, moving in, coming back out 'cause each year you're taking off so many, but to keep supplying the hunt herd, you may have to bring more back in, so overall the average doesn't change.

Q I would suggest you need to check your math. If you have 100 bulls -- and let me give it as an example. If you have 100 bulls.

A Correct.

Q 25 go out.

A Correct.

Q That's 25 percent of your herd.

A Correct.

Q You have 75 left. If you bring in another hundred --

A Correct.

Q -- and cull out the 25 percent of that herd --

A Correct.

Q -- that -- that changes the percentage. It doesn't remain at 25 percent on cull basis. Then you're culling a lesser number. It does -- it --

A If you're at a continuous operation and you want to keep the hundred -- in this case with the Willow Hollow, in the compensation they were bringing in three-year-olds and two-year-olds. These are the ones -- the first bunch that have come off their farm from the breeding program. They're coming in. You're not sure what you got. So you -- you -- the previous year you've done some culling. You bring in the ones following in behind which were part of the depopulation. You don't know what value they are 'cause they've only come in as two and three-year-olds, so the overall average doesn't change.

Q I suggest your math is still wrong. I don't understand how that can be correct.

A No, it's not wrong. I thought about it last night actually.

Q Fair enough. That'll be a point that we agree to differ on, then.

A Okay.

Q If you -- we've already given the example. I don't have to give it any more, but of the animals that remain after the initial

culled -- culled animals, right, that 75, following along with the example for simplicity sake if we could --

A Correct.

Q -- that single group would be worth more money than you stated. The value would increase of those 75 animals.

A 75 animals are left. Each individual animal would have -- would be considered a better animal 'cause you got rid of the poorer ones.

Q Exactly. Thank you. Now, when we talk about hunt bulls --

(Transcript of hearing, pp 337-341)

[214] So we have evidence here that, prior to the final evaluation, Dr. Graham didn't think that culling increased the value of the remaining animals. Yet his evidence is that "culling the low end...made sense to me." If Dr. Graham truly believes that the "overall the average doesn't change" then it is difficult to understand why culling made good business sense. I also think that Dr. Graham's confession that "I thought about it last night actually" is an indication that at this point in his testimony he is engaged in an *ex post facto* defence of his valuation and is not telling us what he thought or did at the material time. All in all, the evidence seems to suggest that, at the material time, Dr. Graham did not ascribe any kind of appreciable or realistic value achieved through the culling process, notwithstanding that he now says it made good business sense.

[215] In his own report, Dr. Bishop tells us that he has had considerable experience in valuating elk. Yet there is no evidence to suggest that he had ever confronted, dealt with, or sought advice on the valuation issues that arose in this case because of the block-purchases and culling that had been used to rebuild the herd after the 2009 depopulation. And there is certainly

no indication in his report that he had ever confronted this issue, or that he knew how to go about dealing with such an evaluation.

[216] Dr. Bishop indicated that both he and Dr. Graham had been involved in the Forjay Farms evaluation that had occurred a few months earlier, and Dr. Bishop indicated that, as far as he knows, no problems have arisen from that compensation. Yet neither Dr. Bishop nor Dr. Graham say that there were any problems related to block-purchases that had to be resolved and/or how they were resolved in that case or any other case. Both Dr. Graham and Dr. Bishop say that they looked at the Forjay Farm situation when dealing with WHGR. Yet Dr. Graham says "an elk is an elk is an elk." So it is difficult to see what relevance Forjay Farms could have had for WHGR if Dr. Graham's approach was adopted. In fact, it is clear from Dr. Bishop's evidence that he went into the WHGR evaluation expecting that the usual situation would prevail and that the evaluation could be based on receipts:

A My thoughts was that this is going to be relatively easy because we will have quite accurate proof of what this animal cost or this one and this one, and we can have a discussion about what changes we might have seen in the past year. It's been a year since those animals were purchased or six months or whatever, and we could fine-tune those figures based on -- on proof of which direction the industry might be going in values and -- and that we should be able to arrive at a very fair level of compensation.

Q And had you had similar experiences to that prior to in your other evaluations?

A Yes, I have. I have had a number of situations where the documentation provided showed what the animals had been purchased for and what similar animals from the same herd had been sold for, so it was fairly easy to arrive at -- at what appeared to be very accurate figures.

(Transcript of hearing, pp 370-371)

[217] This suggests to me that both Dr. Graham and Dr. Bishop had no experience in valuing elk in a situation where animals are acquired under block-purchase arrangements, where they are of a mixed age and value and are culled over time before they are depopulated. This is the central valuation issue in this dispute. And yet neither CFIA witness spoke to any kind of similar experience or suggested a methodology for dealing with it. They insisted that they needed purchase receipts but they didn't explain why a block-purchase receipt would have given them an indication of value for the depopulated animals. Nor, it seems, did either of them consult anyone, or source any information that went to this central valuation issue. They both continue to insist that receipts were needed, but neither of them say what a block-purchase receipt would have told them about the purchase value of individual animals. Nor do they explain how WHGR could have provided a sale comparator in a situation where they were rebuilding a herd from a previous depopulation and were culling and retaining animals to increase the value of the herd.

[218] Both Dr. Graham and Dr. Bishop were focussed on receipts and/or invoices that would demonstrate animal quality and value at the time of acquisition and/or at the time of sale. As a result of not receiving this information, Dr. Bishop says that he could not complete his report:

A No. I was unable to really do the evaluation properly because it should be based on what actual sales and purchases are of the animals involved.

(Transcript of hearing, p 379)

[219] When I questioned Dr. Bishop on his present position, his response was as follows:

Q So I guess I'm seeking some clarity for myself and for the Court too, but you've said that you couldn't value properly, but you -- you came fairly close to Willow Hollow's assertions, so were you still going along on the premise that you were accepting their prices as well?

A I don't think that the issue was so much the exact price of the animals. If we were relatively close on them, the key question is how many of these animals should be valued or what portion of them or, you know, put it in that way, and how many should be valued according to criteria such as velvet and weight. I guess that I like to look at things in extremes and then see if that clarifies things, so if this was strictly a -- a velvet and meat property, 600 animals, well, then it would seem reasonable to look at velvet prices and look at meat price and go from there, but then what if this ranch or this farm had one -- had one hunt a year? Do they all become hunt animals, then, and you up the value by \$2,000 apiece or do you say, well, you hunt one a year, so one of them should be valued as a hunt animal? And I think that's more the approach that Dr. Graham took when he did his final report, and to me it makes sense, and in the lack of other documentation, I think it is as fair as what he could have made it.

Q So I --

JUSTICE: Excuse me.

MS. BIRD: Yeah.

JUSTICE: You're commenting here upon Dr. Graham's report, correct?

A Correct.

JUSTICE: Does that mean that you are now revising your own findings in light of what you've learnt about Dr. Graham and his report?

A In my report I really didn't complete my report.

JUSTICE: But you did come up with some values.

A I came up with some values that were not that far off Dr. Graham's, but the question is how many animals do we apply that value to, and I was unable to come up with enough information to make that judgement.

JUSTICE: But you did recommend a figure for compensation.

A I did, but I did not say times 265 or anything like that.

JUSTICE: Okay. Okay. Thank you.

Q MS. BIRD: So had you had the full wealth of information that had been provided to Dr. Graham with the understanding that no further information would be provided would your values or would your report have changed much?

A I guess if I really believed at the time that that was it, then, yes, I would have had to have done something like Dr. Graham did and made a judgement as to how many animals then should we value as hunt animals and how many then would be at a lesser amount.

Q And did you state your concerns in your report?

A Yes, I do.

Q And what were they?

A That there was just a lack of information about purchase prices. There was a presumption that the bulk of the purchased animals were similar in value to the animals that were purchased primarily for hunting right away and little to back up that assertion that they were of equal value.

(Transcript of hearing, pp 379-381)

[220] I asked Dr. Bishop about the \$4,800 assumption at the hearing in Battleford:

JUSTICE: I wonder if I could put this question to you, Dr. Bishop. In his own report of May 2nd, 2014, Dr. Graham comments upon your report. You may or may not be aware of this, and if you're not aware of it, I'll turn it up for you. He says in his points for review that: (as read)

Dr. Bishop's assigned value of \$4,800 to the hunt herd is premised on the fact that the entire herd is made up of trophy bulls.

Is that accurate?

A Yes.

JUSTICE: You -- that was your premise, the entire herd was made up of trophy bulls?

A I had no proof either way.

JUSTICE: But was that your premise, then? If you had no proof either way, why would you assume they were all made up of trophy bulls?

A Then I guess it was not my premise because, as I said earlier, I did not say times 265 or whatever the number was.

JUSTICE: So you're saying that Dr. Graham is being inaccurate when he says that?

A That may well be, yes.

(Transcript of hearing, pp 382-383)

[221] We also see here how Dr. Graham allocated trophy status to 15 percent of the mature herd. We do not really know how he went about placing a value on the remaining 85 percent of the mature herd but, as his note cited above suggests, any values achieved through the culling process (even though he concedes that WHGR's business plan made good sense) were given no significant weight.

[222] It is clear from the evidence that both Dr. Graham and Dr. Bishop found an absence of purchase receipts (or perhaps invoices) to be the telling factor in evaluating the remaining bulls. It is not difficult to see why the *Common Procedures Manual* says that receipts should be provided. But both Dr. Graham and Dr. Bishop gave evidence that the Manual should be used as a guideline and there is room in the process for flexibility. Yet, in the end, it seems to me that no real flexibility was demonstrated. The lack of receipts remained a presiding preoccupation for Dr. Graham throughout the whole evaluation process and figures strongly in his final report. So the lack of receipts is a crucial issue in this appeal.

[223] We are talking here about WHGR's failure to provide receipts and/or invoices for the block-purchase acquisitions that remained the major part of the herd depopulated in 2014.

[224] First of all, WHGR was wrong not to produce receipts and/or invoice and/or some other documentation to verify the block-purchase arrangements and Dr. Graham was right to ask for them. The evidence before me is that such documentation does exist but, to emphasize its irrelevance, WHGR refused to produce it. In the usual situation, a refusal to produce such basic documentation (required by the *Common Procedural Manual*) would result in the Assessor drawing an adverse inference against WHGR. It would suggest that WHGR is trying to hide something because WHGR had nothing to lose by producing this documentation. If all it does is confirm how much was paid for block-purchases, then this cannot adversely impact WHGR's case, nor would this have changed Dr. Graham's decision unless, of course, those receipts and/or invoices reveal something material about the valuation process that WHGR wishes to conceal from CFIA or the Assessor. Neither Mr. Brown nor Mr. Conacher was called to testify at this appeal so that neither CFIA nor the Deputy Assessor was given the opportunity to question them on this missing documentation and what it reveals. Mr. Wehrkamp's evidence is that it was not produced because it just was not relevant to the evaluation or the appeal. However, it is for CFIA and the Assessor to decide what is relevant, not Mr. Wehrkamp or the Appellant. This documentation is, and was, available. Under normal circumstances, a failure to produce it in accordance with a common procedural manual could well result in a denial of compensation and a denial of any appeal. Producers should beware. Mr. Wehrkamp suggests that the industry generally is reluctant to reveal how it does business. That may well be, but an application for compensation under the Act and an appeal to an Assessor is not an exercise in private business.

When producers call upon the public purse, complete transparency is the order of the day, and failure to provide it could well mean a denial of any compensation.

[225] Fortunately for WHGR, it did not in this case. Dr. Graham was willing to proceed on the verbal advice he received from WHGR that the animals whose valuation was at issue in this appeal were purchased at meat prices. Mr. Wehrkamp confirms it was “near meat prices” in testimony, but he puts no figure on this so that for all intents and purposes Dr. Graham was perfectly reasonable in his conclusion that these animals were purchased for meat prices, and I find as a fact that they were. There is no evidence to suggest otherwise. That, of course, does not resolve the principal issue in this case.

[226] That issue is what market value should be given to elk that were block-purchased at meat prices after they have gone through a farm culling process aimed at removing the poor producers and increasing the value of the herd towards hunt and trophy values.

[227] As I understand the block-purchase arrangements referred to in this case, WHGR went about rebuilding its elk herd following the 2009 depopulation by purchasing groups of animals from different farms at a block price. The animals in each block were of varying age, quality and potential, and no purchase figure was ever ascribed to any single animal. WHGR then went about culling the low producers out of the herd with a view to gradually increasing the value of the remaining animals and the overall value of the herd. So how do you value a depopulated herd that had been developed in this way? Both sides concede there is no easy way. But the legislation requires that this be done because, under ss 51(2)(a) and (b), the amount of compensation has to

be the market value that the animal would have had at the time of its evaluation if it had not been required to be destroyed, minus the value of the carcass.

[228] CFIA places great emphasis on the lack of receipts, but it seems to me that, assuming these animals were acquired under a block-purchase transaction that included animals of varying age and potential, receipts would tell us no more than any individual animal purchased was bought as part of a group, and that the whole group was purchased at meat values. The receipts would not tell us the quality or potential of any individual animal or of the animals remaining after the cull. If this kind of block-purchase arrangement is a legitimate industry practice, and there is no evidence before me that it is not, then CFIA has to come up with a methodology that will allow it to give a reasonable market value in the event of depopulation. Producers cannot be expected to avoid business arrangements (that make good sense, according to Dr. Graham) because animals acquired in this way may be difficult to value if a depopulation occurs.

[229] In my view, Dr. Graham's approach in this case, given the nature of WHGR's business and their rebuilding plan of which he approved, lacks coherence when it comes to valuing the remaining bulls in the herd. He assigned – based upon historical factors – “trophy status” to 15 percent of the mature herd (to which he assigned \$4,500 per trophy bull), but because he then assigned a weighted composite value (hunt, velvet, meat) to animals aged 2010 and older, it isn't at all clear to me how he arrives at a value for the remaining animals, or what justification can be offered given the culling program in place at WHGR.

[230] Considerable debate on this issue took place when Mr. Wehrkamp cross-examined Dr. Graham at the hearing of this appeal.

[231] First of all, it was pointed out to Dr. Graham that, even though he did not have receipts, he did have all of the information he required to value these animals:

Q Okay. Have you -- and really that's -- that's the key point that we want to introduce is that you're aware of it and that you're knowledgeable of it. You mentioned that -- I would like to spend a minute talking about the receipts. You talked about receipts not being available. There's several references in the communication of you asking for the receipts.

A Correct.

Q Agreed? We're agreed. There's also a number of responses indicating that receipts aren't available. I'm curious to know --

JUSTICE: Let him answer. Do you agree with that, Dr. Graham?

A Yes, I do.

Q MR. WEHRKAMP: Okay. So it was an ongoing asking for this and an ongoing response of, oh, I'm sorry, they're not available, right?

A Correct.

Q You've mentioned that you needed the receipts to determine what type of bull, velvet, meat or hunt, was being purchased on the receipt. You've indicated that if you were to get a receipt for a block of animals that you would be able to determine that.

A I think you could get a -- get a general idea what you were getting if you basically have a receipt, the invoice stapled to it where it itemized, you know, what you're getting age-wise, sex-wise and a total at the bottom.

Q But we're really concerned with bulls --

A In this particular --

Q -- in this compensation.

A Yeah.

Q On a block receipt, on a block purchase -- let me explain what a block purchase is. A block purchase is a farm going to another farm and buying that group of bulls. It's not an individualized list. Agreed?

A I understand that, correct.

MS. BIRD: I just want to make sure that we're clear that -- and I can't recall exactly what -- to the word that Mr. Wehrkamp provided in testimony, but I want to be sure that the questions are going in terms of questions rather than at first I thought maybe he was attempting to put some more evidence in.

JUSTICE: Well --

MS. BIRD: It was a statement, and --

JUSTICE: Well, as you can see --

MS. BIRD: Yes, but then he answered --

JUSTICE: -- that wasn't the case. He's just asking him whether he agrees.

MS. BIRD: Yeah.

JUSTICE: He can do that. Go ahead.

Q MR. WEHRKAMP: So if that's the case, if you have -- whether it's a receipt or not, if I tell you today that I just purchased 100 bulls, what did I purchase?

A Well, you would have to have a cervid movement permit, Randy.

Q What does the permit tell you?

A It tells you the age. It tells you the sex.

Q You have those, do you not?

A We do.

Q So you had that information. You had all of the cervid movement permits for the Brown Willow Hollow game farm.

A Correct.

Q So you had that information already.

A Correct.

Q Okay. The only thing -- so you knew the animals that were purchased by Willow Hollow --

A Correct.

Q -- you knew where they came from. You knew how old they were. You knew what sex they were.

A We did.

Q You knew if they were indicated as breeding or hunt.

A Well, working for the government, I know quite often when it comes to breeding, hunt or slaughter -- and I've seen it in my own office -- people don't get that classification necessarily correct.

Q So there's a problem -- there's a possibility of error is what you've saying.

A The reality is is the situation when you get -- let's say 34 males. You bring them in. You determine what you get. You determine -- break them up. If they're going to look like they're going to have potential, you keep them for velvet, like I was saying. If they're even better, you keep them as a hunt bull. The ones that aren't so good you send to slaughter.

Q So if you -- if you have that information, which you've agreed that you do, you then have the information that you indicated earlier that you need to make a determination of whether or not they're hunt or at least a good portion to indicate whether or not they're hunt --

A But you need the receipt to go with it, Randy, 'cause if you've got a -- let's say 34 and 20 of them are hunt-quality bulls, well, 24 -- or, yeah, 24 grand, that's 80 grand, but if they're not worth a lot and they're all meat bulls, well, they're not 80 grand. It's considerably less. So you have some idea what you've got as a composite.

Q But you also have -- but -- fair enough, but you also had and have indicated you needed the information that's on the

movement permits to assist in your determination. That was the key element of -- of your assessment. You have that information.

A Well, the information is there, but if you have it -- and you should have it. Any businessman, what he should be -- I've seen them, you know, write paid in full, and they'll write down on that receipt how much was paid and they'll break it down according how many of each, call it breeding bull, call it a hunt bull, call it a velvet bull, and depending on what classification, that's the value they put against it, and it's totalled at the bottom.

Q I'm not even sure of how to respond to that statement because it's --

JUSTICE: The information on the cervid movement forms, did you, in fact -- and the classification that was given, did you, in fact, take that into account or did you say, well, you know, you can't trust this and so you left it out of --

A Well, I knew those permits were there.

JUSTICE: Yes.

A And I knew animals within the last year were coming on, but the animals had been coming on for the previous six, and they -- you know, as I described earlier, some were basically kept for a year to see where they were, sent to slaughter. Other ones are younger, looking good and they kept as a velvet bull, so it was a continuing process.

JUSTICE: Yes.

A But, yeah, the receipts would have given me some idea.

JUSTICE: You know, I realize you would have wanted the receipts, but it's being suggested to you that you had all the information you needed and you could have taken the cervid transfers into account. Could you or couldn't you? Was that information you could have used or did use?

A No, I didn't because a hunt is a general term. All a hunt is meaning you come to an agreement with someone that wants -- with someone that's willing to hunt a bull that you're able to provide at a certain price. Now, whether that's a 500-inch bull or it's a 250-inch bull, you come up with an agreement.

JUSTICE: All right. So that really played no role in your calculation.

A No, it didn't.

(Transcript of hearing, pp 316-321)

[232] Dr. Graham says here that the receipts “would have given me some idea,” but he doesn't say how or what. There is no evidence before me that receipts for block-purchases would have resolved in any way the problem of valuing the balance of the herd. Also, Dr. Graham's rejection of the “hunt” classification on the cervid movement permits is based upon pure speculation. He provides no real justification for disregarding the “hunt” designations that appeared on the cervid movement permits in this case. He is saying that a “hunt” designation could mean anything when it comes to a real value because a hunt value is simply what anyone is willing to pay. There is no evidence to support that this is the case here and, in any event, Dr. Graham does not explain how a receipt for a block-purchase would have resolved the problem if, as Mr. Wehrkamp testified, these block receipts do not assign a purchase price to any identifiable animal. Even accepting Dr. Graham's point that a “hunt” bull doesn't necessarily mean a “trophy bull,” then it has to be acknowledged that nor does it necessarily mean that a “hunt” designation means the animal only has a meat value. Once again, it seems to me that there is no indication of how receipts in this case could have solved the evaluation problems that CFIA faced.

[233] More importantly, though, if the “hunt” designation, as Dr. Graham says, could include animals of different values (from trophy to meat) then he provides no rationale as to how he assigned the proportions in this case, other than his division into trophy and meat. He allows 15 percent of the herd a trophy value of \$4,500, but appears to value the rest as velvet/meat bulls at \$2,375. He says that “hunt is a general term,” so that it could designate a “500-inch bull or it's a 250-inch bull,” but this means that he has no basis for valuing the “hunt” designated bulls that

were destroyed in this case. Apart from the 15 percent permit trophy he allows, he simply assigns the rest a low arbitrary figure that has no evidence to support it. He rationalizes this approach by saying that "the receipts would have given me some idea," and the "hunt" designation on the permit could mean anything. He does not explain how a receipt for a block-purchase could have given him any idea of the value of the remaining animals after culling had occurred, and there is no evidence to support his contention that a "hunt" designation on a cervid movement permit is not some indicator of value or, if it is not some kind of indicator of value, what indicator was used to value the remaining bulls in this case.

[234] Arbitrariness also creeps into the valuation of trophy animals. The following exchange is revealing:

Q Okay. What's a 400-inch bull worth on the hunt?

A Retail or wholesale?

Q Wholesale. We'll go with retail. We have -- we have the retail numbers. We've already discussed those.

A Yeah, we talked about it earlier today. I think I -- I said I chose 400.

Q Mhmm.

A And I -- I assigned 4,500 bucks to it.

Q Why would you not -- just following up on that particular question, why would you use an average when you have -- the farm's records was provided to you --

A Correct.

Q -- of what the 31 hunts averaged and that they were over -- you had specific information on the farm. It was shared with you.

A Well, what tab is that under?

Q That's the evaluator's report, tab 24 number -- one would think you would remember -- I would remember this. Tab number 6. It's your bull valuation, the third page.

A The one that we were talking about earlier.

Q Correct.

A So we've got 151. Can I stand, Your Honour?

JUSTICE: Of course. Yes, go ahead.

A 151 bulls, so I take it divide by 5, that gives you basically your 31 bulls; is that correct?

Q MR. WEHRKAMP: Correct.

A Okay. So these bulls are the ones that were basically hunted out over the previous five years.

Q Correct.

A And the scores, you know, that they were scored at and the total of 151, and then you gave a percentage of -- what percentage of the overall made up those scores. Down at the bottom, you have number of bulls by age. Those are the ones that were left on the farm that were part of the depopulation, correct?

Q Well, let's just focus, if we would, on the top portion and leave --

A Okay.

Q -- the total number of bulls for a minute because we'll get to that.

A Good enough. So what you're saying is these are the bulls that you hunted over the previous five years. I feel like I'm cross-examining now.

Q Frankly so do I.

A Anyhow, how would those values for the previous five years have got anything to do with the bulls that were depopulated?

Q They have everything to do with that, but firstly, would you agree that this is a reasonable chart that gives us clear picture of the past five years?

A It gives a clear picture of the bulls you hunted off the last five years.

Q That's exactly what I'm asking. Thank you.

A Okay.

Q And yet you chose to use a valuation for a 400-inch bull.

A Yeah, I keep coming back to the point. What you -- the past doesn't have nothing -- you keep buying them. It's not like you were in the -- in the -- like the Willow Hollow was in business for 11 or 12 years with the same cows, they knew what they were coming up each year, they had that same genetics, they created the genetics, there was more consistency. Here you were buying -- you were culling, buying, culling. That consistency wasn't there from year to year, so how can you say since you've got the last five years, the next five years is going to be the same? You can't.

Q It could be more.

A It could be more, it could be less, so I took in-between and took 400.

Q It seems to me that accuracy is determined by using historical information that's available and projecting into the future.

A If the historical information is correct.

Q Okay.

A That information is correct, but it --

Q Okay. Thank you.

A -- but you can't over -- if you're not -- if you're not -- it's correct if everything else is equal. In this case everything else wasn't equal.

Q I can't -- I don't want to debate that same point --

A Okay.

Q -- with you. We have historical and just I'm -- just to conclude this portion, let me recap what I've heard I believe. We have five years of actual data that isn't being applied moving

forward, but we're using an arbitrarily-chosen score of 400 as an average. Is that what you said? Yes or no. That's --

A That's what I -- I did, correct.

Q Okay. Thank you. Then let's move on from there.

(Transcript of hearing, pp 322-325)

[235] There is also a major conflict between the parties over the concept of age and maturity that is dramatized in the following exchange:

Q Let's talk about the decision to -- the number of bulls that qualify as a hunt bull.

A Okay.

Q Because I think that's a key element to -- to -- to the case. It's a key element to the compensation, and perhaps that's a good time, then, to look at -- at the chart --

A Okay.

Q -- on the bottom of the page, which is would you agree that's an accurate summary of those particular bulls?

A The total numbers of them?

Q That are here.

A Yeah.

Q Okay.

A That looks correct.

Q Okay. Thanks. The -- you've made the comment and in your documentation and testimony you've stated that bulls how old are considered mature for the purposes of -- of hunting?

A Well, I -- two and three-year-olds I valued, I think, at a specific price.

Q No, no. How many -- at what age did you categorize bulls as mature and appropriate for the hunt market?

A Did I put that in my report?

Q Well, I'm -- I'm asking you your opinion, and I would assume the answer would be consistent today.

A I'm missing the question again. I'm sorry.

Q At what age do you consider a bull to be mature and appropriate, then, for the hunt market?

A Well, whenever he gets the -- I guess whenever he gets the measurements that would allow him to be considered a hunt bull.

Q And what is the minimum measurement that you would use?

A Myself? Well, you can hunt -- like I was saying, you can hunt any bull you like as long as you get -- you know, they get so far down on the scale, I mean it's not much over meat price, so why bother?

Q Why -- is that a decision for you to make or is that a decision for Willow Hollow to make?

A I'm not making the decision. I'm just saying that --

Q Well, you're asking the question why would you bother, and --

A No, I'm just saying --

Q -- I would simply like you to answer the question why you would bother.

A You asked the question of the determination of what I considered what age a hunt bull would be.

Q Correct.

A But whatever age you can get a bull that's someone's willing to buy.

Q Okay. So CFIA, you have determined as the representative and the chair and completing the report that is what age? You've applied in your report -- you've indicated that you are applying to -- and compensating how many bulls for -- considered mature and appropriate for the hunt market?

A 15 percent of 200 I think it was.

Q Okay. That's about 31 bulls for the purposes - -

A Correct.

Q So you did recognize the previous years, and you are taking into consideration, even though --

A Well, it's -- that's pretty specific, the number of hunts. I mean you can't -- you can count the hunts each year, but you're basically saying what we did over the five years was basically what's going to happen coming up, but what you keep forgetting, Randy, that each year they weren't able to supply from the ones they were buying to put into the hunt farm for their sales, so they had to go out and buy hunt-ready bulls, so that basically gave them the complement to put in the -- put in the hunt farm. They didn't really come out of -- they did come out of the 31, but they went in what you already had. You had to buy them and put them into the hunt.

Q And you can confirm that? You're confident in that statement?

A I've got the --

Q For all of the hunt bulls?

A I think I could.

Q For all of the bulls that were hunted, you're confident.

A I've got a couple of them for sure.

Q Okay. You're absolutely right. We agree with you, Dr. Graham, that some bulls are purchased off the farm, but those are select bulls. Those are usually the large bulls, and they represent a very small percentage of the bulls that are hunted.

A I understand that.

Q It is -- and for the -- for the -- for the explanation for the -- for the Court, if I could, the hunt property is a large --

JUSTICE: This is something -- I mean you're giving evidence now.

MR. WEHRKAMP: Okay.

JUSTICE: And you can't do that. You can't provide that explanation. You can put the explanation to Dr. Graham and ask him if he agrees with it --

MR. WEHRKAMP: Okay.

JUSTICE: -- or understands it.

Q MR. WEHRKAMP: Would you agree that -- thank you, Justice Russell. So in the context of the hunt area have you been on the Willow Hollow hunt area?

A I don't believe so.

Q Okay. Did you -- and you didn't look at the animals that were to be depopulated either.

A You're correct.

(Transcript of hearing, pp 325-329)

[236] The key to Dr. Graham's approach is found in the following exchange:

A All bulls can make hunt bulls at varying prices with scores and inches on the racks.

Q Thank you. That was -- that's a key point because what we're looking at here is valuation by category of bull, and earlier in your testimony, that's not what you said. You said that some are velvet bulls and some will only be velvet bulls and some will only be meat bulls. The bottom is gone.

A Correct.

Q What's left is the upper end of that group of bulls.

A Correct.

Q That group of bulls -- a bull that is six years old --

A Mhmm.

Q -- if that's a reasonable age -- and it was agreed at one point that that was a reasonable age --

A Correct.

Q -- to be a hunt bull, a bull that's four or five will grow to be a six-year-old bull.

A Correct.

Q In the case of your valuation, what you said and applied to this was 31 bulls --

A Correct.

Q -- based on the previous year were categorized as hunt bulls. There was no allowance in your valuation for the category of bulls that were growing in that would make -- that are five years old, that are six years old. You chose arbitrarily 31 as a number, and our challenge is an explanation as to why that constitutes a reasonable number when, in fact, the only number that that is based on is the hunt from the previous year --

A Correct.

Q -- the number of hunts per previous year. It has no correlation to the actual bulls that were on the farm. You've made a number of assumptions --

A Correct.

Q -- and that's all they are. Agreed?

A They're not assumptions.

Q In --

A The reality is you could take all those hundred bulls or whatever they were, Randy, move them down to the hunt premise, okay? Call them hunt bulls. Call them what you like. Will they be hunted out as hunt bulls? If, you know, a guy's got 30 -- or \$2,500 and you're willing to take 2,500, he'll hunt it, take it out at \$2,500.

Q I'm not sure you're in a position to -- to qualify -- I guess I would ask you what your qualifications are to determine that that bull is a \$2,500 bull.

A Well, he wouldn't be much worth more than -- worth more than a meat/velvet bull. Take a look at some of these things out. Less than 300, some bulls, those prices are right down to meat prices.

Q But you can't give me any information and you can't substantiate your report in any other way than your assumptions and a report from Darcy Lepowick.

A I'm not taking Darcy Lepowick into account. You'll have to talk to Clarence about that. That's not my --

Q Okay. Okay. Fair. The point being that all bulls make hunt bulls. Not only is it 31 bulls of the 260 odd bulls --

A Why don't we just -- it's all semantics. Let's call it hunt/trophy. Anything can be a hunt bull. If someone's willing to pay for it, great, but realistically they want the ones that are called trophy bulls that are a little higher up the scale and they'll pay bigger money for.

Q So bigger bulls are worth more money and smaller bulls are worth less money, but they're all still hunt bulls, and to the individual who shoots or hunts that individual bull, regardless of score is it not their trophy?

A Correct. If that's what they want to do and they're willing to pay for it, that's fine, but what we're trying to determine today is how many bulls are hunt bulls and what price you want to put on them. It's just basically a percentage of the herd. That's what this is all about.

(Transcript of hearing, pp 345-347)

[237] This highlights the nature of the valuation problem in this case. If, as Dr. Graham says, "Anything can be a hunt bull," but the only meaningful distinction for valuation purposes is between "trophy" bulls and the rest, which are given no particular value even though designated as hunt bulls on cervid movement permits, then we have a severe division between trophy bulls and the rest of the herd, some of which have been designated as hunt bulls. For purposes of Dr. Graham's calculation, I think he is telling us that the "hunt" designation is meaningless and that an elk is either a trophy animal or a meat/velvet animal with no real gradations in between.

[238] This severe division is not born out by other evidence before me. First of all, I have no evidence before me to support the proposition that a “hunt” designation on a cervid movement permit is meaningless (or was meaningless in this case) and could include animals that have no more than meat/velvet value, or that the cervid movement permits in this particular case should be treated that way.

[239] Secondly, given the development that WHGR had to go through following the 2009 depopulation and its plan (approved by Dr. Graham) to build itself back into a world-class hunt facility, it cannot be assumed (as Dr. Graham seems to have assumed) that the purchase of trophy animals to meet the hunt market each year indicates that the herd itself did not have animals of a high quality apart from the 15 percent allocation he made for trophy animals.

[240] Thirdly, Dr. Graham states in his report that “Above average/superior genetics would have reflected higher prices on purchase.” This could be true if a purchase price could be ascribed to a particular animal, but it doesn’t help a valuation of animals of varying age and quality that were acquired under a block-purchase and which have been culled over a number of years to remove the meat animals from the herd. Dr. Graham nowhere explains, or even mentions in his report, what this means when animals are block-purchased so that, as the evidence before me suggests, the group purchased contains animals of varying age and genetic quality, and the meat animals will be progressively culled out. It seems to me that Dr. Graham’s report simply ignores this fundamental reality that he was asked to deal with. He appears not to know what to do in the case of block-purchased animals, and his constant emphasis on the absence of receipts suggest that he never actually came to grips with valuing the herd. He

appears to assume that if meat values are used to acquire a group of animals then the remaining animals in the herd will not significantly increase in value, notwithstanding his approval of the business plan of WHGR to rebuild its elk herd in this way. His handling of this problem (and I am not suggesting there was an obvious answer) was to simply divide the animals into 15 percent trophy and then give a weighed composite (hunt, velvet, meat) for those animals born in 2010 and older, with no higher value to younger animals.

[241] Dr. Bishop's incomplete report (disregarded by Dr. Graham) is helpful on the role that age plays in elk valuation:

Male elk values are mostly based on antler scores for the hunt industry. Antler size is a function of age, to a degree, so an age-mix with a higher proportion of mature bulls lends itself to a higher average value.

[242] By Dr. Bishop's calculations, the weighted average for WHGR bulls born in 2010 and earlier was 6.5 years.

[243] Dr. Bishop points out in his report that:

This lends some credence to awarding a higher value (than that awarded to the Janzen bulls) for the average hunt bull in the Willow Hollow herd, as bulls generally increase in size and value with increasing age.

At our meeting with the owners, I stated that I agreed with the owners that their value of the – 54 bulls 8 years and older (born 2006 and older) seemed fair based on the ages and the scores presented for hunts over the past 5 years (-\$5100 average). It was implied that the older bulls in the herd were of a similar mix of scores compared to those hunted off and scored. I agreed that the bulls born in 2007 & 2008 would be expected to be of similar value. I have received no information (purchase receipts) that demonstrate that the current elk inventory of 2008 and older

animals have the quality (antler growth potential) of the animals hunted off over the past 5 years. I understand that many of the hunted animals were purchased “hunt ready”, already bearing hunt-worthy animals.

[244] Once again, we see the preoccupation with purchase “receipts” as being the only possible way of establishing value. And once again, there is no mention by Dr. Bishop of how value can be calculated from block-purchase receipts.

[245] He points out that “the remaining animals values are not necessarily linked” to the values of “the animals hunted off over the past 5 years.” However, not all of the animals hunted off in the previous five years were purchased “hunt-ready” and there is no attempt by Dr. Bishop to explain what this tells us. And the fact that animals were purchased “hunt-ready” for the hunt in the context of a herd that is attempting to rebuild itself after a previous depopulation does not mean that other mature males in the herd do not have a significant hunt value. Dr. Bishop is tied to the same valuation model as Dr. Graham that says receipts are required for valuation, but with no explanation of how this can be so in a block-purchase situation followed by a culling program that removes the meat animals from the herd. When Dr. Bishop was asked by CFIA counsel, “[a]nd how is elk usually sold on the market in Saskatchewan,” he mentioned “private treaty” but he did not allude to block-purchase arrangements, how common they are, and how valuations are done for a herd built in this way following a CWD depopulation.

[246] Dr. Graham and Dr. Bishop in their evidence, although conceding that the *Common Procedures Manual* is just a guideline, both appear to assume that apart from the 15 percent trophy allocations, the rest of the animals only have a meal/velvet value. Their justification for

this is that no purchase receipts are provided to establish any kind of trophy value and that, in Dr. Graham's case, "hunt" value could mean anything. Neither of them addresses any experience they may have had with a valuation involving animals that have been block-purchased and what receipts revealed in any such case. The result is a fairly arbitrary division of the herd into trophy and meat/velvet animals.

[247] Dr. Bishop was asked how market value can be established:

Q All right. Sorry. And your understanding going into the Willow Hollow compensation process of market value, what was it?

A Well, market value is -- is what, at the time of evaluation, the value in a sale from a willing seller to a willing buyer, something at arm's-length, not within a company, for instance. It could be substantiated in a number of ways. The most obvious way would be to -- to provide invoices and receipts of animals that are of concern, particular animals that -- that one is trying to establish a value on.

(Transcript of hearing, pp 366-367)

[248] In other words, Dr. Bishop only knows how to value animals if there is a receipt for an individual amount. He mentions the previous valuation he was involved in with Dr. Graham where, apparently, there was no problem, but neither of them draws any parallels with the problems that arose in the present case. If Dr. Bishop, as he indicates, requires receipts for individual animals before he can do a valuation, then the implication must be that such receipts were provided for Forjay Farms, and they could only have been provided if Forjay Farms had purchased or sold animals individually or, at least, was not doing business by way of the block-purchase approach in a context where rebuilding is taking place following an earlier depopulation.

[249] Dr. Bishop concedes that at the March 5, 2014 meeting “I agreed more or less with what they were saying for a hunt-ready bull.” Dr. Bishop was able to agree to this because of

A Previous history, price lists from other individuals. The price of a hunt-ready bull is something that can be documented because there are purchases that - - and sales for - - for that class of an animal, just as we could determine the meat price on a given day or a given month.

(Transcript of hearing, pp 373-374)

[250] Dr. Bishop agrees he was told at the March 5, 2014 meeting that purchase receipts were not available and that WHGR considered them irrelevant. Yet he never goes on to look for any way to value this herd other than based upon purchase receipts. He never considers how a herd could be valued if receipts cannot be provided to give value to individual animals. Yet there is no indication from him that such a situation could not exist, or that block-purchases are unusual in the elk business.

[251] He describes his whole approach to valuation as follows:

Q So in making your report what did you base your numbers on? What -- what was the information that you were using to apply to this report?

16A Based on purchase receipts from people like Darcy Lepowick and looking at the documentation that was supplied to us in generalities on what was said to be similar animals, a little difficult because purchases that were made of hunt-ready animals in this situation, because of the rebuilding, a lot of those animals were shot off, which is why they were purchased, so the other animals weren't necessarily purchased at the same price, and there's not necessarily a link in their quality because they were purchased for different reasons.

Q So you said that you were relying on the receipts or information that was provided by Willow Hollow. Were you still

applying the same kind of approach, I suppose, as you had gone into the compensation meeting with?

A No. I was unable to really do the evaluation properly because it should be based on what actual sales and purchases are of the animals involved.

Q Now, you -- if we review Mr. Wehrkamp's report, his March 10th valuation, and your report and the valuation that you ended up assigning to the animals, would you agree that they are fairly close?

A Yes, they were.

Q So I guess I'm seeking some clarity for myself and for the Court too, but you've said that you couldn't value properly, but you -- you came fairly close to Willow Hollow's assertions, so were you still going along on the premise that you were accepting their prices as well?

A I don't think that the issue was so much the exact price of the animals. If we were relatively close on them, the key question is how many of these animals should be valued or what portion of them or, you know, put it in that way, and how many should be valued according to criteria such as velvet and weight. I guess that I like to look at things in extremes and then see if that clarifies things, so if this was strictly a -- a velvet and meat property, 600 animals, well, then it would seem reasonable to look at velvet prices and look at meat price and go from there, but then what if this ranch or this farm had one -- had one hunt a year? Do they all become hunt animals, then, and you up the value by \$2,000 apiece or do you say, well, you hunt one a year, so one of them should be valued as a hunt animal? And I think that's more the approach that Dr. Graham took when he did his final report, and to me it makes sense, and in the lack of other documentation, I think it is as fair as what he could have made it.

Q So I --

JUSTICE: Excuse me.

MS. BIRD: Yeah.

JUSTICE: You're commenting here upon Dr. Graham's report, correct?

A Correct.

JUSTICE: Does that mean that you are now revising your own findings in light of what you've learnt about Dr. Graham and his report?

A In my report I really didn't complete my report.

JUSTICE: But you did come up with some values.

A I came up with some values that were not that far off Dr. Graham's, but the question is how many animals do we apply that value to, and I was unable to come up with enough information to make that judgement.

JUSTICE: But you did recommend a figure for compensation.

A I did, but I did not say times 265 or anything like that.

JUSTICE: Okay. Okay. Thank you.

Q MS. BIRD: So had you had the full wealth of information that had been provided to Dr. Graham with the understanding that no further information would be provided would your values or would your report have changed much?

A I guess if I really believed at the time that that was it, then, yes, I would have had to have done something like Dr. Graham did and made a judgement as to how many animals then should we value as hunt animals and how many then would be at a lesser amount.

Q And did you state your concerns in your report?

A Yes, I do.

Q And what were they?

A That there was just a lack of information about purchase prices. There was a presumption that the bulk of the purchased animals were similar in value to the animals that were purchased primarily for hunting right away and little to back up that assertion that they were of equal value.

(Transcript of hearing, pp 378-381)

[252] Dr. Bishop's problem, he tells us, is that he was "not able to determine how many of the animals should be valued as hunt-ready animals," and this, of course, is the key problem in this appeal. However, Dr. Bishop's evidence is also to the effect that it would be reasonable to assume that a 6-year-old bull is hunt-ready:

A Yes. Yeah. So in my report, I -- I agree that six years and older would be -- would be a relatively similar value or --

Q MR. WEHRKAMP: Are you familiar with antler competitions and -- held in Alberta and previously held in Saskatchewan --

A Yes.

Q -- where they define mature? What age is that?

A I believe it's six and older.

Q So it's -- not only is it a farm opinion that that's a reasonable age, it's your opinion and certainly the opinion of industry that that's a reasonable point to expect bulls of that age are hunt-ready.

A Correct.

(Transcript of hearing, p 389)

[253] Hence it would appear that age (six years) can be used as a reasonable indicator of hunt-readiness. Dr. Graham does not agree with this but the evidence before me is that Dr. Bishop (the CFIA expert in this case) has significantly more experience and knowledge of the elk industry than does Dr. Graham. Dr. Bishop has also been involved in a significant number of elk evaluations. For this reason, I think that his evidence at this point is to be preferred.

[254] So far, I have tried to indicate:

- a) The evaluation problem that both sides faced in this case;

- b) CFIA's approach to that problem; and
- c) What appears to me to be some of the shortcomings of that approach.

[255] From the CFIA perspective, this all comes down to a shortage of information. From Dr. Graham's perspective he agrees that culling should increase the value of the herd ("in theory") although "overall the average doesn't change" – a point I cannot understand or accept – but his main problem is that he couldn't accept WHGR's assessment of the numbers of hunt-quality animals in the remaining 85 percent of the herd: "they basically assigned hunt-quality values to every animal that was on the place other than the two and three-year olds."

[256] I accept Dr. Graham's analysis that not every elk can be given a hunt value. However, he says in his evidence that "an elk is an elk is an elk," by which he seems to mean that all elk have different values, and the WHGR herd cannot be compared to other herds; general criteria such as age and cervid permit designations are meaningless. This pretty well means then, that no comparators are possible for any particular herd or animal and that the only way to value an animal is by way of a purchase receipt that will give you an indication of the quality of that animal at the time of purchase. And that is the approach that Dr. Graham took in this case. The problem with it is that it is inflexible, cannot work with industry practices such as the block-purchasing that was used in this case, and does not yield a value that is required under s 51(2)(a) of the Act.

[257] WHGR's hunt market was animals that had reached maturity and the requisite antler score. Dr. Graham pegged that at 15 percent but that figure is not accurate in this situation.

WHGR was buying “hunt-ready” animals to meet much of the hunt market demand. Their explanation for doing this is that they were still rebuilding the herd after the devastation of the 2009 depopulation and needed to retain mature animals with good breeding potential. So the issue, as I see it, over and above the 15 percent trophy allocation that Dr. Graham ascribed to the herd, is how many of the other remaining animals could be said to be of hunt-ready quality and value, and how to value different age bands of animals that have not yet reached maturity but may have the potential to become part of the hunt market on maturity.

[258] Although CFIA says that the original purchase receipts for these animals would have helped to determine this issue, CFIA has failed to explain how this could be the case when the animals were acquired in block-purchase of animals of mixed quality, so that no monetary value (as I understand it) could be ascribed to any particular animal. Dr. Graham thought this was a good business approach to rebuilding the herd but he did not materially take the culling program into account when he assigned values and failed to acknowledge that hunt averages for the past five years did not necessarily reflect the number of hunt-quality animals in a herd that was rebuilding, and so was required to retain genetic strength and potential.

[259] This is the information gap that WHGR attempted to fill by relating the age of animals in the herd to acquisition sources. Dr. Graham rejected these indicators of value because he felt they didn't give him the precision he wanted in relation to the actual animals within WHGR's herd. In my view, however, the receipts would not have given him any precision either, given that they were receipts for block-purchases of animals of different ages, value and potential. I have no evidence to suggest that Mr. Wehrkamp's evidence on this point is inaccurate. He has

said that block-purchases include animals of high, low, and medium quality. If this were not the case, then I am sure Dr. Bishop, who has a long association with the elk industry, would have advised the Court accordingly. And it would make no sense for WHGR to purchase blocks of animals that did not contain elk with the potential to rebuild a world-class hunt herd. But Dr. Graham thought that what WHGR was doing did make sense.

[260] The usefulness of age as a fairly reliable source of value was confirmed by Mr. Weber, but I also have Dr. Bishop's confirmation that "not only is it a farm opinion that [six and older is] a reasonable age, it's your [*i.e.*, Dr. Bishop's] opinion and certainly the opinion of the industry that that's a reasonable point to expect bulls of that age as hunt-ready." Of course, it won't always be the case that a bull of six years and older is hunt-ready, but the weight of the evidence before me suggests it is reasonable to assume it is, particularly at WHGR where the business plan is to progressively cull the herd back to a high quality hunt ranch.

[261] It seems to me then, that on this basic issue WHGR has proved its case; all bulls that were aged six and upwards could reasonably have been valued as hunt-ready bulls.

[262] I think WHGR has also established that, where a culling program is in place, the value of elk, generally speaking, will increase with age, so that for those elk younger than six that do not qualify as hunt-ready, valuation should take account of appropriate age bands. This is confirmed by Mr. Weber's evidence and is evident in Dr. Bishop's report.

[263] WHGR also complains that Dr. Graham's velvet calculations are unreasonable.

Dr. Graham used \$35 per lb while the actual price of elk antler in 2014 was \$40 per lb. In the evidence before me at the hearing, Mr. Weber said that average values for velvet in 2014 were around \$40 per pound. He ought to know because he is involved in purchasing velvet for Norelko, and Norelko has purchased about 30 percent of the velvet produced in Western Canada.

[264] In conclusion, the legislation says that compensation should be the market value at the time of the evaluation. It does not say market value at the time the animal was purchased. Nor does it say that the only way that market value can be established is from purchase receipts.

Dr. Graham was right to indicate that there was no precise way to value the remaining animals in this herd, but that did not relieve him of the obligation to identify a reasonable value on the facts of this case.

[265] Dr. Graham knew, or ought to have known, at least the following factors:

- a) That WHGR was in the process of rebuilding the herd back to a high-quality hunt operation following the 2009 depopulation;
- b) A significant aspect of this rebuilding process involved the acquisition of bulls by way of block-purchase arrangements;
- c) Although the block-purchase acquisition of bulls in this case involved a block-purchase price that could be equated to meat values, the animals acquired were of a variable age, quality and potential;
- d) The value of remaining animals increased as a result of a regular culling process that removed animals that did not have the potential to meet WHGR's overall objective of rebuilding their hunt herd;
- e) Block-purchase receipts would not have assisted in the evaluation of individual animals and would have told Dr. Graham no more than he already knew, *i.e.* that the blocks were acquired at the equivalent of meat prices;

- f) WHGR was rebuilding its hunt herd and retained hunt-ready and quality animals in order to do this, so that not all quality animals were hunted off every year;
- g) Although a precise evaluation in this case was not possible – given the block-purchase and culling process being used to rebuild the herd – it was still necessary to give the depopulated animals a market value at the time of the evaluation;
- h) 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.

[266] Velvet should have been valued at \$40 per lb which was the industry average in 2014.

[267] I see no reason to find that Dr. Graham's approach to meat valuation was unreasonable.

XII. EVALUATION

[268] Following my review and conclusions as set out above, I provided the parties with a draft of my findings and invited them to consider whether they could apply my conclusions and reach a mutually agreeable figure for additional compensation. Failing that, I asked them to provide me with their respective calculations based upon my findings.

[269] In a commendably cooperative way, the parties were able to agree upon a figure for additional compensation to WHGR.

[270] I have reviewed that figure and the methodology used to calculate it as set out in the letter of March 14, 2016 from counsel for the Respondent. The letter is attached to these reasons as Schedule "A".

[271] In my view, this calculation has been reached in accordance with my reasons and through the cooperation and consent of those knowledgeable in the industry on both sides. For that reason, it is preferable and far more authoritative than any attempt the Court could make to identify an actual figure and, for that reason, I accept both the approach and the final figure as part of my own reasons.

XIII. COSTS

[272] WHGR has asked me to award them the costs of this appeal. The rationale offered is set out in Mr. Wehrkamp's letter of March 14, 2016:

Further to Ms. Bird's correspondence of the same date and in addition to the proposed award of additional compensation of \$332,260.00 Willow Hollow Game Ranch Ltd. is asking the Court for consideration of reimbursement of the Ranchs (*sic*) court costs.

The process to reach this settlement has taken two full years from the date of the initial meeting with CFIA. It has proven to be expensive and time consuming for the owners of Willow Hollow Game Ranch Ltd. Although the Ranch is appreciative of the Court's decision, diligence and the insight of Judge Russell to determine the need for addition compensation it must be noted that the Ranch will not be able to restock to the previous levels as the costs of bulls has again increased significantly. The lost revenue from the understocked Ranch is a further hardship that can never be recovered. The appeal mechanism does not allow for or recognize these critical factors.

The Ranch is thereby requesting the Court consider reimbursement of the costs associated with this process. As lay people we are not sure of the process to determine court costs and should Judge

Russell determine that costs be awarded to the Ranch we request that Judge Russell rule on the most appropriate mechanism to determine these. We await the direction of the Court on this matter.

[273] The Respondent concedes that I have the discretion to award costs pursuant to s 57(2) of the Act, but takes the position that the parties should bear their own costs:

The Respondent, the Minister of Agriculture and Agri-Food Canada, submits that each party bear their own costs for the above noted proceeding. In consideration of the issue of costs, the Respondent submits that the respectful and conscientious manner of the Parties, as commended by Justice Russell in his February 12, 2016 Draft Decision, be taken into account.

[274] The deficiencies in the compensation scheme noted by Mr. Wehrkamp cannot be used as a basis for awarding costs. They are an inherent and unfortunate aspect of the system as it is presently constituted.

[275] The Assessor's power to award any costs under the statutory scheme is governed by s 57(2) of the Act which reads as follows:

Powers of Assessor

57 (1) ...

Costs

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

...

Pouvoirs de l'évaluateur

57 (1) ...

Frais

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

...

[276] This provision provides no guidance as to how and when costs should be awarded, or the basis for any costs calculation.

[277] The jurisprudence on this issue shows that the majority of s 56 cases do not engage in any substantive assessment of costs or any review of submissions of the parties on the topic of costs, with the result that each party is responsible for their own costs: *Kreshewski v Canada (Minister of Agriculture and Agri-Food)*, 2006 FC 1506; *Mills v Canada (Minister of Agriculture and Agri-Food)*, 1996 CarswellNat 678; *Vanderwees Poultry Farm v Canada (Minister of Agriculture and Agri-Food)*, 1993 CarswellNat 464.

[278] In *Alsager*, above, I provided some assessment of the parties' positions on costs and held that each side would bear its own:

[139] The Minister has not claimed costs from the Appellant and asks that each side bear their own costs. Mr. Alsager has asked for costs but I have disallowed much of his appeal and any additional compensation, if any, has yet to be determined. In addition, Mr. Alsager has chosen to represent himself in this matter. In the circumstances I think it is appropriate that each side bear their own costs.

[279] In *Ferme Avicole Héva*, above, however, Justice Tremblay-Lamer dismissed three appeals to the assessor and awarded costs to the Minister in accordance with the tariff established by the *Federal Courts Rules*, SOR/98-106 [*Federal Court Rules*], providing no additional explanation.

[280] In *Donaldson*, above, the Court awarded the appellant \$730,796.14 after determining that the amount received for the destruction of his Silkie Breeders following the detection of avian

influenza (\$439,719.36) fell significantly below market value. When addressing the issue of costs, Justice Kelen stated:

[34] Under subsection 57(2) of the *Health of Animals Act*, legal costs may be awarded to and against the Minister in an appeal. In this case, the appellant is entitled to his legal costs which I will assess under the Tariff of Counsel Fees for the Federal Court. I will use the upper end of Column III. On this basis, I find that the legal costs under the Tariff are \$4,680 which will be awarded to the plaintiff as a fixed lump sum.

[281] In both of the cases above where costs were awarded, the party receiving costs was represented by legal counsel, which is why the Court was able to refer to the Tariff of Counsel Fees used by the Court.

[282] In the present case, WHGR was represented very ably by Mr. Wehrkamp who was one of the experts used in the initial assessments. Mr. Wehrkamp is an industry expert, but he is not legal counsel, so that he is not entitled to counsel fees under the tariff.

[283] As yet, WHGR has placed no bill of costs before me that would enable me to see precisely what the appeal has cost in terms of fees and disbursements. But it would be strange indeed if an appellant who used legal counsel could only claim fees in accordance with the tariff, while an appellant who uses someone like Mr. Wehrkamp could claim the full amount in fees charged.

[284] There is also the additional problem of the Court awarding costs for fees to someone who is not licensed to practise law in Saskatchewan. The process under the Act allows appellants to represent themselves and is not as formal as normal Court proceedings, and the Minister made no

objection to WHGR seeking Mr. Wehrkamp's assistance and allowing him to present their case at the hearing. But this does not turn Mr. Wehrkamp into legal counsel for whom WHGR is entitled to seek reimbursement for fees in accordance with the Court Tariff. In fact, if the *Federal Courts Rules* had been used in this case, Mr. Wehrkamp would not have been allowed to participate except as a witness.

[285] It is important that appellants under the Act be allowed to represent themselves because this is an access to justice issue and the cost of legal counsel could be prohibitive in some cases. In effect, WHGR represented themselves in this case, even though they had significant, able assistance from Mr. Wehrkamp. In regular Court proceedings, where parties choose to represent themselves they do not usually receive costs for doing so and are confined to allowable disbursements. The Court had the following to say on point in *Stubicar v Canada*, 2015 FC 722:

[8] For the most part, the Court has not given special directions to award Tariff B costs for assessable services to self-represented litigants, be they lawyers or not. As stated in *Lavigne v Canada (Human Resources Development)*, 229 NR 205, [1998] FCJ No 855 (QL) (CA) at paras 1-2, Tariff B does not contemplate the awarding of counsel fees to lay litigants. The service cannot be rendered by a litigant to himself.

[9] On occasion, the Court has made a special award. In *Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202, the Court of Appeal awarded some Tariff B costs to a self-represented lawyer. However, the order read:

...a moderate allowance for the time and effort devoted to preparing and presenting the case before both the Trial and the Appeal Divisions on proof that the appellant, in so doing, incurred an opportunity cost by forgoing remunerative activity.

[Emphasis added]

[286] The Federal Court of Appeal in *Sherman v Canada (Minister of National Revenue)*, 2004 FCA 29, had the following to say on point:

[8] The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff B. As the Federal Court properly said in *Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 159 F.T.R. 233, Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party.

[9] Column III of the table to Tariff B is intended to address a case of average complexity: *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2001 FCA 137. The Tariff includes counsel fees among the judicial costs. Since it applies uniformly across Canada, it obviously does not reflect a counsel's actual fees as lawyers' hourly rates vary considerably from province to province, from city to city and between urban and rural areas.

[10] There is no doubt that the appellant, who was unrepresented, expended time and effort in the pursuit of his claims. However, as the Alberta Court of Appeal pointed out in *Dechant v. Law Society of Alberta*, 2001 ABCA 81, "represented litigants also sacrifice a considerable amount of their own time and effort for which no compensation is paid". Furthermore, their lawyers' fees are not fully reimbursed. I agree that "applying an identical cost schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time": *ibid*, paragraph 16. It could also promote self-litigation as an occupation: *ibid*, paragraph 17; see also *Lee v. Anderson Resources Ltd.*, 2002 ABQB 536, (2002) 307 A.R. 303 (Alta Q.B.).

[11] In the present instance, if the appellant had been represented, he would have been awarded party and party costs according to column III of the table to Tariff B. I believe that his award of costs as an unrepresented litigant can, at best, equal, but should not exceed, what would have otherwise been paid to him if he had been represented by counsel. I should add that the unrepresented litigant enjoys no automatic right to the full amount contemplated by the tariff. The amount of the award is in the discretion of the Court. The concept of a "moderate allowance" is

an indication of a partial indemnity although, as previously mentioned, I accept that, in appropriate but rare cases, the amount of that indemnity could be equal to what the tariff would grant to a represented litigant.

[12] Like Registrar Doolan in *City Club Development (Middlegate) Corp. v. Cutts* (1996) 26 B.C.L.R. (3d) 39, Registrar Roland of the Supreme Court of Canada concluded in *Metzner v. Metzner*, [2000] S.C.C.A. No. 527, that the “reasonably competent solicitor approach was unworkable when assessing special costs awarded to a lay litigant”: S.C.C. Bulletin 2001, p. 1158. She endorsed the conclusion that the only reasonable approach was to make an award on a *quantum meruit* basis.

[13] In *Clark v. Taylor* [2003] N.W.T.J. No. 67, Vertes J. of the Northwest Territories Supreme Court was called upon to assess costs for an unrepresented female litigant. At paragraph 12 of the decision, he wrote:

In considering what would be a “reasonable” allowance for the applicant's loss of time in preparing and presenting her case, I am not convinced that it is at all appropriate to simply apply what she herself would charge for her hourly fees to a client. The reality is that any litigation will eat up time and expenses whether one is represented or not.

[14] He went on to add that the tariff can provide useful benchmarks, even if costs are not assessed on the tariff basis. I agree. The hourly rate claimed by the appellant in the present case is not the benchmark to be used in determining the quantum of a moderate allowance. It is much in excess of the allocation rate contemplated by the tariff.

[Emphasis added]

[287] This approach was reiterated by the Federal Court of Appeal in *Air Canada v Thibodeau*, 2007 FCA 115:

[21] The purpose of awarding costs is limited to providing the party receiving them with partial compensation: *Sherman v. The Minister of National Revenue*, 2004 FCA 29, at paragraph 8. Under Rule 407 of the *Federal Courts Rules*, they are assessed in

accordance with Column III of the table in Tariff B. Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party. Column III concerns cases of average or usual complexity: *ibidem*, paragraphs 8 and 9.

[22] I do not consider it appropriate to derogate from the principle of Rule 407 and proceed as the respondent did in Federal Court and on appeal by calculating costs according to Column V of the table in Tariff B. The nature and content of the issues do not warrant derogation from this principle.

[23] In addition, the respondent is not a lawyer and cannot receive legal fees, including those specified in the Tariff.

[24] However, given the three-fold objective of costs, i.e. providing compensation, promoting settlement and deterring abusive behaviour, case law has acknowledged that it is appropriate to award some form of compensation to self-represented parties, particularly when that party is required to be present at a hearing and foregoes income because of that: see *Sherman v. Minister of National Revenue*, [2003] 4 FCA 865. However, the compensation awarded may at best be equal to what the party could have obtained under the Tariff if it had been represented by a lawyer: see *Sherman, supra*, 2004 FCA 29, at paragraph 11. It is generally a fraction of that amount. This is what the Federal Court judge did.

[Emphasis added]

[288] I don't see how the Assessor can go beyond this approach in the present case.

[289] This means that the Court cannot award costs for legal fees, including those specified in the Tariff. The Court may, however, award a "moderate allowance."

[290] Under the Court Tariff B, s 1(3) says that a bill of costs shall include disbursements including:

- a) Payments to witnesses under Tariff A; and

- b) Any service, sales, use or consumption taxes paid of payable on counsel fees or disbursements allowed under the Tariff.

[291] Subsection 1(4) reads as follows:

Evidence of disbursements

Preuve

(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

(4) À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

[292] As would be the case for a self-represented litigant under the *Federal Courts Rules*, the Court is willing to consider allowable disbursements in accordance with ss 1(3) and (4) above.

[293] If WHGR wishes to proceed with a costs claim then it should prepare a bill of costs in accordance with the jurisprudence set out above and the disbursement tariff, and submit it to the Court and counsel for the Minister to review. Minister's counsel should then provide the Court with any comments and objections that she feels are appropriate. The Court will then consider whether any costs award should be made in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed. CFIA shall pay the Appellant additional compensation in the amount of \$332,260.00;
2. The Appellant may submit a bill of costs in accordance with the Court's directions which will be dealt with by a Supplemental Order as to costs.

“James Russell”

Deputy Assessor

Schedule "A"

Department of Justice Canada

Ministère de la Justice Canada

Security
Classification: Protected BPrairie Region
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SK S7K 7E6Région des Prairies
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Notre dossier:Your file:
Votre dossier:

March 14, 2016

VIA FACSIMILE

Federal Court
Thomas D'Arcy McGee Building
90 Sparks Street, 5th Floor
Ottawa, ON K1P 5B4

Attention: Registrar

Dear Sir/Madam:

**Re: Willow Hollow Game Ranch Ltd. v The Minister of Agriculture and Agri-Food
Canada
Court file #: P-2-14
Additional Compensation Amount**

On February 12, 2016, Justice Russell, sitting as Deputy Assessor, issued a Draft Decision and Direction wherein he has directed that the Parties consult with each other with the view to identify a mutually agreeable amount of additional compensation to be paid to the Appellant for the 2014 destruction of their bull elk. If in the event the Parties are unable to reach agreement, he has directed that respective calculations and rationale, based on his reasons, be submitted to the Court. As directed, the Parties should either come to a mutually agreeable amount or submit their calculations and rationale within 30 days of the Direction, that being March 14, 2016.

In consultation, the Parties have arrived at a mutually agreeable amount in additional compensation for the 2014 destruction of the Appellant's bull elk due to chronic wasting disease. The following is a summary that is provided on behalf of the Parties.

Proposed Additional Compensation

Taking into account Justice Russell's Draft Decision and the rationale set out below, the Parties agree that a mutually acceptable amount to be paid to the Appellant in additional compensation is \$332,260.00. This amount is based on a revised valuation that would result in a total compensation to Willow Hollow in the amount of \$979,560.00. Willow Hollow has already

Canada

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been compensated a total of \$647,300 (the market value plus carcass value) as set out in the Awards of Compensations issued May 2, 2014.¹

Rationale Applied

In coming to an amount that was mutually agreeable to the Parties, a comprehensive review and re-calculation based on the February 12 Draft Decision included, but was not limited to, the following conclusions reached by the Court:

- that all bull elk over 6 years of age could be valued as hunt-ready (paragraph 260);
- the price of velvet in 2014 was \$40.00 per pound (paragraph 262);
- the meat values as calculated by CFIA were reasonable (paragraph 266);
- Willow Hollow purchased their elk in “block purchases” that contained elk of various quality and potential (paragraph 227);
- Willow Hollow was engaged in an aggressive annual cull of their elk (paragraphs 209 and 210); and
- genetic value is difficult to establish when there are no antlers to score (paragraph 202).

In addition, the available evidence and the various indicators and assumptions were reviewed that were suggested by Justice Russell at paragraph 264(h) of the Draft Decision:

- age;
- velvet weights;
- Cervid Movement Permits;
- source comparators; and
- the value of replacement bulls acquired after the 2014 depopulation.

Bulls 6 Years of Age and Older

Hunt Values

Willow Hollow submitted an invoice from Klettburg Farms Ltd. for \$72,500.00 wherein it purchased 17 bulls with an average age of 8.9 years old (the “replacement bulls”) after the 2014 depopulation. These replacement bulls, older than the average hunt bull destroyed, would have been more valuable given their maturity and genetic potential.² The average price per replacement bull, based on the invoice provided by Willow Hollow, has been calculated and rounded up to \$4265.00.

In addition, the Appellant provided a five year historical view of animals killed on the farm, breaking them down by SCI scores and the percentage of animals killed (over 5 years) from each score.³ Unfortunately, and as recognized by Justice Russell in his Draft Decision,⁴ assigning a

¹ Respondent’s Book of Documents, Tab 79 and 86.

² See Appellant’s Book of Documents, Tab 4, page 4 that substantiates that elk of 8 years and up are considered mature bulls.

³ See Appellant’s Book of Document, Tab 2, page 5.

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genetic value to the 2014 animals without the benefit of actual antler scores or information related to the bulls makes the valuation difficult. However, making the assumption that the 5 year historical data would reflect 2014 scores, taking into account the ages and numbers of bulls depopulated in 2014 over the age of 6 years old, and applying source comparators for the corresponding ages/scores, the Parties have agreed to an average value of \$4745.93 for an elk over the age of 6 years old.

By averaging the average value of the replacement bulls and the average value of the hunt ready elk based on the historical kills over a five year period, the Parties have agreed to an average for the hunt ready bulls as follows:

$$(\$4265.00 + \$4745.93) / 2 = \$4505.00^5$$

Application of 2014 cull rate

Based on evidence provided, Justice Russell concluded that Willow Hollow was engaged in an aggressive annual cull, but made no determination/estimation on the 2014 "cull ready" animals.⁶ Prior to the March 2014 depopulation, Willow Hollow had not yet culled any of their bull elk. The Parties have agreed that it is reasonable to apply a 2014 cull rate to be taken into account in coming to a mutually agreeable amount as being within the rationale of the Court's conclusions.

Based on a review of the evidence that was provided by the Appellant, conclusions of the Court, and a review of indicators, as directed by Justice Russell, that may lead to reasonable assumptions, the Parties agree that the previous years' culls indicate an average cull rate of 6%.⁷ Therefore, we have agreed that it is reasonable to assume that 6% of the 2014 bulls would be "cull ready" and applied that rate towards reaching a mutually agreeable amount.

Velvet and Meat Values

The value of velvet has been adjusted to reflect \$40.00 per pound as directed by Justice Russell. The meat values have remained the same as originally valued given Justice Russell's determination that CFJA's assigned values were reasonable. A combined velvet and meat value assigned to bulls over the age of 6 years old has been adjusted to be \$2475.00 (from \$2375.00).

The following is a breakdown of the compensation calculated for the bull elk over the age of 6 years old based on the ages of the animals as set out in the Awards of Compensation.⁸

⁴ See Justice Russell's Draft Decision at para 202.

⁵ Number has been rounded to the nearest dollar.

⁶ See Justice Russell's Draft Decision at paras 209 and 210.

⁷ The 2014 cull rate of 6% is based on averaging the bulls culled between 2011 and 2013, Cervid Movement Permits, records tracing elk in and out of the Appellant's farm over that period, and the actual number of elk depopulated in 2014.

⁸ See Respondent's Book of Documents, Tabs 79 and 86.

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Class of elk	Number of animals	Value	Amount
Hunt ready	149	\$4505	\$671,245
Cull ready (6% assigned meat/velvet values)	9	\$2475	\$22,275
Total compensation for 6 years and over bulls	158	Subtotal:	\$693,520.00

Bulls Less Than 6 Years of Age

The Parties agree that a reasonable value to be assigned to the bulls less than 6 years of age includes information provided by Willow Hollow on velvet weights,⁹ and that the values of the less than 6 year old group were not primarily based on velvet and meat because they were being grown to "hunt ready" status. An increase in value has been assigned to velvet to reflect \$40.00 per pound and a reasonable annual cull rate of 6% (explained above) has been applied:

Age of bulls	Number of bulls	Cull ready (6% cull rate)	Value (with velvet valued at \$40.00)	Amount
2	38		\$1700.00	\$64,600.00
2		2	\$1050.00 ¹⁰	\$2100.00
3	14		\$2400.00	\$33,600.00
3		1	\$1715.00	\$1715.00
4 ¹¹	8		\$3075.00	\$24,600.00
5	40		\$3800.00	\$152,000.00
5		3	\$2475.00	\$7425.00
Total bulls	106		Subtotal:	\$286,040.00

Based on the above, the Parties have agreed that additional compensation to be paid to Willow Hollow, pursuant to Justice Russell's Draft Decision and the rationale as set out therein, is \$332,260.00. For ease of reference, I have broken it down as follows:

Class of elk	Number of elk	Value	Totals
6 years and over	158	\$693,520.00	
Up to 6 years	106	\$286,040.00	
Total Proposed Compensation			\$979,560.00
Compensation Received			(\$647,300.00)
Proposed Additional Compensation			\$332,260.00

⁹ See Appellant's Book of Documents, Tab 2, page 4.

¹⁰ Meat value assigned only. Supported by Mr. Wehrkamp's report regarding 2 year old 2013 velvet weights.

¹¹ No cull rate of 6% applied given the low number of bulls in this age category.

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Should you have any further questions related to the above, please do not hesitate to contact me directly.

The Parties ask that this letter be placed before Justice Russell, in his capacity as the Deputy Assessor for the above noted matter, in response to his February 12, 2016 Direction.

Yours truly,



Sarah Bird
Legal Counsel
Prairie Region
Department of Justice Canada

cc. Randy Wehrkamp (representative for WHGR)
Keith Conacher (Appellant – WHGR)
Bentley Brown (Appellant – WHGR)
Christine Taylor (CFIA)
Pat Bouchard (CFIA)
Vickie McCaffrey (Department of Justice)

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: P-2-14

STYLE OF CAUSE: WILLOW HOLLOW GAME RANCH LTD v MINISTER
OF AGRICULTURE AND AGRI-FOOD CANADA

PLACE OF HEARING: BATTLEFORD, SASKATCHEWAN

DATE OF HEARING: DECEMBER 15, 2015

JUDGMENT AND REASONS: RUSSELL J.

DATED: MARCH 22, 2016

APPEARANCES:

Randy Wehrkamp (Agent) FOR THE APPELLANT

Sarah Bird FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Deputy Attorney General of
Canada
Battleford, Saskatchewan