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COURT OF QUEEN'S BENCH OF MANITOBA

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-and-	)	
	)	David M. Wright, T. David Gisser, Q.C.,
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FARM PRODUCTS MARKETING COUNCIL,	)	for Manitoba Farm Products
	)	Marketing Council
respondents.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	December 18, 2020

APPLICATION UNDER: Queen's Bench Rules 14, 38 and 68

REMPEL, J.

Introduction

[1] The issues in dispute arise from a series of decisions made by Manitoba Egg Farmers (the "MEF"), the statutory body tasked with the "supply management plan" that

governs the production and marketing of eggs in this province. Also in dispute is an appeal from the decisions of the MEF to the Manitoba Farm Products Marketing Council (the "Council"), which is also a creature of statute, namely ***The Farm Products Marketing Act***, C.C.S.M. c F47 (the "***FPMA***").

[2] The applicant is seeking orders quashing the decisions of the MEF and the decision of the Council on an appeal of those decisions under a judicial review. The question of the appropriate standard of review of the MEF decisions and the Council appeal are squarely before me in this matter.

Backdrop

[3] The backdrop for this dispute are the dramatic fluctuations in consumer demand for certain kinds of eggs arising from the COVID-19 pandemic (the "Pandemic"). Both sides in this dispute maintain that my decision in this matter will result in devastating consequences. The applicant insists that its business will face financial ruin if the MEF decisions and the Council appeal decision survive judicial review, while the respondents claim that the integrity of the "supply management" system and the livelihoods of some 170 egg producers in this province are at risk should the applicant succeed.

Decision

[4] I am dismissing the application. My reasons follow.

Supply Management - Quotas

[5] The decisions and the appeal in dispute cannot be analyzed without an understanding of the key concepts that underlie the supply management plan for farm

products established through legislation across Canada. A quota system lies at the heart of any supply management plan.

[6] In very broad terms, food producers acquire a quota from a regulatory board or commission that is created by statute. That quota permits them to produce a certain volume or quantity of food products that are then sold to the board at a set price. Producers who do not hold quota of regulated food products are not permitted to sell what they produce to consumers. Only sales to the regulatory board are permitted and a series of rules governs any surplus created by a producer above the set quota amount and the payment, if any, for that surplus to the producer. The regulatory board, which operates on a non-profit basis, then markets the product and offers it for sale to the public.

[7] The quotas themselves do not belong to the producers. The property rights to the quota or the "ownership" of quota always remains with the regulatory board. In practical terms, this means that there is a finite supply of quota of any regulated farm product that is available for allocation by the regulatory board to individual producers. To be clear, a quota is not a commodity that is sold by a regulatory board to individual producers. A quota represents an acquired right to produce a food product under a legislative plan.

[8] The supply management plan for agricultural products in Manitoba cannot exist without the acquisition of a quota by producers and the limitation of production in accordance with those quotas. Without adherence to quotas, prices for agricultural products cannot be regulated and this in turn would make it impossible for producers to realize a set price for what they produce.

[9] The public policy rationale underlying the supply management scheme for agricultural products in Canada is the benefit created to consumers by a reliable supply of agricultural or food products at stable prices that offer a fair return to producers. This kind of system protects both consumers and producers from wild price fluctuations caused by the vagaries of the market.

The Regulatory Framework for Eggs

[10] In broad terms, the Farm Products Council of Canada ("FPC Canada") oversees the national supply management plan for poultry and eggs. The planning, marketing and sale of eggs across Canada is coordinated by a federal agency, Egg Farmers Canada ("EF Canada"), under the auspices of FPC Canada.

[11] In order to coordinate egg production across Canada, EF Canada establishes certain annual egg quotas which are assigned to each province. Every Canadian province has a corresponding provincial agency to EF Canada. In Manitoba the ***FPMA*** provides for the creation of boards, such as the MEF, by the Minister of Agriculture. MEF is established by regulation under the ***FPMA*** pursuant to the ***Manitoba Egg and Pullet Producers Marketing Plan Regulation***, Man. Reg. 70/2005 (the "Plan"). The Plan makes MEF responsible for the promotion, regulation and management of the production and marketing of eggs produced by layer hens ("Layers") and pullets (birds too young to produce marketable eggs).

[12] The Council is also a creature of the ***FPMA***. It is responsible for overseeing the administration and operation of various boards and commissions in Manitoba, each with their own jurisdiction and expertise in regulating distinct agricultural industries or food

producers including root vegetables, pork, chicken, turkey, bee keepers, dairy farmers and egg farmers. The Council also enforces the regulations of these boards and commissions.

[13] Apart from the above noted responsibilities, the Council is also tasked under the ***FPMA*** with the hearing of appeals in respect of any of the decisions made by these specialized boards, including those made by the MEF. The ***FPMA*** does not provide for the right of an appeal to court from a decision or order issued by the Council. Judicial review is the only option available to a producer or a regulatory board from an order of the Council.

The Pandemic and the Demand for Eggs

[14] One of the many unanticipated consequences of the Pandemic has been the nature of consumer demand for eggs. While the Pandemic has caused a surge in demand for eggs in their shells found in any grocery store ("Table Eggs"), it has resulted in a drop of demand for eggs for processing that are not sold in their shell ("EFP Eggs"). EFP Eggs are typically purchased by hotels and other businesses connected to the hospitality industry, which have seen a precipitous drop in business volumes during the Pandemic.

[15] The nationwide drop in demand for EFP Eggs caused EF Canada to direct provincial regulators, including MEF, to reduce the supply of EFP Eggs going to processors. Each provincial regulator was granted discretion in how to implement this reduction under its own provincial regulatory framework.

[16] The supply management plan in Manitoba regulates the production of Table Eggs through a quota system allocated to the 170 egg producers in this province. Until the

spring of 2020, egg producers in Manitoba were permitted to participate in a voluntary program that allowed for the acquisition of permits (not quotas) to produce EFP Eggs above their regular quota (the "EFP Program").

[17] As an aside, it is important to note that Manitoba's EFP Program, like those operating in other provinces, is authorized by EF Canada under a special agreement. The sacrosanct nature of quota in the national supply management framework for eggs is protected by this special agreement and it clearly states EFP Eggs cannot displace eggs produced under a quota or displace those eggs that are produced as surplus within a quota. Surplus eggs produced under a quota are described as "Industrial Product" and are separate and distinct from EFP Eggs produced under a permit.

MEF Decisions

[18] In the face of plummeting demand for EFP Eggs, MEF decided to terminate the EFP Program on May 1, 2020. MEF saw this drastic measure as the only effective way to reduce the oversupply of eggs that were once destined for processing facilities. MEF decided that the ability to store EFP Eggs over a long-term basis was not viable and the destruction of the EFP Eggs was the only option in face of the glut on the market.

[19] Soon after the termination of the EFP Program, MEF required all producers with EFP egg permits to "depopulate" the Layers that produced the EFP Eggs ("EFP Layers") from their flocks. The term "depopulate" is a bureaucratic term for euthanization. The effect of the MEF's decision to order the depopulation of EFP Layers impacted all 31 producers in Manitoba who held EFP permits, including the applicant. A compensatory scheme was devised for the affected EFP permit holders under the regulatory framework.

[20] The applicant was the only producer under the EFP Program, who refused to comply with the decision of the MEF and maintained its production of EFP Eggs from its 24,007 EFP Layers. MEF estimates that the refusal of the applicant to comply with the decision to terminate the production of EFP Eggs has caused about 12,250 dozen EFP Eggs to enter the egg processing supply chain in Manitoba since May 1, 2020. This surplus of EFP Eggs entering the supply chain causes surpluses that must either go into storage or be destroyed.

MEF Decisions under Judicial Review

[21] The May 1, 2020 decision of the MEF to discontinue the EFP Program, which affected all EFP permit holders and not just the applicant, is being challenged in these proceedings. The decision of the MEF ordering all EFP permit holders to depopulate their flocks of EFP Layers is also challenged. That decision also affected all EFP permit holders and not just the applicant.

[22] The applicant exercised its right under the ***FPMA*** to demand a hearing in which it asked the MEF to reconsider its decision to terminate the EFP Program and the order to depopulate the EFP Layers. After this fresh hearing the MEP upheld the original order to terminate the EFP Program and the depopulation of the EFP Layers, by way of a written decision dated June 19, 2020. That decision also denied the applicant's request to transfer its EFP permit to a new "specialty egg" quota.

Council Order under Judicial Review

[23] The applicant exercised its statutory right of appeal under s. 19(1) of the ***FPMA*** from these MEF Decisions to the Council. On September 17, 2020 the Council issued a

written decision under Order No. 03/09/20 (the "Council Order") in which it upheld the original MEF decision to terminate the EFP Program and order all EFP permit holders to depopulate their EFP Layers.

[24] Prior to the appeal hearing, the the Council requested that both the applicant and the MEF provide any additional evidence that they wished to produce at the hearing for its consideration.

[25] The applicant provided its written submissions to the Council on July 24, 2020, with fresh evidence that had not been put before the MEF at the reconsideration hearing. The MEF provided its written submissions on August 14, 2020, and also provided fresh evidence for the Council to consider.

[26] At the hearing before the Council on September 3, 2020 both parties:

a) were represented by experienced counsel;

b) provided written submissions and fresh evidence to the Council; and

c) were given the opportunity to ask and answer questions from Council and the opposing party. After the appeal hearing both parties were provided with a copy of the Council's Order containing written reasons for the decision.

[27] Although the Council did not expressly set out which standard of review it utilized, the Council Order clearly sets out:

a) the issues as framed by both parties;

b) the background or context of the appeal, including the business operations of the applicant;

c) the prior decisions of MEF;

d) the positions put forward by the parties;

e) the authority of MEF to make the MEF Decisions; and

f) the circumstances facing the egg industry in Manitoba and Canada.

[28] The decision recorded in the Council Order were reduced to five bullet points, set out below:

i. The Respondent acted within its authority under Section 2 of the Marketing Plan when it decided to discontinue the EFP program until further notice.

ii. When Manitoba Council in earlier appeal decisions stated that the Appellant would be allowed to participate in the EFP program, this was based on circumstances at the time and did not anticipate a global pandemic which has significantly disrupted historical consumption patterns.

iii. Net payments made by the Appellant to the Respondent for EFP eggs were never anticipated to be consideration for quota. The Respondent operated a pooling arrangement where some EFP participants sent both quota and EFP production to processors and some EFP producers sold all of their production to the table market. Payments received by the Respondent for table eggs offset payments made by the Respondent.

iv. Given the significant payments made by the Appellant to the Respondent since 2011, the Appellant could have chosen to participate on the quota exchange but chose not to do so until May 2020.

v. As for issuing specialty quota for the EFP permits being revoked, the EFP agreement between Egg Farmers of Canada and the Respondent clearly states that producers cannot transfer EFP quota to other forms of quota.

Relief Sought

[29] The application for judicial review seeks orders quashing and setting aside the decisions of the MEF dated May 1, May 6 and June 19, 2020 (the "MEF Decisions"). Further, the applicant seeks an order quashing and setting aside the Council Order.

[30] In the Amended Notice of Application, the applicant argues various grounds under which the Council Order should be set aside. These grounds for review include:

- The Council Order was based on erroneous findings of fact, hearsay and unproven or incomplete evidence;
- The MEF Decisions and the Council Order were unreasonable because they:
  - fail to reveal a rational chain of analysis;
  - are not transparent, intelligible or justified;
  - are not consistent with past decisions of Council;
  - are not responsive to the key facts and issues of the matter before it; and
  - breach the duty of procedural fairness by failing to be responsive to the concerns of the applicant, and by failing to disclose the evidence on which the MEF Decisions and Council Order were based.
- The Council erred in law by applying the wrong standard of review to an internal appeal of the MEF's Decisions;

- The Council Order was issued in an arbitrary and capricious manner without regard for the material and facts presented; and
- In all of the circumstances, the MEF and Council acted in bad faith.

[31] Although the Amended Notice of Application seeks judicial review to quash the MEF Decisions, it is the Council Order that is front and center in this dispute. The Council Order dismissed the applicant's appeal and confirmed the MEF Decisions that all touched on the termination of the EFP Program in some way.

Motions to Strike

[32] The record of Council was filed as document no. 9 in the proceedings before this court on November 16, 2020 (the "Record") by Mr. Gisser, who is the lawyer representing the Deputy Attorney General and the interests of the Council in these proceedings. Prior to that date, the applicant had Mr. Grauer (an officer of the applicant) affirm an affidavit on October 19, 2020 (filed as document no. 8 in Registry) ("the Grauer affidavit"). The MEF had two affidavits affirmed in response to the Grauer affidavit (subsequently filed as document nos. 6 and 7 in Registry).

[33] MEF and the applicant filed competing motions to strike these affidavits. The parties argued the motions to strike during the course of their main arguments pertaining to judicial review. I indicated that I would make a ruling on the admissibility of these affidavits in these reasons and give them the appropriate weight if they were admissible or ignore them if they failed to meet the threshold admissibility test.

[34] The Grauer affidavit triggered the filing of the MEF affidavits. It is clear to me that the MEF affidavits were only filed in response to the Grauer affidavit, which raises issues

pertaining to the applicant's argument that the specialty eggs produced by the applicant were not contributing to an egg surplus that forced the termination of the EFP Program. The Grauer affidavit attached as exhibits email exchanges with the Canadian Poultry and Egg Processors Council dated May 27, 2020 and EF Canada dated June 10, 2020.

[35] These emails all predate the appeal hearing before the Council which was heard on September 3, 2020. The Grauer affidavit also refers to an email issued by EF Canada on September 15, 2020 to all Canadian egg producers which contained information of a general nature about the difficulties the Pandemic has caused to egg producers in Canada.

[36] Mr. Gisser advised me during oral argument that before filing the Record, he submitted a draft index of the proposed Record to counsel for the applicant and MEF and asked them if something was missing or should otherwise be included in the Record prior to filing. The other lawyers did not ask him to include any of the material referred to in their affidavits on the Record. These representations, which Mr. Gisser submitted to me as an officer of the court, were not challenged or disputed by the other lawyers.

[37] The crux of any judicial review application is that it is not a *de novo* hearing. Judicial review serves as a review of a decision made by an administrative tribunal based on facts and arguments that were placed before it for consideration. One of the first principles of administrative law is that the record of proceedings before the tribunal or board is the only admissible "evidence" before the court on an application for judicial review. There are limited exceptions to this general rule that permit an administrative record to be supplemented. (See Donald J.M. Brown, Q.C. and

The Honourable John M. Evans, with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada Limited, 2017) vol. 2 (loose-leaf), ch. 6:5300, 6-56 to 6-57 and ch. 6:5410 at 6-61.)

[38] Edmond J. of this court provides a concise summary of this general principle, including the noted exceptions to this rule, in ***Ladco Company Limited v. The City of Winnipeg***, 2020 MBQB 101 (CanLII), at paras. 97-98:

> [97] Applications for judicial review are, in most cases, determined on the basis of the "record" that was before the administrative decision-maker when it made the impugned decision. Extrinsic evidence is permitted, but only in exceptional cases. Principled exceptions to the general inadmissibility of extrinsic evidence include evidence to establish:
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> i. that the Record is incomplete or contains gaps;
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> ii. procedural unfairness, jurisdictional error or bad faith; and
>
> iii. the existence, the scope and the content of Crown's duty to consult. (See ***Manitoba Metis Federation Inc. v. Manitoba (Premier)***, 2019 MBQB 118, [2019] M.J. No. 216; ***Pimicikamak et al. v. Her Majesty the Queen in Right of Manitoba et al.***, 2014 MBQB 143, 308 Man.R. (2d) 49, at paras. 52-54 (***Pimicikamak QB***); ***Pimicikamak et al. v. Manitoba***, 2018 MBCA 49, [2018] M.J. No. 113, at para. 71 (leave to appeal to SCC refused) (***Pimicikamak CA***) and ***Sowemimo v. College of Physicians & Surgeons of Manitoba***, 2013 MBQB 42, 287 Man.R. (2d) 270, at para. 54).
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> [98] The reason for the rule that extrinsic evidence on judicial review is only permitted in exceptional circumstances is to ensure that the review is conducted on the evidence that was before the decision-maker, in this case, City council. (See ***AOV Adults Only Video Ltd. v. Manitoba (Labour Board)***, 2003 MBCA 81, 177 Man.R. (2d) 56 (QL), at para. 34; ***Town of Grand Bay-Westfield v. The Canadian Union of Public Employees, Local 2404***, 2006 NBCA 115, 308 N.B.R. (2d) 205, at para. 4; ***Sowemimo***, at paras. 53-55 and ***Albu v. The University of British Columbia***, 2015 BCCA 41, 69 B.C.L.R. (5th) 222, at para. 36).

[39] The Manitoba Court of Appeal in ***Pimicikamak et al v. Manitoba***, 2018 MBCA 49 (CanLII), provided further commentary about the importance of preserving the record

on a judicial review application, especially in light of an allegation that there is a gap in the record, at paras. 75-77:

> [75] As a general principle, the record of evidence that was before a decision-maker plays a significant role in judicial review. At stated by Stratas JA in *Tslei-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 (at para 71):
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> > [T]he evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and—most importantly for present purposes—the evidentiary record before the administrative decision-maker.
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> [76] Also as noted by Stratas JA at para 75, the Saskatchewan Court of Appeal explained the reason underlying the requirement for a full record in *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74 (at para 24):
>
> > [I]n order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question.
>
> [77] The gap exception allows for situations wherein the record filed by the decision-maker is incomplete to the extent that the court has not been presented with a complete picture of the evidence that was before the decision-maker, or there was a lack of evidence on which the decision-maker could base a finding of fact. See *AOV Adults Only Video* at para 33.

[40] The onus is on the party seeking to adduce such extrinsic evidence to demonstrate that it is relevant, necessary and falls within one of the limited exceptions. (See ***Manitoba Metis Federation Inc. v. Brian Pallister et al***., 2019 MBQB 118 (CanLII), at para. 62.) Further, there are general limits to the admissibility of evidence. Evidence that could have been put before a tribunal or board, but was not, will generally not be

permitted on an application for judicial review where the grounds alleged are errors of law or errors of fact (Brown and Evans, ch. 5:2130 at 5-30).

[41] In this case the Grauer affidavit makes reference to email exchanges that, with only one exception, occurred prior to the hearing of the appeal before the Council. The filing of the Grauer affidavit, which triggered the filing of affidavits by the applicant and MEF as a chain reaction, amount to a strategic decisions by the lawyers to play evidentiary cards they could have played when they appeared before the Council at the appeal hearing. The applicant and MEF failed to provide me with explanations as to why this "evidence" was not raised at the appeal hearing.

[42] I am satisfied that all of the evidence contained in the affidavits provided by the applicant and MEF could either have been provided to Council before or at the time of the hearing or are already otherwise included in the Record. Therefore, the affidavits filed as evidence extrinsic to the Record do not fall into any of the noted exceptions in the case law. Due to the fact that the lawyers for the applicant and MEF have failed in their onus to explain why extrinsic evidence should be permitted I am striking the three affidavits from Registry and I will give them no weight.

Applicant's Business Model

[43] The applicant is a family farm corporation that has been registered as an egg producer with the MEF since 1987. Over time, the applicant saw the potential of developing a niche market for organic eggs produced by free-run chickens. Starting in 2006, the applicant voluntarily decided to ramp down its Table Eggs production to expand and diversify its business operations.

[44] Over a five-year period, the applicant divested itself of about 40 percent of its Table Eggs quota and invested the necessary time and resources to develop a hatchery and the facilities to raise free-run chickens that would be fed an organic diet. Eventually the applicant expanded its business operation to include an egg-grading station and a facility that produces specialty pasta products.

[45] Towards the end of 2011, the applicant saw growth in the demand for organic Table Eggs and saw the potential of developing a market for specialty Table Eggs laid by free-run Layers that carry both organic and Omega-3 certifications ("Specialty Eggs"). With this in mind, the applicant approached MEF and requested that MEF consider a separate quota for Specialty Eggs which the applicant could then acquire.

[46] The Specialty Eggs the applicant now produces are marketed as "Smart Eggs" that are laid by free-run Layers and carry both organic and Omega-3 certifications. A portion of the applicant's Specialty Eggs are sold to out-of-province customers and up to five percent of these eggs are used in the applicant's pasta production facility.

[47] MEF advised the applicant that it was not in favour of the creation of a stand-alone quota for Specialty Eggs, because it would affect the existing Table Eggs quota issued to Manitoba by EF Canada. Despite its opposition to a new Specialty Eggs quota, MEF was not opposed to the applicant's efforts to produce Specialty Eggs because it understood there was a market for them in Manitoba and other provinces. After ongoing discussions, the applicant and MEF entered into an agreement that was reduced to writing and dated December 22, 2011 but was never signed.

[48] There is a lot of controversy amongst counsel for the parties about this agreement. Counsel for the applicant describes it as a "scheme," which connotes some degree of underhandedness or deceit by MEF, but I am satisfied that a fair reading of this unsigned document is that it reduced to writing the terms of an agreement between the applicant and MEF and I will refer to it as the "EFP Agreement" in these reasons.

[49] The EFP Agreement includes several clauses that clearly reflect that it was intended to serve as a compromise that would allow the applicant to bring its Specialty Eggs to market as EFP Eggs rather than under the existing Table Egg quota the applicant already held. The EFP Agreement is written in informal language. The pronoun "we" or "us" is used to describe MEF, which clearly drafted the EFP Agreement, and the term "Producer" is often used to describe the applicant.

[50] Certain clauses in the EFP Agreement are crucial to understanding what exactly was agreed to between the parties, including the following:

- "*The following outlines the procedures and expectations of [MEF] in entering into the EFP Agreement with [the Producer]*";
- [The producer] will *"house 34,477 layers in total, 9,645 quota layers and 24,832 EFP layers*";
- "*As outlined at the December 7th Board of Directors meeting we have a request from a producer-grader to enter the EFP Program*";
- "*For all intent and purposes this Producer plans to follow our normal EFP procedures*";
- "*The EFP [agreement] will be for a full flock Cycle (Unless [the Applicant] purchases Quota on the exchange)*"; and
- "*Allowing [the Applicant] to proceed will assist us in providing additional eggs to the processor, the main reason for creating our EFP program.*

[51] It is clear from reading these clauses and the EFP Agreement in its entirety that the applicant was aware that it was operating within the permit process of the EFP Program and not under its existing Table Eggs quota or some other kind of additional specialty quota. Further, the applicant knew that the Layers it was adding to its flock would be laying eggs under an EFP permit for a "*full flock cycle*," which means the duration of a chicken's ability to produce eggs of sufficient quality for sale. The EFP Agreement explicitly acknowledges that the applicant could acquire more quota on the MEF exchange for Table Eggs quota if it wanted to go that route.

[52] Nothing in the EFP Agreement can reasonably lead me to conclude it was a "scheme" as the applicant alleges. There is an express acknowledgement in the EFP Agreement that the Specialty Eggs produced by the applicant would oblige MEF to create an offset towards the EFP Eggs supply and MEF would provide additional eggs to the processor to achieve this goal.

[53] It is reasonable to conclude on an objective basis that MEF was doing this to stay onside with the existing quotas allocated to Manitoba by EF Canada, while accommodating the desire of the applicant to fill a niche in the specialty Table Egg market. There is also no question that MEF was fully aware of the fact that the Specialty Eggs produced by the applicant would be sold to the Table Egg market and not to processors.

[54] I am satisfied that when considered objectively, the goal of the EFP Agreement was intended to allow the Specialty Eggs produced by the applicant to be sold as Table Eggs without altering the number of EFP Eggs going to egg processors. It is also obvious from reading the EFP Agreement that MEF did not intend to depart from the fundamental

principle that the existing Table Eggs quota issued to Manitoba by EF Canada could in no way be manipulated. The obvious effect of this meant that there was no way for the applicant to avoid the acquisition of more Table Eggs quota if it wanted the security that a quota offered, as opposed to an EFP permit to produce EFP Eggs that might become worthless if egg processors no longer wanted to buy them.

The Applicant's Prior Appeals to Council

[55] The applicant made several appeals to Council for the creation of a specialty egg quota or that an exemption from quota rules should apply to the production of its Specialty Eggs after the EFP Agreement was signed. In 2013, the applicant requested, as an alternative to the exemption it had requested from MEF, that it be granted "specialty production quota" for 38,000 Layers. The Council decided that since the applicant failed to make an initial application to MEF, the ***FPMA*** did not provide for the Council to grant such relief on appeal.

[56] In its written reasons dismissing the 2013 appeal, the Council made a number of findings, including the following:

> 4. That [the applicant's] request would require [MEF] to depart from the quota allocation procedures set out in the Quota Order and could lead to complaints from producers who are negatively impacted by such departure.
>
> 5. That [MEF] has, within the principles underlying the supply-management system contemplated under the Regulation and the Federal-Provincial Arrangement, continued to accommodate the subset of the egg market produced and marketed by [the applicant].
>
> 6. That [the applicant] has not sought to re-acquire quota through the Retirement and Quota Reallocation System since 2006.
>
> 7. That an Order made by the Manitoba Council, required [MEF] to grant a temporary pullet production permit to [the applicant] to raise pullets in a free-run

> aviary laying hen facility as long as the free-run aviary laying hen facility is operated. [The applicant] has not been required to acquire pullet quota.
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> 8. That by permitting [the applicant] to participate in the Eggs for Processing (EFP) program, [MEF] has accommodated [the applicant's] business plan. In its role as producer, [the applicant] delivers both quota and EFP production eggs to its own grading station.
>
> 9. That the arrangement leaves [the applicant] (as a grading station) free to capture any price premium which the table market is prepared to pay for eggs marketed by [the applicant].

[57] In 2015 the applicant again requested a Specialty Eggs production permit along with a specialty production quota to allow the marketing of certified organic and specialty free-run eggs. Council agreed with the position of MEF that the applicant's existing EFP permits could not be converted into a new specialty quota, as it would amount to the acquisition of quota at no charge to the applicant. The result of such a step would provide immediate benefits to the applicant that would not be available to other egg producers.

[58] A third appeal was filed by the applicant in 2018, in which it requested a specialty egg production permit along with a specialty production quota units for the production and marketing of its Specialty Eggs. The Council denied the applicant's request for an appeal hearing under s. 20(3)(a) of the ***FPMA***. That section allows the Council to deny the right of a hearing if the subject matter of the appeal is trivial or the appeal is not made in good faith or is frivolous or vexatious. The Council was not persuaded how the 2018 appeal was materially different from the previous two appeals that had been dismissed.

[59] The position taken by MEF throughout the three appeals was that the applicant was seeking preferential treatment to the detriment of all other producers and this was

inconsistent with the fundamental principles underlying the supply management plan for eggs in Manitoba.

[60] As an aside, it is interesting to note the increasing production of Specialty Eggs by the applicant as reflected in the annual limits on the size of the flock of EFP Layers permitted by the MEF above the initial number of 24,832 established in 2011 under the EFP Agreement. The 2013 appeal sets the limit at 26,500 Layers and the 2015 appeal sets the limit at 31,943 Layers.

The Issues Open for Judicial Review

[61] The applicant has raised a number of issues in judicial review that were not raised before the Council and are not reflected in any of its submissions in the Record before the Council. These new issues raised for the first time on judicial review are as follows:

a) The arrangements that MEF purported to enter into with the applicant and EF Canada were either invalid or had not been proven;

b) MEF did not have the ability to enter into the EFP Agreement with the applicant under s. 10 of the Laying Hen Quota Order, M.R. 128/98; and

c) The Council failed to apply the correct standard of review on the appeal from the decisions made by MEF.

[62] It is a fundamental principle of administrative law that a court conducting a judicial review may decline to deal with issues that were never raised before the administrative body if it is inappropriate to do so. (See ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61 (CanLII), [2011] 3 SCR 654, at para 22; ***Town of Russell v. Her Majesty the Queen in Right***

of the Province of Manitoba, 2011 MBCA 56 (CanLII), at paras. 38-39; ***Houston Recruiting Services Ltd. v. Green***, 2011 MBCA 16 (CanLII), at paras. 15-17.)

[63] The discretion to permit parties to raise fresh issues on judicial review should not be exercised where the issue could have been raised but was not raised before the administrative body (***Alberta (Information and Privacy Commissioner)***, at para. 23).

[64] The main rationales for this general principle are set out by the Supreme Court of Canada in ***Alberta (Information and Privacy Commissioner)***, at paras. 24-26, and include:

a) That on an application for judicial review, if the decision-maker has not been asked to address a particular issue in its original decision, it is difficult conceptually to conclude that the decision-maker erred;

b) Where the legislature has entrusted the determination of the issue to the administrative tribunal, the courts should respect the legislative choice of the tribunal as the first instance decision-maker by giving the tribunal the opportunity to deal with the issue first and to make its views known;

c) The courts should be especially careful not to overlook the loss of the benefit of the tribunal's findings of fact and analysis inherent in allowing the issue to be raised, especially if the issues related to the tribunal's specialized functions or expertise; and

d) Raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record to consider the issue.

[65] The Supreme Court of Canada further cautioned courts in admitting new issues on judicial review in ***Alberta (Information and Privacy Commissioner)***, at paras. 54 and 55:

> [54] … The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
>
> [55] … Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

[66] The applicant, represented by experienced counsel, had the opportunity to raise all relevant issues before Council, including issues related to MEF's ability to enter into certain agreements and the validity of these agreements, as well as the applicable internal standard of review; but did not do so.

[67] I am satisfied based on my review of the Record that the issues argued by the applicant and MEF before the Council were:

a) The consequences and effect of the MEF Decisions was substantially more devastating for the applicant than other EFP permit holders;

b) The applicant should have received a quota for Specialty Eggs in exchange for the compensation payments provided through MEF as a result of the depopulation order;

c) MEF had less draconian options open to it other than the total shut down of the EFP Program and depopulating all EFP Layers in responding to the drop in demand caused by the Pandemic. One such option being a specialty quota program to support the applicant's business;

d) The Specialty Eggs produced under the EFP Agreement had no effect on the stated goal of MEP to deal with excess supply of EFP Eggs during the Pandemic; and

e) The Council in its previous decisions had reassured the applicant that its business model would remain viable under an EFP permit.

[68] Given the fact that the applicant limited its arguments to these issues before Council on or before the appeal hearing of September 3, 2020, I am satisfied, that the scope of the judicial review should be limited to the consideration of the above noted issues. I will however deal with the issue of the standard of review on internal appeals of the MEF Decisions to the Council.

The Argument of the Applicant in General Terms

[69] The applicant argues the impact of the MEF Decisions will decimate its business. One estimate from the applicant's accountants is that the loss of Specialty Eggs sales will result in operating losses of $821,000 in 2020. The applicant submits the compensation package offered to EFP producers for the depopulation of their 24,007 EFP Layers is grossly inadequate for this kind of loss and the applicant argues that MEF and the Council gave inadequate consideration to the devastating impact these decisions will have.

[70] The common thread running through the various arguments advanced by the applicant is that both MEF and the Council chose to ignore the special status the EFP Agreement gave to the Applicant as a specialty egg producer. By virtue of the EFP Agreement, the applicant maintains it was not an ordinary producer under an EFP permit and the refusal of MEF and the Council to recognize the applicant's special status amounted to an act of bad faith.

[71] The applicant also maintains that the refusal of MEF and the Council to recognize "fact over fiction" lead to the numerous errors outlined in the Amended Notice of Application. The same thread runs through the applicant's arguments challenging the validity of the MEF decision after the reconsideration hearing and then the dismissal of the internal appeal by the Council.

[72] The "fact over fiction" argument advanced by the applicant arises from the practical effects of the EFP Agreement, which MEF and the Council are coldly choosing to ignore. Among the practical effects are the following:

a) The Specialty Eggs produced by the applicant were only notionally EFP Eggs. Immediately after they were produced they were "sold" to MEF by way of a paper transaction as EFP Eggs and "repurchased" for resale by the applicant as Table Eggs to customers;

b) The Specialty Eggs never went into the pool of EFP Eggs that were purchased by processors. They went straight from the applicant's farmyard to its customers for sale as Table Eggs. For this reason the Specialty Eggs could

not be considered as part of the "problem" created by the excess supply of EFP Eggs for which there is no longer a demand due to the Pandemic;

c) Demand for Table Eggs has increased due to the Pandemic, which means that every Specialty Egg produced by the applicant can be sold to customers who are willing to buy them as Table Eggs or can be utilized in the pasta production facility operated by the applicant; and

d) The applicant was lead to believe that the EFP Agreement represented a special and permanent program unlike the EFP Program that ran on a permit basis instead of a formal quota.

[73] It is in this context that the applicant attacks the decisions of MEF and the Council Order. The latter, according to the applicant, is merely a perfunctory document that follows a kind of checklist of the history of the applicant as a specialty egg producer under the EFP Agreement, the positions of the parties and the summary of arguments advanced by the parties before a scant five-bullet point "Analysis and Decision" is offered in conclusion.

The Applicant's Arguments as to the Council Order

[74] The attack on the Council Order rests largely on the alleged failure of the Council to recognize or articulate the context created by the EFP Agreement and fails to provide analysis on a number of crucial points, including:

- The consideration of an "Early Flock Removal" approach, instead of the more drastic depopulation order;

- Why the burden of any production cut-back had to be shared equally by all EFP producers, instead of being limited to only those EFP producers who contributed to the pool of EFP Eggs;
- The disproportionate impact on the applicant as opposed to other egg producers, which amounts to discrimination;
- There was no reference to the EFP Agreement and rights the Applicant had thereunder;
- The actual terms of the EFP Agreement were never in evidence before the Council and there was no basis for the Council to conclude it could be unilaterally terminated, since there were no terms about termination in the EFP Agreement; and
- The "facial inconsistency" of the EFP Agreement represented within the broader supply management plan.

[75] The applicant argues that the inadequacy of the reasons of MEF and the Council constitute breach of the duty of procedural fairness. In this case the applicant argues the reasons fail to reflect the arguments made by the parties, the interests at stake, and the significance of the issues decided (***Scarborough Health Network v. Canadian Union of Public Employees, Local 5852***, 2020 ONSC 4577 (CanLII), at para. 28).

[76] It is further argued that, both statutory and common law impose constraints on how and what an administrative decision-maker can lawfully decide and since the Council Order addressed a contractual relationship between the decision-maker and the applicant, the decision-maker cannot ignore private law in adjudicating the impacted

party's rights within that relationship. (See ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 (CanLII), at para. 111; ***Dunsmuir v. New Brunswick***, 2008 SCC 9 (CanLII), at para. 74.)

[77] The common law also requires that the parties to a contractual relationship are bound by a duty of good faith and honest performance (***Bhasin v. Hrynew***, 2014 SCC 71 (CanLII)).

[78] From a policy perspective, the applicant argues the destruction of the applicant's EFP Layers would not, in fact, assist MEF in achieving its stated objective of reducing the flow of EFP Eggs to processors. This means that the outcome could not be not justified in light of the rigour of the legal and factual constraints MEF was required to make decisions under.

[79] The principle of responsive justification requires the decision-maker to explain why its decision best reflects the legislature's intention when the impact of the decision affects the affected party's livelihood. It is argued the Council did not attempt to do this and failed to consider the devastating consequences of its decision on the economic viability of the applicant. This failure renders the MEF Decisions and the Council Order both unreasonable and procedurally unfair.

Arguments of the Applicant – Internal Appeal

[80] Section 19 of the ***FPMA*** empowers the Council to hear appeals of any orders or decisions of MEF. Of note, s. 20(1) provides that the Council must hold a hearing for each appeal. Section 20(8) also reveals that, on appeal; Council "*may receive new evidence that was not presented at the hearing*."

[81] Section 21(1)(b) of the ***FPMA*** further provides that, after a hearing, Council may direct MEF to "*repeal or rescind the […] decision about which the appeal was made, either fully or partly, to the extent the council considers appropriate*."

[82] The applicant insists the Council applied the wrong standard of review when it considered the decisions of MEF. In this case, the ***FPMA*** contains broad discretion and this indicates that the standard of review for an internal appeal (that is, an appeal from a first-instance administrative decision-maker to an appellate administrative tribunal) is not necessarily reasonableness. Rather, the intention of the legislature as revealed by the rules of statutory interpretation is what should determine what standard of review an appellate tribunal should apply.

[83] The very broad legislative wording, the ability to consider new evidence, and the requirement to hold a hearing, according to the applicant, demonstrates the intention of the legislature to give Council the leeway to give no deference to the decisions of MEF. The duty of Council in the legislative framework of the ***FPMA*** required it to undertake its own analysis of the issues and determine whether it agreed with the decisions of MEF.

[84] Instead of conducting its own analysis of the issues, Council simply accepted the way MEF defined the parameters of the grounds of appeal, which amounted to an error in that it reviewed the MEF Decisions on a reasonableness standard, while showing blind deference to MEF determinations before concluding MEF acted within its authority when it decided to discontinue the EFP Program, notwithstanding the devastating financial consequences this would cause to the applicant. Had Council performed its prescribed

duty under the ***FPMA*** and made its own independent assessment the applicant argues "the outcome may have very well been different."

Analysis and Conclusion

Quality of Reasons

[85] The argument as to a breach of the duty of procedural fairness by the Applicant was framed as the inadequacy of the reasons themselves. The attacks against the decisions or reasons of MEF and Council, based on a breach of the duty of procedural fairness, revolve around the variation of two recurring themes, namely:

a) The reasons did not contain the necessary degree of responsiveness to each and every concern raised by the applicant; and

b) The reasons fail to survey the evidence on which the ultimate decisions were based.

[86] At their core, these arguments all boil down to the adequacy or quality of the reasons. This amounts to the conflation of the "adequacy of reasons" under a reasonableness review, with the requirement that a tribunal issue reasons as a matter of procedural fairness.

[87] The Supreme Court of Canada has drawn a bright line between decisions of administrative tribunals that are issued without reasons that attract a correctness review and decisions that are issued with reasons that are inadequate, to which the standard of reasonableness applies. The latter do not raise concerns about procedural fairness. In ***Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador***

(Treasury Board), 2011 SCC 62 (CanLII), at paras. 21-22 the Supreme Court of Canada states:

> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
>
> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.
>
> [Emphasis mine]

[88] There is nothing in the ***Vavilov*** decision, which suggests the Supreme Court, overruled the ***Newfoundland and Labrador Nurses' Union*** decision in whole or in part. The Supreme Court states in ***Vavilov***, at para. 136 that:

> [136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: … where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. …

[89] I am satisfied that the issue of responsiveness or quality of reasons as articulated by the applicant in this matter cannot constitute a breach of procedural fairness.

The Internal Standard of Review Applied by the Council

[90] The Alberta Court of Appeal recently affirmed that the standard of review framework as set out in ***Vavilov*** only applies to the external standard of

review (i.e. judicial review) and not to the internal standard of review within a regulatory framework. (See ***Yee v. Chartered Professional Accountants of Alberta***, 2020 ABCA 98 (CanLII), at para. 32.)

[91] A statutory appeal tribunal reviewing the decision of an internal tribunal is not required to apply a specific standard of review. These internal statutory appeal tribunals are instead tasked with the responsibility to determine if such a decision contains "*errors of law, errors of principle, or is not reasonably sustainable*." Appeal tribunals should review the decision of the lower tribunal flexibly and holistically, "*without a rigid focus on any abstract standard of review*" (***Yee***, at para. 35).

[92] The decision in ***Yee*** lists the following guideposts to assess how an internal standard of review is to be determined, at para. 35:

> [35] …
>
> (a) findings of fact made by the [lower] tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;
>
> (b) likewise, inferences drawn from the facts by the [lower] tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;
>
> (c) with respect to decisions on questions of law by the [lower] tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the [lower] tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;
>
> (d) with respect to matters engaging the expertise of the profession … the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct … It obviously should not disregard the views of the [lower] tribunal, or proceed as if its findings were never made. However, where the appeal

> tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;
>
> (e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the [lower] tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;
>
> (f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

[93] The standard of review applicable to internal appeals must be considered in light of the role assigned to the appeal tribunal by the governing statute. In ***Yee,*** the relevant statute made clear that the appeal tribunal was to conduct "*appeals"* and that the decision of the appeal tribunal was to be "*based on the decision of the body from which the appeal was made*" (para. 34). The Alberta Court of Appeal found that this signaled that the primary role of the appeal tribunal was to review the decision of the lower tribunal, and not to re-conduct the hearing *de novo.* This indicates that deference was owed to the lower tribunal.

[94] Deference is owed to lower tribunals in statutory schemes even if, as in ***Yee***, the appeal tribunal has the power to "*quash, confirm, vary or reverse all or any part of [the lower] decision.*" Concluding that the appeal tribunal owed no deference to the lower tribunal would "*undermine the integrity of the first level of the disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision" (**Yee**,* at para. 33).

[95] The Alberta Court of Appeal in ***Yee*** also concluded that the statutory discretion to consider fresh evidence did not change the internal review standard. The governing

statute in ***Yee*** allowed the appeal tribunal to receive new evidence on appeal, but this did not diminish the deference owing to the disciplinary tribunal:

> [34] … The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal …

[96] I do not accept the argument advanced by the applicant that the correctness standard should have been applied by the Council on the internal appeal. The mere fact that the legislature uses very broad wording in the ***FPMA***, which includes the ability of the Council to consider new evidence and that the Council must hold a hearing, does not mean that no deference is owed to MEF on an appeal to the Council.

[97] In this case, s. 19(1) of the ***FPMA*** provides discretion to the Council to consider new evidence at appeal hearings, but it is not obliged to do so.

[98] In ***Rizzo & Rizzo Shoes Ltd, (Re)***, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, the Supreme Court sets out the modern of statutory interpretation, at para. 21:

> 21 …
>
> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> …

[99] The overriding principle of "large and liberal" interpretation at s. 6 of ***The Interpretation Act***, C.C.S.M. c. I80, also applies when interpreting provisions in statutes or regulations in Manitoba. Section 6 of the ***Act*** states:

Rule of liberal interpretation

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[100] It is important to note the legislative scheme under the ***FPMA*** creates specialized tribunals for various farm or agricultural products. MEF is a specialized board created under the ***FPMA*** to regulate the production and marketing of eggs in Manitoba. The purpose of the MEF and all of the specialized boards created by the ***FPMA*** is to allow for quick adjustments to production levels given the reality of rapidly changing market conditions driven by consumer demand. If no deference was owed to the decisions of specialized boards such as MEF, they would be severely hampered in their ability to make binding decisions and they would be like an "*ineffectual waystation along the path to a final decision*" (***Yee***, at para. 33). The application of a correctness standard to internal appeals would undermine the regulatory plan provided by the legislature.

[101] Based on the overall legislative scheme and the roles of Council and MEF within the governing legislation, I am satisfied that the Council properly paid deference to the decisions of MEF because:

- The Council is responsible for supervising a number of boards and commissions with their own expertise and experience (i.e. eggs, poultry, pork, bees). One of the Council's supervisory tasks includes hearing appeals of orders, decisions and regulations made by these various boards and commissions. Requiring the Council to review decisions on a *de novo* basis would take up the resources, time and energy of Council in its supervisory function over a diverse group of

administrative bodies that each regulate different agricultural industries in Manitoba; and

- The expertise and exclusive jurisdiction of MEF over the production and marketing of eggs provided by the ***FPMA*** is not something the Council should ignore and properly resulted by the Council showing deference to MEF in reviewing its decisions on appeal. The role of the Council is to sit on an appeal from MEF, not to carry out the function of MEF.

[102] It cannot be overlooked that the Council was well familiar with the ongoing dispute between the applicant and MEF about the production of Specialty Eggs that had dragged on for many years. The Council was cognizant of the context provided by the well-known history of this long-standing dispute.

[103] The Council is a lay board that is not necessarily cognizant of legal terminology, but was established to remain flexible in its approach and review of the decision under appeal holistically, without a rigid focus on any abstract standard of review. I am satisfied that the Council was entitled to give deference to the findings of fact by MEF and review them with a view to determining if they were based on errors of law, errors of principle, or were not reasonably sustainable.

[104] I am satisfied that the Council took a holistic and flexible approach in applying the standard of review at the appeal hearing as it was entitled to do.

Standard of Review for the Council Order

[105] The ***FPMA*** does not explicitly prescribe that a court is to have a role in reviewing a decision of the Council. Since there is no legislated standard of review in the ***FPMA***, I

must engage in a reasonableness review of the Council Order (***Vavilov***, at para. 23). Counsel concede that the three exceptions to a reasonableness review, in cases where no legislated standard of review is established, do not apply in this case. Those three exceptions set out in ***Vavilov*** are "… *constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies*" (para. 53).

Deference and the Reasonableness Standard

[106] The reasonableness standard described in ***Vavilov*** often leads to deference to the decisions made by administrative decision-makers. The scrutiny that the reasonableness standard brings to bear on the decision of a tribunal is essentially about the overall acceptability of a decision that is informed by both the reasoning process leading to the outcome and the outcome itself, as set out in ***Vavilov***, at para. 83:

> [83] … Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[107] Overall acceptability of a decision has two essential features:

1. The reasoning process, which must be "*internally coherent*" and reveal a "*rational chain of analysis*" (***Vavilov***, at para. 85); and

2. Justification, which demands that the decision be justified "*in relation to the facts and law that constrain the decision maker*" (***Vavilov***, at para. 85). Constraints vary according to the context and "*dictate the limits and contours of the space in which the decision make may act and the types of solutions it may adopt*" (***Vavilov***, at para. 90).

The Reasoning Process

[108] Brevity is not necessarily a fatal flaw in the reasons of decision-makers. There is no standard of perfection. Internal coherence and a rationale chain of analysis can be inferred, supplemented or surmised from the Record before the decision-maker, the institutional context in which the decision was made and the history of the proceedings (***Vavilov***, at paras. 91 and 97). Decision-makers must follow the same "*text, context and purpose*" approach to interpretation that courts follow (***Vavilov***, at para. 118) but the reasons themselves do not have to be formal or follow a particular format. Judicial review is not a "*line by line treasure hunt for error*" (***Vavilov***, at para. 284). "*An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation* (***Vavilov***, at para. 118).

[109] The Council in this case was aware of the history of the proceedings between the applicant and MEF and their long-standing dispute about Specialty Eggs. The Council also knew the applicant decided on a voluntary basis to divest itself of some of its Table Eggs quota years earlier to expand other areas of its business including an egg grading station and pasta production facility.

[110] The applicant was certainly familiar with the consequences of this divestiture. Quota could only be reacquired in the future if some other producers decided to divest themselves of their quota or EF Canada created more quota. The Council was alive to the fact that the EFP Agreement offered something of lesser value than a quota and that the applicant was at risk if MEF needed to adjust EFP Eggs production downwards.

[111] The Council was also aware from the Record that the applicant, like any other EFP producer, was required to acquire EFP permits on an annual basis, while this was not the case for producers holding quota. This placed all EFP producers at risk in case of a potential drop in demand of EFP Eggs. The EFP Agreement itself addresses the risk indirectly by mentioning that the applicant had the option to acquire further Table Eggs quota in the future.

[112] There was also nothing secretive about the EFP Agreement. MEF knew all of its records were subject to audit by EF Canada on an annual basis and it had to account for the offset in EFP production that the Specialty Eggs were producing for the Table Eggs market. The understanding of the Council, reflected in its reasons, was that the EFP Agreement was never intended to create an exemption from the normal rules affecting all EFP producers or the quota scheme in general. The fact that the applicant had no special status as a specialty egg producer under an EFP permit or was not the "first among equals" by virtue of the EFP Agreement, was a finding of fact that the Council was entitled to make and is entitled to deference on a reasonableness review. That crucial finding of fact lies at the core of the dispute between the parties and the Council was clearly alive to it.

[113] The Council Order does more than offer a perfunctory list of submissions of the parties. It goes father by synthesizing several of the issues raised by the submissions of the parties. This reveals not only that the Council considered the submissions of the parties but that it also understood them before they were rejected or accepted.

[114] The "Analysis and Decision" section of the Council Order also responds directly to those issues raised by the applicant that were not raised before MEF, such as the applicant's arguments regarding payments to MEF for the EFP Eggs. The Council rejected the applicant's argument that all monies paid by it to MEF under the EFP Agreement could somehow be converted into quota, which was directly contrary to the entire regulatory framework that governed the acquisition of quota by a producer.

[115] The lengthy Record in this matter also includes correspondence between MEF and the applicant and counsel for the parties both after the MEF made its decisions about the termination of the EFP program and depopulation order and prior to date of the reconsideration hearing. The decision after reconsideration reflected the concern of MEF that the integrity and viability of the supply management plan was in jeopardy due to the oversupply of EFP Eggs caused by the Pandemic and that drastic action was required.

[116] By necessity, this drastic action had to affect all EFP producers equally. The Council was sensitive to this key issue as well and was fully aware of the financial burden these decisions would place on the applicant as an EFP producer who was losing its permit to produce EFP Eggs. These findings as to the integrity of the supply management plan fall squarely within the legislative mandate of MEF.

[117] When read in context, it is clear that the Council considered and rejected the key arguments raised by the applicant, including that the EFP Agreement placed it in a special category of egg producer that was exempted from the termination of the EFP Program and that its Specialty Eggs were not contributing to the EFP Eggs surplus in Manitoba. It is also clear that the Council Order shows deference to the MEF Decisions, as it held that MEF acted within its statutory mandate before dismissing the appeal. Council also noted that the decision to discontinue the EFP Program corresponded to "a global pandemic which has significantly disrupted historical consumption patterns."

[118] The Council Order disposes of the applicant's request for a Specialty Eggs quota with a simple finding that the applicant's request could not be granted due to the prohibitions on the transfer or exchange of EFP Eggs quota to other forms of quota. The simplicity of the wording here is not an indication that the Council failed in its duty to grapple with all of the key issues raised by the applicant. There is no obligation on MEF to respond to every argument raised by the applicant, as this would amount to the imposition of a "perfection" standard, which is prohibited by ***Vavilov***, as it "*would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice*" (para. 128).

[119] The Council knew that the applicant was operating its Specialty Eggs production under an EFP permit that was voluntarily entered into and MEF was moving other eggs into the EFP pool as an offset. Further, the Council knew that applicant specifically relied on the EFP Agreement in its appeal of 2013 and accepted the payments the EFP

Agreement provided to the applicant. The Council obviously did not accept the argument advanced by the applicant that the EFP Agreement was somehow an effort at deception by MEF or an effort to advance fiction over fact. Arriving at the conclusion is another sign of an internally coherent decision and a rational chain of analysis.

[120] There was nothing capacious or arbitrarily about the termination of the EFP Program. Like any other board under a supply management plan described in the ***FPMA***, the Council concluded MEF had the discretion under the ***FMPA*** to adjust production in the face of fluctuations in the demand for eggs that were particularly pronounced when the Pandemic started and that are still ongoing. The decisions of MEF to terminate the EFP Program and depopulate EFP Layers were reasonable and within its legislated mandate to manage egg production.

[121] A failure by MEF to take drastic action would have been a dereliction of its' duty to effectively manage the oversupply of EFP Eggs in Manitoba which could have potentially harmed all Manitoba egg producers if EF Canada decided to impose sanctions for the oversupply of EFP Eggs.

[122] I am not persuaded that the Council Order reveals logical fallacies on critical points, circular reasoning unfounded generalizations or an absurd premise. It "*adds up*" when viewed in context (***Vavilov***, at para. 104). The exercise of discretion of the Council was not disproportionate to the facts and the law in a way that can only be regarded as being the product of arbitrariness or personal spite or somehow disregards the statutory objective of MEF under the ***FPMA***.

[123] The attack against the written reasons contained in the Council Order based on a lack of internal coherence and the absence of a rational chain of analysis must fail.

Is the Decision Justified?

[124] An administrative decision must be justified in relation to the facts and the law that constrain the decision-maker (***Vavilov***, at paras. 85 and 101). To answer the question as to justification on judicial review, it is important to understand "*the limits and contours of the space in which the decision-makers may act and the types of solutions they may adopt*" (***Vavilov***, at para. 90).

[125] As in all judicial review applications, context matters. ***Vavilov*** emphasises the centrality of the relevant legislation on the limits or the constraints administrative decision makers must respect. Legislation may set narrow boundaries or specific requirements that constrain what kind of decision is acceptable. If a decision maker is acting under broad statutory authority that is capable of an array of meanings, there is relatively less constraint in the statutory interpretations tribunals may reach, all other things being equal (***Vavilov***, at para. 110).

[126] In this case, the ***FPMA*** is broadly worded in achieving the purpose or objectives set out by the legislature. Section 2(a) of the ***FPMA*** provides:

> **Purpose**
>
> 2
>
> The purposes of this Act are to provide for
>
> (a) the promotion, regulation and management of the production and marketing of farm products in Manitoba, including the prohibition of all or part of that production and marketing; and
>
> . . .

[127] Section 3(1) of the ***FPMA*** speaks to policy issues in the following subsections

> **Establishing a plan**
>
> 3(1)
>
> The Lieutenant Governor in Council may, by regulation,
>
> (a) establish a plan to provide for the promotion, regulation and management of the production or marketing, or both, of a farm product within the province;
>
> (b) establish either a board or a commission to operate and administer the plan under the supervision of the Manitoba council;
>
> . . .
>
> (e) provide that the plan is to apply to all of Manitoba or only certain parts of Manitoba;
>
> (f) if the plan is to apply to only parts of Manitoba, describe those parts of Manitoba to which the plan will apply;
>
> (g) exempt any quantity, quality, variety, class or grade of the farm product from the plan;
>
> (h) exempt specified producers or other persons — or classes of producers or other persons — from the plan;
>
> (i) permit the board or commission to process a regulated product or to market a regulated product either as principal or agent;
>
> (j) authorize the board or commission to pay remuneration to its members; and
>
> (k) do any other thing the Lieutenant Governor in Council considers necessary or advisable for the operation of a plan.

[128] It is also significant, in my view, to note that s. 4(1) of the ***FPMA*** indicates that every member of a board (like MEF) must be a producer of the farm product in question and be elected to the board by other registered producers of that farm product, unless the plan explicitly provides for a different process.

[129] The discretionary powers of MEF are broad ranging and include the right to impose drastic remedies. Section 17 of the ***Laying Hen Quota Order***, Man. Reg. 128/98 ("***Quota Order***") specifically provides discretionary powers to MEF to "*suspend, reduce or cancel, either on a temporary or on a permanent basis, a quota*" on various grounds

including as set out in s. 17(g) "*if the Board has reasonable grounds for believing that such action is in the [best] interests of Manitoba producers, consumers or the egg industry*."

[130] Establishing and running a supply management plan under the ***FPMA*** by necessity involves multifaceted and sensitive weighings by the various boards of complex information using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. All other things being equal, the decisions a board like the MEF must make are therefore relatively unconstrained and harder to set aside (***Vavilov***, at paras. 129-132).

[131] This means that the MEF is less constrained in its decision-making in achieving the public interest or purpose set out in the ***FPMA***. The implementation of a supply management plan under the ***FPMA*** involves considerations of policy at a very broad level. MEF must consider the fluctuation of demand for eggs by consumers in context of prevailing economic conditions. These kinds of considerations are quintessentially executive in nature and are very much unconstrained because the legislation contemplates the decision-maker is to have greater flexibility in interpreting the meaning of the statute (***Vavilov***, at para. 110).

[132] The ***FPMA***, using expansive language, makes the MEF responsible for implementing and operating the supply management plan for eggs in Manitoba for the benefit of the pubic and all producers in Manitoba. MEF must perform this complex public function within the context of yet another complex statutory relationship MEF has with EF Canada. It is in this complex statuary framework that MEF evaluated the economic

trends during the Pandemic, which changed consumer demand for eggs in an unprecedented way, and then made the drastic decision to terminate the EFP Program and issue the depopulation order. The fact that the MEF is a specialty board consisting of only egg producers cannot be overlooked here. The MEF fully appreciated the economic pain this would impose on all of their 31 fellow producers who held EFP permits.

[133] By creating a board like MEF, managed exclusively by other egg producers, the legislature has given MEF extensive room to maneuver in achieving its stated purpose of managing the production and marketing of eggs in Manitoba through the special skills and expertise of a board consisting only of egg producers. I certainly do not have any of the special skills and expertise an egg farmer would have and I must respect the legislature's choice in delegating policy decisions about the supply management plan for eggs to MEF.

[134] This specialized and unique expertise of MEF also provides context that assists me in understanding why the Council accepted the arguments advanced by MEF, as it was entitled to, on the key policy decisions underlying the drastic decisions MEF made. The deference the Council made to the policy decisions made by MEF, occurred in a way consistent with its stated purpose and within the scope of its statutory authority.

[135] The reconsideration decision of MEF, that the Council was well familiar with, directly addressed the applicant's request for the creation of a quota for Specialty Eggs and explained that this request would create a benefit to the applicant that other producers could not avail themselves of and would be contrary to the federal framework MEF operated under. MEF also set out the fundamental premise known to all producers

under the regulatory framework that quota is a finite resource and that the applicant could not be "given" some form of quota without a corresponding amount of quota being taken away from another producer or devaluing the quota other producers already held. These conclusions are entirely within the statutory mandate given to MEF to regulate the production and marketing of eggs in this province.

[136] The Council Order when read in full context shows that it accepted the policy decisions made by MEF given the exigencies of the dire circumstances egg producers were facing due to the Pandemic. Accepting these MEF policy decisions, in the context offered by the Record, is part of the rationale underpinning the Council Order. The Council Order also mentions the history of the past appeals to Council, the MEF Decisions and the EFP Agreement between MEF and the applicant. Further, the Council Order provides that consideration be given to all of the materials that were supplied to it and offered details of the procedure it followed as consented to by the parties and the issues in dispute as defined by the parties.

[137] The arguments concerning the validity of the EFP Agreement advanced by the applicant attempt to straddle both sides of the fence. On the one hand, the applicant argues the EFP Agreement is void as MEF had no statutory authority to enter into it and on the other hand, the applicant argues the special status the EFP Agreement provided as a specialty egg producer was ignored and that MEF failed to give reasonable notice of its termination.

[138] The common law or the EFP Agreement does not define the relationship between the applicant and MEF. The ***FPMA*** and the regulations passed under this ***Act*** alone

define this relationship under the supply management plan. Although it is true that it is unreasonable to ignore the law governing the adjudication of the rights of parties within a contractual relationship (***Vavilov***, at para. 111), I am satisfied that this is not a scenario where considerations of private law or contractual obligations apply.

[139] I am satisfied that the broad powers given to MEF under the ***FPMA*** to regulate all production of eggs in Manitoba are wide enough to permit it to agree to the terms provided for in the EFP Agreement. Sections 10 and 17 of the ***Quota Order*** allow MEF to allocate permits for the EFP Program and allow it remove those permits with compensation. As already noted in these reasons, all regulatory bodies under the ***FPMA***, including MEF, "own" all quota and permits. To find that MEF does not have the ability to allow production under EFP permits or to cancel EFP permits would undermine the entire supply management plan.

[140] In this case, deference is owed to the findings of the Council that MEF had the jurisdiction and authority to discontinue the EFP Program that cancelled the applicant's EFP permits and the EFP Agreement that was a creature of those permits.

[141] As I have already noted, the applicant could have raised the breach of private contract issue arising from the termination of the EFP Agreement before the Council and failed to do so. Even if I had reached the conclusion that it was appropriate to consider this issue on judicial review, I still would have found that there was no breach of contract in these circumstances because the language of the EFP Agreement, when viewed objectively, did not create "expectations" of a special deal for the applicant that would run outside or parallel to the quota scheme.

[142] The language of the EFP Agreement clearly places it inside the regular EFP Program and not a Table Egg quota, which the applicant could have applied for on the quota exchange. The fact that the applicant knew the EFP Program did not offer the security of quota and that the EFP Agreement was subject to cancellation if demand exceeded supply, is obvious from the fact that the applicant appealed three separate times for a specialty egg quota after it entered into the EFP Agreement. To repeat, the Council was aware of the context created by the long simmering dispute between MEF and the applicant about specialty egg production that boiled over regularly. It did not have to repeat or analyze the details of this dispute in its reasons.

[143] I am satisfied the decision contained in the Council Order is justified in relation to the facts and the law that constrains the Council.

The Burden of Proof

[144] The burden resting on a party challenging the decision maker in this case is to show a sufficiently serious shortcoming or fatal flaw that is central or significant in determining the reasonableness of a decision. The majority of the Supreme Court of Canada in ***Vavilov*** articulates that burden this way, at para. 100:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

Conclusion

[145] The applicant has failed to discharge its burden of proof in its attacks on the MEF Decisions and the Council Order. I find that the Council applied the correct standard on the internal appeal and its decision in denying the applicant's appeal was reasonable.

[146] The application is dismissed. The parties can speak to costs if they cannot agree. Counsel should file written briefs if they intend to present arguments as to costs.

REMPEL J.