COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Patton v. British Columbia Farm Industry Review Board,* 2021 BCCA 75

Date: 20210222
Docket: CA46819

Between:

Andre Patton dba Cedar Creek Farms Ltd.

Respondent
(Petitioner)

And

British Columbia Farm Industry Review Board

Respondent
(Respondent)

And

British Columbia Chicken Marketing Board

Appellant
(Respondent)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2020 (*Patton v. British Columbia Farm Industry Review Board*, 2020 BCSC 554, Nanaimo Docket S88118).

Counsel for the Appellant (via videoconference):	C.E. Hunter, Q.C. R.D.W. Dalziel, Q.C.
Counsel for the Respondent Andre Patton dba. Cedar Creek Farms Ltd. (via videoconference):	J.P. Millbank
Counsel for the Respondent, British Columbia Farm Industry Review Board (via videoconference):	R.J. Gage J. Trueman
Place and Date of Hearing:	Vancouver, British Columbia November 20, 2020

Place and Date of Judgment: Vancouver, British Columbia
February 22, 2021

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Grauer

Summary:

The Chicken Marketing Board appeals an order of the chambers judge quashing the decision of the Farm Industry Review Board, which summarily dismissed the appeal of the respondent chicken grower. The chambers judge allowed the judicial review brought by the grower on the basis that the Farm Industry Review Board had breached the grower's procedural fairness rights, and remitted the case back to the FIRB. The chambers judge did not address the substantive arguments. Held: Appeal allowed and the decision of the Farm Industry Review Board is restored. The chambers judge erred in finding that the Farm Industry Review Board had breached the grower's right to procedural fairness. The conclusion of the Farm Industry Review Board cannot be said to be patently unreasonable.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The commercial production and processing of chickens in British Columbia is a highly regulated business under the *Natural Products Marketing (BC) Act* and the *British Columbia Chicken Marketing Scheme, 1961*.

[2] Andre Patton and Christina Patton are owners of Cedar Creek Farms Ltd., a chicken farm near Duncan, British Columbia, located on Vancouver Island. They are, collectively, the respondents in this appeal. I will refer to Mr. Patton as representative of the respondents.

[3] Mr. Patton is subject to an undertaking that he will sell his chickens exclusively to the only processor on Vancouver Island. He wishes to expand the territory in which he can sell his chickens, but the Chicken Marketing Board refused his request. The Farm Industry Review Board dismissed Mr. Patton's appeal on the basis that it was bound to fail, and would thereby be an abuse of process.

[4] Mr. Patton brought a judicial review, and the chambers judge allowed the appeal and quashed the decision on the basis that the Farm Industry Review Board breached Mr. Patton's rights to procedural fairness. She did not address the substantive arguments. The parties have requested that this Court address all of the issues.

[5] I would allow the appeal, and restore the decision of the Farm Industry Review Board.

BACKGROUND

[6] This case concerns the web of legislation, regulatory schemes and adjudicative processes governing the marketing and processing of chickens in British Columbia.

The Regulatory Scheme

[7] The marketing and processing of chickens in British Columbia involves three administrative bodies: the Canadian Chicken Marketing Agency, the British Columbia Farm Industry Review Board ("FIRB") and the British Columbia Chicken Marketing Board ("CMB").

[8] The CMB is the appellant in this appeal.

[9] The Canadian Chicken Marketing Agency is a federal agency that determines the total volume of chicken production in each province, including British Columbia, pursuant to federal-provincial agreements.

[10] The FIRB is a provincial agency that oversees regulated marketing in this province under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 [*NPMA*].

[11] The *NPMA* contemplates a general regime for the "promotion, control and regulation of the marketing of natural products" (s. 2(1)). As well, the *NPMA* provides for the existence of a board designed for product regulation and to carry out supervisory functions over the commodity-specific boards that are created under the regulatory schemes (s. 3).

[12] The oversight body provided for under s. 3 of the *NPMA* and engaged in this appeal is the FIRB.

[13] The supervisory powers of the FIRB are laid out in s. 7.1 of the *NPMA,* which includes powers of general supervision over all marketing boards under its jurisdiction and the exercise of the duties, functions and authority prescribed to it to fulfill the purposes of the *NPMA*. Under s. 8 of the *NPMA*, the FIRB can hear appeals from a marketing board of a specific commodity.

[14] Under the *NPMA*, the Lieutenant Governor in Council may create regulatory schemes for various natural products, including chicken.

[15] The CMB is a provincial governing body established pursuant to the *British Columbia Chicken Marketing Scheme, 1961*, B.C. Reg. 188/61 [*Scheme*], to oversee provincial chicken marketing under the auspices of the FIRB. Section 11 of the *NPMA* vests marketing boards, like the CMB, with powers of production, regulation, distribution, transportation, marketing and licensing of a particular commodity.

[16] The CMB is the first-instance body responsible for distributing the total provincial allocation of chicken determined by the Canadian Chicken Marketing Agency. The CMB distributes the total allocation to individual quota holders who, in turn, sell their chickens to processors. Processors, as the name indicates, process the chickens from the farms in facilities, and then market the chicken to consumers, wholesalers, grocery stores and restaurants.

[17] Under s. 4.01(l) of the *Scheme*, the CMB has the power to make orders it considers "necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of" chickens.

[18] Section 4.01(c.1) of the *Scheme* gives the CMB the mandate to:

> [E]stablish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board.

[19] Central to the supply management system of chicken marketing in British Columbia is the distribution of quotas to individual growers. In addition to that, the relationship between the growers and the processors are integral to a proper functioning of the overall chicken marketing scheme.

[20] Those quotas and relationships give rise to the events underlying this appeal.

Chicken Marketing on Vancouver Island

[21] The reasons of the FIRB, and the decisions in *Paul Kuszyk, Three Gates Farm v. British Columbia Chicken Marketing Board* (24 December 2010), BCFIRB [*Three Gates Farm*] and *Bev and Brian Whitta dba Whitta Farm, 43933 B.C. Ltd., Steven & Lorne Jack dba Firbank Farm and Eric Boulton dba Somerset Farm v. British Columbia Chicken Marketing Board* (14 June 2013), BCFIRB [*Whitta*], set out the history of chicken marketing on Vancouver Island. Vancouver Island is, and has long been, a relatively uneconomical and vulnerable region for chicken marketing in this province. The region bears higher production costs and less competitive conditions. There is a history of challenges, complexities and policy efforts relating to protecting the stability of the chicken industry in the region.

[22] In 1999, Vancouver Island's only processor closed, and much of Vancouver Island's chicken quota was transferred off the island, greatly reducing the amount of chicken produced (*Three Gates Farm* at para. 6).

[23] In 2000, the *Scheme* was amended to include s. 5.01. Section 5.01, aimed explicitly at Vancouver Island, reads:

> Despite section 4.01, the board must not permit a disposition or transfer of quota issued to a person to produce regulated product on Vancouver Island to any area of the Province other than Vancouver Island unless the board sets aside quota exclusively for purposes of the production of regulated product on Vancouver Island in an amount equal to the amount the board permits disposed of or transferred off Vancouver Island.

[24] Section 5.01 allows the CMB to re-allocate quota that has been transferred off Vancouver Island, back to Vancouver Island, if a processing plant returned to Vancouver Island. The history is summarized in *89 Chicken Ranch Ltd. et al v. British Columbia Marketing Board* (BCMB, October 6, 1999).

[25] In 2005, encouraged by policy initiatives of the CMB, Island Farmhouse Poultry ("IFP") opened a small (below 2% of the market share) chicken processing plant on Vancouver Island. Even as Vancouver Island's only chicken processor (and it remains so), IFP struggled to access an adequate supply of chicken.

[26] In response, in 2005–2006, the CMB created a policy initiative called the "New Entrant Grower Program". It was designed to attract new growers to the industry through block quotas. However, the units of transferable chicken quota that were granted proved insufficient for a grower to earn a profit.

[27] By 2010, despite the program, and due to increased costs of production and difficulty accessing an adequate supply of chicken, IFP was not having its supply needs met.

The Incentive Quotas

[28] In June 2010, again in an effort to boost the chicken economy on Vancouver Island, the CMB began to offer "incentive quotas" to Vancouver Island growers. These quotas were designed to combat the issues of profitability and costs of production by offering additional quotas to new growers, subject to the condition that their quotas would be tied to Vancouver Island.

[29] In 2010, and again in 2012, Mr. Patton was one of the growers who was offered, and who accepted, an incentive quota. Mr. Patton's incentive quota arrangement was tied exclusively to IFP, the only processor on Vancouver Island. In January 2012, Mr. Patton signed an undertaking which, amongst other things, stated:

> I further acknowledge that all incentive quota issued to me will be restricted to the region in which it was issued as long as there is a processing plant in operation in that region. These quotas are not eligible for transfer to another region of the province by me or any subsequent transferee of the quota while there remains an active processor in my region.

[30] Mr. Patton would receive an additional quota permitting him to produce extra chickens, if he signed an undertaking subject to a number of conditions:

a) Mr. Patton was obliged to ship all product to IFP (as the only regional processor) as long as the plant remained in operation;

b) Mr. Patton's quotas could not be transferred to another region;

c) Mr. Patton was not permitted to change processors;

d) Mr. Patton would agree to the elimination of the ferry freight subsidy for processing on the mainland;

e) Mr. Patton's quotas were restricted to Vancouver Island; and

f) the undertaking included an acknowledgement that Mr. Patton had received independent legal advice before signing.

[31] Ultimately, this appeal concerns the quota governing the relationship between Mr. Patton (the grower), and IFP (the processor), both of which are located on Vancouver Island. The issues in this case concern decisions that prevented Mr. Patton from altering that relationship.

Assurance of Supply

[32] Another factor in this regulatory framework is a marketing policy known as "Assurance of Supply". Under the federal-provincial agreement relating to chicken processing, Assurance of Supply assigns shares of the provincial allocation of chicken to the various chicken processors in British Columbia. The Assurance of Supply system guaranteed processors a specific amount of chicken during growing periods based on historical market share.

[33] A general order made under s. 4.01(l) of the *Scheme* states that chicken processors are entitled to Assurance of Supply (the "General Order"). As well, a processor may, in writing, opt out of the Assurance of Supply system.

[34] The Assurance of Supply system was repealed, in part, in 2010 to promote market stability by encouraging long-term contracting. This repeal did not apply to small processors whose market share was under 2%. As a small processor, IFP continued to benefit from the Assurance of Supply system, where it was guaranteed a specific amount of live chickens.

[35] In 2014, IFP withdrew from the Assurance of Supply scheme, opting to contract with suppliers on the open market in hopes of growing its market share beyond the 2% level. But the undertakings of growers remained in effect. In other words, Vancouver Island growers, like Mr. Patton, were still obliged to sell their product only to IFP. Part 7 of the General Order, the part relating to Assurance of

Supply, was in place when IFP opted out in 2014; however, Part 7 was subsequently repealed on July 1, 2016.

[36] Before it was repealed, Part 7 read as follows:

> **Part 7 Assurance of Supply**
>
> 7.1 Effective with the signing of BC 101 contracts for period A-103 (February 27 to April 23, 2011) Assurance of Supply to all processors at or above 2.0% of the BC domestic allocation is repealed. Processors at or above 2.0% of the BC domestic allocation will participate in an open sign up process subject to the provisions of Part 7 and Part 9 (Section 9.6) of these General Orders.
>
> 7.2 All processors beginning operations after June 11, 2010 will not be eligible for assurance of supply and must participate in the open sign up process to secure their live product.
>
> 7.3 A processor that has been licensed by the Board prior to June 12, 2010 and is processing less than 2.0% of BC's domestic allocation may:
>
> a. Be capped at their average level of processor allocation for the 6.5 cycles prior to and including A-101, or as notified by the Board through correspondence dated June 11, 2010, expressed as a percentage of the total domestic allocation. This will maintain assurance of supply for these processors at an individual maximum percentage of the domestic allocation for future periods. This would not allow them to grow beyond that level except to participate in the average industry increase or decrease experienced by all processors:
>
> i. Assurance of Supply as per Section 7.3(a) of the Part is specific to the processor of record and is non-transferable and cannot be combined with another processor's existing assurance of supply;
>
> ii. A maximum of 50% of the allocation under Section 7.3(a) can be custom processed.
>
> b. Request in writing to be released from assurance of supply. This would permanently remove the protection provided by assurance of supply, and would require participation in the open sign up process.

THE PROCEEDINGS BELOW

The CMB and the FIRB

[37] In September 2018, Mr. Patton requested approval to transfer a portion of his quota to another region in British Columbia. He cited health and financial reasons for his request.

[38] On September 27, 2018, the CMB denied this request, citing the conditions of the incentive quota trade-off as reasons for denial.

[39] In December 2018, Mr. Patton made another request to the CMB seeking to have the restrictions on his quota removed entirely. This request was based on IFP's withdrawal from the Assurance of Supply scheme four years earlier.

[40] The CMB met on January 21, 2019, to consider Mr. Patton's request. By letter dated January 24, 2019, the CMB again denied Mr. Patton's request. This decision was recorded internally in a Schedule 15 Board decision or Determination (the "Schedule 15 document").

[41] The reasons cited related again to Mr. Patton's undertakings and the nature of the incentive quota arrangement to which he was a party.

[42] Part of the CMB letter (dated January 24, 2019) read:

> The quota that was issued to you and all Vancouver Island new entrants was designed for the specific purpose of supplying the Vancouver Island processor. The Board has no intention of allowing quota to move from Vancouver Island to other regions of the province. Doing so could place the Island processor in financial jeopardy and would not be in the best interests of a basic tenet of supply management, namely orderly marketing.

[43] On February 22, 2019, Mr. Patton appealed to the FIRB.

[44] On March 25, 2019, in a pre-hearing conference call, the CMB indicated its intention to apply for summary dismissal of the appeal.

[45] The FIRB directed that the CMB would submit the application for summary dismissal by April 2, 2019, and that Mr. Patton would submit his response by April 9, 2019.

[46] On April 2, 2019, the CMB delivered its application for summary dismissal with supporting documents.

[47] Self-represented up until this point, on April 5, 2019, Mr. Patton retained counsel, who subsequently requested a two-week extension to provide a response to CMB's filings.

[48] The FIRB granted the request on April 11, 2019. However, by that time, Mr. Patton had already filed his response (one day earlier, on April 10, 2019).

[49] The FIRB case manager asked Mr. Patton's counsel at the time if the extension would still be necessary. On April 12, 2019, Mr. Patton's counsel replied that, "[h]aving submitted [Mr. Patton's] response already," there was "no point to an extension at [that] stage".

[50] As Mr. Patton's response was filed a day late due to a transmission error, the FIRB subsequently asked counsel for the CMB if she required a one-day extension to file the CMB's reply. Counsel requested the extension on April 12, 2019, and it was granted within the hour.

[51] On May 10, 2019, the FIRB granted the CMB's application for summary dismissal on the basis that it had "no reasonable prospect" of success and "would give rise to an abuse of process", pursuant to ss. 31(1)(c) and 31(1)(f) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] (applicable to the FIRB under s. 8.1(1)(a) of the *NPMA*): see the FIRB's reasons at para. 48.

[52] The FIRB's decision cited two of its prior decisions—*Three Gates Farm* (2010) and *Whitta* (2013)—in which it had rejected appeals challenging the terms of similar undertakings by Vancouver Island growers like Mr. Patton. Indeed, Mr. Patton had testified at the *Whitta* hearing. *Three Gates Farm* and *Whitta* had reasoned that the undertakings "supported regional chicken production and processing on Vancouver Island as sound marketing policy".

[53] In *Three Gates Farm*, the question was whether the CMB erred in its decision to deny the appellant's request to remove the transfer restrictions on the incentive quota offered to him as a new entrant grower on Vancouver Island. The FIRB canvassed, at length, the long history of regulatory changes to the chicken supply management scheme, along with policy initiatives like the New Entrant Grower Program, that, in the panel's words, aimed to fill—but not overfill—the domestic market. Like this appeal, *Three Gates Farm* involved IFP and its operations. The appellant grower in *Three Gates Farm* argued that the CMB did not have the legal authority to make the incentive quota offer and that the CMB failed to consider quota values when it crafted the offer.

[54] The panel in *Three Gates Farm* thoroughly assessed the regional structure and the regulatory scheme as it pertained to Vancouver Island, noting that change and flexibility were important to effective marketing regulation. They stated that the conditions on the incentive offer were "an attempt … to respond to the broader sound marketing goals of supporting regional processors, supplying local product, and reducing the concentration of animal agriculture in the Fraser Valley" (para. 21, emphasis added). The FIRB went on to note that, "[q]uota conditions are an exercise of regulatory authority", accepting that the CMB had the discretion to put terms and conditions on its offer, and finding that the CMB had the authority to deny the appellant's request to remove the restrictions (paras. 25 and 31).

[55] In *Three Gates Farm*, the FIRB concluded that, "maintaining a viable chicken industry on Vancouver Island is sound marketing policy" and that the "quota incentive offer is an exercise of its discretion to create a regulatory means of supporting sound marketing policy for the good of the entire industry" (para. 47).

[56] In the result, the FIRB found that the CMB had the power to offer the incentive quota and did so in a manner that best served the sound marketing policy—that is, maintaining a viable chicken industry on Vancouver Island. The panel held that the appellant grower did not have to accept the free incentive offer, but having done so was bound by the conditions attached to it. He could not have it "both ways" (para. 38). As such, the panel in *Three Gates Farm* dismissed the appeal.

[57] *Whitta* took place a few years later. The issue in *Whitta* was whether the CMB's decision to offer incentive quotas on certain conditions accorded with sound marketing policy.

[58] The appeal in *Whitta* originated from an offer by the CMB to various Vancouver Island new entrant growers, which was contingent on the acceptance of specified conditions and the delivery of specific undertakings by each grower. The offers and undertakings signed by the appellant growers included, *inter alia*, an agreement that, on acceptance of the incentive quota, the subsidy provided by the CMB for the cost of ferry transportation would cease. After a request to review the matter of transportation costs, the CMB confirmed its original decision to discontinue ferry freight assistance as a condition of the incentive quota offer.

[59] Like in *Three Gates Farm*, the FIRB panel in *Whitta* reviewed the system of supply management and the historical background relevant to the chicken marketing scheme, including Vancouver Island's particular difficulties and the history of ferry freight assistance. The panel also canvassed the background of IFP, as it had done in *Three Gates Farm.*

[60] The appellant growers in *Whitta* argued that the CMB's decision was "unfair, discriminatory, irrational and contrary to the interests of the chicken industry and the public interest on Vancouver Island and in BC generally" (para. 35). The CMB, on the other hand, argued that the supply situation for IFP had reached a crisis point, that the new entrant policy was not sufficient to aid the situation and that the ferry freight subsidy was contributing to the supply crisis IFP was facing. The CMB also argued that the conditions attaching to the incentive quota were "intended to promote a regionalization strategy of a long term chicken farming industry on Vancouver Island by supporting the local processor" (para. 53). As mentioned earlier, Mr. Patton was a witness in the *Whitta* appeal before the FIRB (para. 29).

[61] In *Whitta*, the FIRB carefully considered the arguments and evidence from both parties. As the panel in *Three Gates Farm* had done, the panel in *Whitta* found that consideration of what is or is not sound marketing policy is an evolving and dynamic inquiry that necessarily reflects the changing circumstances (para. 64). The FIRB accepted that supporting the facilitation of IFP as a processing plant "and its allied trades" continued to be a sound marketing policy (para. 69). In the result, the panel held that each of the appellant growers had made a business decision on whether to accept the conditional offer of the incentive quota. In coming to their decision, the FIRB quoted from their previous decision in *Three Gates Farm* at para. 38, making the point that the appellants could not have it "both ways":

> ... If Mr. Kuszyk chooses not to accept this offer, nothing changes for him. It is only if he accepts the offer of the incentive quota, which he has no obligation to do, that the rules change. In our view, the appellant would like the free incentive quota, but is not prepared to accept the conditions that come attached to it. The panel accepts the argument of the Chicken Board on this issue. Mr. Kuszyk cannot have it both ways ...

[62] Considering the interests of the appellant growers, other province-wide growers, IFP and other processors, the FIRB concluded that the CMB *only* offered

the incentive quota to the appellant growers *on the condition* that the ferry freight assistance would cease, and that the decision of the CMB accorded with sound marketing policy. The panel therefore dismissed the appeal in *Whitta*.

[63] In Mr. Patton's current appeal, the FIRB rejected Mr. Patton's arguments that *Three Gates Farm* and *Whitta* were distinguishable on the basis that IFP was, at the time of those decisions, bound by Assurance of Supply.

[64] In fact, the FIRB found that the removal of Assurance of Supply did not strengthen Mr. Patton's argument but, rather, weakened it. The FIRB explained, at para. 47:

> The January 24, 2019 decision [the letter of the Chicken Marketing Board to Mr. Patton] makes clear that IFP's withdrawal from Assurance of Supply was made in reliance on the continuation of the conditions restricting the transfer of 2010 and 2011 incentive quota off Vancouver Island. As such, IFP's withdrawal from Assurance of Supply reinforces and further militates against removal of the conditions as it must now compete in the open sign up process for growers. Allowing growers to transfer quota off island would restrict the available pool of production available to the island processor.

[65] On July 2, 2019, Mr. Patton filed a petition for judicial review.

The Supreme Court of British Columbia

[66] The chambers judge quashed the decision of the FIRB on procedural fairness grounds and remitted the matter back for further proceedings. Her reasons are indexed at 2020 BCSC 554 ("Reasons").

[67] The chambers judge found two breaches of procedural fairness in the FIRB proceedings. She characterized these as: (1) a violation of the *audi alteram partem* principle, and (2) failing to respond in a timely manner to the request of Mr. Patton's counsel for an extension of time to file material.

[68] In terms of the *audi alteram partem* principle, she held, first, that the CMB's failure to produce any documents recording "why IFP asked and was granted permission to withdraw from [Assurance of Supply] resulted in [Mr. Patton] being unaware of a critical aspect of the FIRB's decision". She concluded that this failure breached the *audi alteram partem* principle because Mr. Patton did not know the case he had to meet. She concluded, at para. 69:

> I find that the failure to produce a document that explains why IFP asked and was granted permission to withdraw from [Assurance of Supply] resulted in the petitioner being unaware of a critical aspect of FIRB's decision. I find that is a fundamental breach of procedural fairness because he did not know the case he had to meet.

[69] Second, she held that the *audi alteram partem* principle was breached by the CMB's failure to disclose the Schedule 15 document recording its decision until it filed its materials in its summary dismissal application on April 2, 2019.

[70] Mr. Patton's primary concern in petitioning for judicial review was that IFP's withdrawal from the Assurance of Supply system was "incompatible" with the transfer restrictions on his quota. In other words, he was of the view that opting out of the Assurance of Supply system negated the need for conditions on his quota.

[71] The January 24, 2019 letter denying Mr. Patton's second request contained no mention of IFP's withdrawal from the Assurance of Supply system. On this point, the chambers judge concluded, at para. 75, that "the failure to address [IFP's withdrawal from Assurance of Supply] in the CMB Decision was problematic". She further concluded that the reasons given by the CMB were "an incomplete summary of CMB's actual decision" (para. 76).

[72] As well, the chambers judge held that the Schedule 15 document contained reasoning that was absent in the letter communicated to Mr. Patton, particularly in respect of the systemic consequences of allowing Mr. Patton to remove quota restrictions.

[73] On the whole, she concluded that the core reasons of the CMB were never communicated to Mr. Patton, and it was therefore a "fundamental breach of procedural fairness to issue what purports to be a 'decision' which inaccurately summarizes the tribunal's actual decision" (para. 83). At para. 88, she wrote:

> In other words, there is nothing in the record that alerted the petitioner to the case he had to meet: that IFP's withdrawal from [Assurance of Supply] was granted in reliance on there being no change to the restrictions on transfer of Vancouver Island quota. That is the fundamental point relied upon by FIRB to refute the petitioner's argument that the previous decisions refusing transfers of quota were distinguishable. And that is the primary basis upon which FIRB concluded his appeal could not succeed.

[74] She did not refer to the FIRB's finding that Mr. Patton's appeal raised "foundational" issues requiring an "industry-wide process", on which basis "alone" the FIRB concluded the appeal should be dismissed (see the FIRB reasons paras. 42–43).

[75] Third, she held that the FIRB had breached procedural fairness by failing to reply to Mr. Patton's counsel's request for an extension of time until *after* the initial filing deadline had passed (having received the request for an extension of time on April 5, 2019). The FIRB's "unequal treatment" of Mr. Patton's counsel's request as compared to their quick response to counsel for the CMB on April 12, she explained, was "*prima facie* a breach of procedural fairness". As further factors undermining the fairness of the process, she highlighted: the lack of explanation given by the FIRB case manager in respect of the delay in response; the pre-emptive offer of an extension to the CMB's counsel; the non-urgent nature of the matter that would have allowed for extensions; the difficulty that Mr. Patton would have faced in responding on the original timeline as a self-represented litigant; the knowledge the FIRB had that Mr. Patton, as of April 3, 2019, wanted to retain counsel; the legal complexity of the matter; the volume of materials filed by the CMB; the ease with which Mr. Patton had received an earlier extension of time, which gave rise to a legitimate expectation; the asymmetry in the FIRB's communication with the two parties' counsel; and the relative brevity of the requested extension.

[76] The chambers judge concluded that the FIRB breached procedural fairness, and declined to address the substantive grounds of the petition for judicial review.

ISSUES ON APPEAL

[77] As I see it, there are two overarching issues on appeal:

(1) Did the chambers judge err in finding that Mr. Patton was denied procedural fairness by the FIRB? (the "procedural fairness issue"); and

(2) If so, was the decision of the FIRB patently unreasonable? (the "substantive fairness issue").

[78] The CMB submits that the "fundamental and permeating flaw" in the chambers judge's reasoning was her mischaracterization of the FIRB's decision. Her error, they allege, was in focusing on a subject that did not form the basis, or even a deciding consideration, of the FIRB's decision.

[79] As the trial judge did not address the substantive fairness issue, there remains the additional question of whether the decision of the FIRB was patently unreasonable.

POSITION OF THE PARTIES

[80] The parties agree that the chambers judge erred in concluding that Mr. Patton did not receive the Schedule 15 document. He did receive the document, and it appears that the chambers judge misconceived the evidence on that point.

Chicken Marketing Board

[81] On the procedural fairness issue, the CMB says that the chambers judge made a number of errors: she misconceived the *audi alteram partem* principle, created a document production obligation that is ill-suited to the process, and failed to conclude that Mr. Patton, in fact, knew the case he had to meet and was given a full opportunity to respond to it. Furthermore, the CMB submits that the FIRB's decision was based on considerations that had nothing to do with the matters raised or considered by the chambers judge. The decision was not patently unreasonable, nor was there any unfairness in the FIRB's process.

[82] On the substantive grounds, which the trial judge did not address, the CMB says that the decision of the FIRB was not only *not* patently unreasonable, but in fact, correct. It says that the Assurance of Supply, which governs who a processor can buy from is not the same as who a grower can sell to, thus the fact IFP opted out of the Assurance of Supply was irrelevant when considering the undertaking given by Mr. Patton to sell only to IFP, and the concomitant quota incentives he received.

Farm Industry Review Board

[83] The FIRB made submissions to explain the record, explain the structure and provisions of the *NPMA* and the related regulations, and on the standard of

review. It took no position on the substance of the appeal.

Mr. Patton

[84] Regarding the procedural fairness issue, Mr. Patton submits that the chambers judge did not err in her determination that the FIRB breached the rules of procedural fairness in granting the CMB's application for summary dismissal.

[85] With respect to the substantive fairness issue, Mr. Patton submits that the FIRB decision was patently unreasonable for one overarching reason: that in summarily dismissing his case, it failed to consider the import and impact of what he alleges is a fundamental conflict between the words of (the now repealed) Part 7, Section 7.3(b) of the General Order; IFP's withdrawal from Assurance of Supply; and, in light of that, the CMB's decision to hold growers like Mr. Patton to their incentive quota undertakings.

[86] Mr. Patton says that, in the words of Section 7.3(b) of the General Order, IFP's decision to opt out of Assurance of Supply "would permanently remove the protection provided by Assurance of Supply and would require participation in the open sign up process". Yet, he argues, despite the opting out, IFP is not, in fact, required to engage wholly in the open sign up process by virtue of incentive quota undertakings that bind him, and growers like him, to IFP. He says that this conflict is what underlies the patent unreasonableness of the FIRB's decision to summarily dismiss his appeal. He further submits that the judge did not err in recognizing the procedural unfairness present in the summary dismissal of his appeal.

[87] Mr. Patton submits that, in relation to IFP's withdrawal from Assurance of Supply, the CMB failed to disclose certain documents that went to the issue of the conflict he alleges. Mr. Patton says that these documents are important in allowing him to craft his argument that the conditions on his quota are no longer valid due to what he says is a demonstrable conflict between Section 7.3(b) of the General Order and IFP's current supply structure. Ultimately, he argues that, in light of the disclosure obligations in the FIRB process, the evidentiary foundation for a summary dismissal application by the CMB was insufficient to comply with procedural fairness. He says he was unable to pursue lines of inquiry that ought to have been open to him to pursue. Thus, he says the chambers judge did not err in

presuming that a document existed in which IFP withdrew from Assurance of Supply, but rather that her conclusion was based on the evidence before her.

[88] With respect to *Three Gates Farm* and *Whitta*, Mr. Patton's submission is that the regulatory regime has changed since those decisions—a phenomenon that is specifically contemplated by those decisions. Since those decisions, he says, two important things have happened that ought to have been considered by the FIRB: first, IFP has opted out of Assurance of Supply, and second, Mr. Patton has been directed to ship his chickens off Vancouver Island. Mr. Patton specifically cites to *Three Gates Farm* and *Whitta* for the proposition that the supply management system must be flexible and dynamic. His case, he argues, is an example of the CMB's need to re-evaluate decisions in circumstances that warrant it.

[89] Mr. Patton's principal argument is that IFP's opting out of Assurance of Supply should have, under Section 7.3(b) of the General Order, resulted in open contracts, but did not. This identified conflict, he says, is what the FIRB ought to have considered and to which he says he was entitled to a reasoned response.

[90] Mr. Patton submits that he has experienced actual prejudice in the form of insufficient time to file materials or retain legal counsel, and an inability to seek out disclosure of relevant documents and evidence. Despite a tribunal's ability to determine its own procedures, which Mr. Patton recognizes, he argues that this ability does not extend to procedures that are unfair. He cites to the chambers judge's reasons:

> [112] This unequal treatment of opposing parties relating to the simple matter of requests for short extensions to deadlines for submissions is *prima facie* a breach of procedural fairness. Nothing about this particular appeal required that CMB's application (nor the appeal) proceed urgently.
>
> [113] I am also concerned by the deadlines that were given. It is difficult to see how one week for an in-person litigant to respond to an application by a marketing board to dismiss his appeal would be adequate.

[91] At trial, the chambers judge declined to rule on the issue of whether or not the FIRB's decision ought to be set aside on grounds of patent unreasonableness. While Mr. Patton argued that the issue of document disclosure is what, on the substantive grounds, justified a finding of patent unreasonableness, the judge framed the issue on the basis of the *audi alteram partem* principle. Now, on

appeal, Mr. Patton again says that neither the CMB nor the FIRB engaged with the issue regarding IFP's withdrawal from Assurance of Supply. The failure to explore the implications of the withdrawal by summarily dismissing his appeal, he says, amounts to a patently unreasonable decision. IFP's opt out, in his view, ought to have been part of the analysis by the FIRB. As a matter of judicial efficiency, he asks this Court to rule on the substantive grounds of his appeal.

[92] Mr. Patton raises three specific arguments with respect to why the FIRB decision to summarily dismiss his appeal was, in his view, patently unreasonable: (i) the ruling was inconsistent with the low threshold to defeat a summary dismissal application; (ii) the FIRB relied on facts that were not in evidence; and (iii) the FIRB failed to consider the fact that Mr. Patton had been directed by the processor to ship his chicken off Vancouver Island. He acknowledges that the patent unreasonableness is a *high* threshold for a petitioner to meet, but argues that this threshold is "tempered substantially" in this case by the corresponding *low* threshold to defeat a summary dismissal application.

[93] In summary, Mr. Patton submits that the following arguments amply satisfy the test to overcome an application for summary dismissal: the continued existence of the undertakings conflicts with the language of Section 7.3(b) of the General Order; the "factual vacuum" regarding IFP's withdrawal from Assurance of Supply; and a lack of consideration of Mr. Patton's instructions to ship chickens off the Island. In light of this, he says, summary dismissal was patently unreasonable.

STANDARD OF REVIEW

[94] The standard of review of a decision of a tribunal with a privative clause is set out in s. 58 of the *ATA*. The section addresses the standard for procedural fairness, findings of fact and the exercise of discretion:

> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

[95] That provision applies to the FIRB by virtue of s. 3.1(o) of the *NPMA*.

[96] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Court revisited the approach taken to the standard of review analysis in judicial review proceedings. In defining whether a tribunal's decision was reasonable, the reviewing court considers both: (a) the outcome, whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the law (para. 86), and (b) the reasoning, whether the reasoning is coherent and justified in light of the legal and factual constraints that bear on the decision (paras. 87 and 102–107).

[97] In addition, reviewing courts are to "respect administrative decision makers and their specialized expertise" (para. 75).

THE PROCEDURAL FAIRNESS ISSUES

[98] The grounds of appeal in relation to procedural fairness may be reduced to three issues, as submitted in argument. The chambers judge found that Mr. Patton did not receive disclosure of documents with respect to IFP's withdrawal from Assurance of Supply and the Schedule 15 document. In addition, she concluded that his rights to procedural fairness were breached by the delay of the refusal to grant a timely extension of time to file Mr. Patton's material.

Legal Framework: Context is Everything

[99] The first two issues engage an aspect of the *audi alteram partem* principle defined in the context of this case by Arbour J. in *Ruby v. Canada (Solicitor*

General), 2002 SCC 75 at para. 40:

> As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position ...

[100] That principle is a fundamental principle of procedural fairness, but it is not without limit. Procedural fairness requirements are assessed contextually (*Ruby* at para. 39; and *May v. Ferndale Institution*, 2005 SCC 82 at paras. 90–93).

[101] The point is made in *IWA, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at 323–324, (citing *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105), where the majority held:

> I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:
>
> > 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, [[1962] 1 All E.R. 834 (C.A.)] at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109] at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.
>
> [Emphasis in original.]

[102] However, it is also clear that there is no need for actual prejudice, but only a possibility of prejudice.

[103] In *Kane* at p. 1116, the Court set out the test for prejudice:

> ... The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. *Kanda v. Government of the Federation of Malaya,* [[1962] A.C. 322] *supra,* at p. 337. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. See *Jeffs*

> *v. New Zealand Dairy Production and Marketing Board* [[1967] 1 A.C. 551], at p. 567. We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[104] Most recently, in *Vavilov,* the Supreme Court reaffirmed the *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, approach to procedural fairness, which recognizes that "[t]he duty of procedural fairness in administrative law is 'eminently variable', inherently flexible, and context-specific" (*Vavilov* at para. 77). This requires consideration of the statutory scheme within which the tribunal operates, and the choices of procedure made by the tribunal (*Baker* at paras. 24 and 27).

[105] The context of the process of decisions by the CMB and appeals to the FIRB is critical to understanding the scope of procedural fairness. It is succinctly stated in the FIRB's factum at paras. 57–60:

> **The BCFIRB's decision making context**
>
> 57. This appeal arises within the context of a complex, policy-driven system of economic regulation. Section 8 of the *NPMA* allows "a person aggrieved by or dissatisfied with" a decision of the Chicken Board to "appeal" that decision to the BCFIRB. However, the BCFIRB "does not act simply as an appeals commission. It has the 'overall responsibility for natural products marketing in the province'."
>
> *Verdonk v. British Columbia Farm Industry Review Board*, 2010 BCSC 601 at para. 32 qtg. *British Columbia Chicken Marketing Board v. Reid*, 2002 BCSC 1451 at para. 6.
>
> 58. Among other things, the *NPMA* expressly directs the BCFIRB to determine whether orders of the Chicken Board accord with "sound marketing policy," the terms of a "scheme" and the orders of the Chicken Board.
>
> *NPMA*, s. 9(2).
>
> 59. Thus, the BCFIRB's exercise of its discretion to dismiss appeals that have no reasonable prospect of success will necessarily include consideration of the history and policy rationale of the particular marketing policies at issue. These policies may date back many years or decades and will undoubtedly include proceedings in which an individual appellant did not participate. An individual appellant's interests, however important, must be viewed in light of the BCFIRB's overall responsibility to ensure that the Chicken Board applies sound marketing policy.
>
> 60. Decisions by BCFIRB on individual appeals are polycentric in nature, for they require consideration of the individual appeal within the broader regulatory scheme for which the legislature has assigned the BCFIRB a

> supervisory responsibility. A decision that is "more policy driven than judicial" may warrant "a lower level of procedural fairness" than might otherwise be the case.
>
> *Pacific Booker Minerals Inc. v. British Columbia (Environment)*, 2013 BCSC 2258 at para. 141.

Discussion

[106] The first issue relates to the failure of the FIRB to provide Mr. Patton with the basis for its conclusion that IFP withdrew from the Assurance of Supply so it could pursue more than 2% of the market, recalling that Assurance of Supply in 2014 (when it withdrew) only applied to the processors with less than 2% of market share. Assurance of Supply was repealed for all processors in 2016. While IFP would have had to write a letter in 2014 to request the withdrawal, there is nothing to suggest that the letter was before the FIRB. At paras. 66–69, the chambers judge speculated that there was such a document and that the document was critical to the FIRB's decision. She also opined that it should have been produced by the CMB to the FIRB:

> [65] Section 8(4) of the *Act* (as embodied in Rule 4(1) of FIRB's *Rules of Practice and Procedure for Appeals under the Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330* (July 2016)), states that the marketing board "must promptly produce" to FIRB "every bylaw, order, rule or other document touching on the matter under appeal" (emphasis added).
>
> [Emphasis in original.]

[107] There is no evidence that the FIRB (a highly specialized tribunal) had any document with respect to IFP's reasons for withdrawal from Assurance of Supply. It was entitled to draw a common sense inference that IFP wished to withdraw so it could increase its share. It was also entitled to rely on its experience, including its previous decisions, for the notion that "IFP's withdrawal from Assurance of Supply was made in reliance on the continuation of the conditions restricting the transfer of 2010 and 2011 incentive quota off Vancouver Island" (para. 47).

[108] Perhaps more important is that the judge erred in concluding that the purported document was a "critical aspect" of the decision. The FIRB concluded that "the appeal had no prospect of success" drawing parallels between Mr. Patton's case and *89 Chicken Ranch Ltd.*, taking into account, as it is entitled, the industry and the agricultural sectors:

42. [*89 Chicken Ranch Ltd*] is instructive to these circumstances as it involved a decision of the Chicken Board to move away from regional quota transfer restrictions and allow transfers on restricted grounds. The appellants (much like the appellants here) sought a repeal of the Chicken Board order in favour of "free and unrestricted transfer of quota". The panel held (at paragraphs 37-40):

> The Appellants have challenged the BCMB to issue a judgement effectively concluding that there is "no hope" for a processing plant, and therefore no basis for a policy that fetters quota transfer. We reject that approach as being unwise. By definition, the creation of public policy requires an informed assessment to be made about the future. Very often, it is about creating an environment in which those solutions can arise. Perhaps the answer will lie in a new processing plant. Perhaps some other creative approach will be developed.
>
> We have been asked to render a judgement about all this today. We have also been asked by all parties not to take into account subsequent developments, such as recent correspondence between Lilydale and the Chicken Board in connection with Lilydale's purchase of chicken produced on the Island. Having respected that wish and made our decision based on the evidence and arguments before us, we are not satisfied that the future is so bleak, and the solutions so improbable, as to justify our rendering a decision which sounds a death-knell for the Vancouver Island chicken industry. *A major decision such as this requires time, thought and consultation, much of which must include participants from other agricultural sectors. Before any decision is made that has the potential of altering almost 40 years of agricultural practice on Vancouver Island, all affected parties deserve an opportunity to be heard. The BCMB sees merit in a review and believes that although the Chicken Board must review the situation within its own industry, MAF must lead the industry-wide discussion on regional issues, including those involving Vancouver Island. The future of the chicken industry on Vancouver Island is inextricably linked with the future of agriculture at large on the Island.*

43. In my view, this decision reflects the significant nature of any decision to remove conditions on incentive quota restricting transfer. This type of decision is foundational and could not be made lightly and in response to the *ad hoc* request of one grower. <u>On this basis alone, I conclude that this appeal has no prospect of success</u>, as in my view, any move away from regional restrictions on quota transfer would require an industry-wide process where the positions of all interested parties could be heard.

[Italic emphasis in original; underline emphasis added.]

[109] It was after that conclusion that the FIRB moved on to consider the request to change the transference of the quota in the context of the Assurance of Supply. If there was a document, failure to produce it had no effect on the FIRB's decision. In any event, the Assurance of Supply was irrelevant. Mr. Patton signed

undertakings so he would receive a quota incentive. The quota incentive was offered to ensure that IFP would have sufficient supply to be viable. Contrary to the submission by Mr. Patton, the fact that IFP withdrew from the Assurance of Supply does not impact the undertakings given by Mr. Patton for the reasons outlined by the FIRB, noted above. And indeed, by the time Mr. Patton applied to withdraw from his undertaking, Assurance of Supply no longer existed.

[110] In my view, the chambers judge erred when she concluded that Mr. Patton was denied procedural fairness as a result of not receiving a copy of IFP's 2014 letter to withdraw from the Assurance of Supply.

[111] I also note the final paragraph of the FIRB's decision:

> 49. I pause here to note, that in their submissions, the appellants indicated that this appeal is not motivated by a desire to transfer quota but rather a desire to open their own processing plant. Nothing in this decision should be taken as determinative of the Chicken Board's ability to consider whether, based on a properly supported business case, there are sufficient reasons to consider alternate processing arrangements for Vancouver Island or Vancouver island growers. That however, is not the situation before me on this appeal.

If the context is so, namely that Mr. Patton can do his own processing, then the reasons outlined in the FIRB's decision regarding examining the industry on a larger scale are even more apposite.

[112] As noted above, Mr. Patton acknowledges that he had the Schedule 15 document, and did not raise it as an issue.

[113] The final issue in relation to procedural fairness is the chambers judge's finding that procedural fairness was also breached by the failure to respond in a timely way to Mr. Patton's counsel and its quick response to the CMB's counsel. While it is unfortunate that the FIRB did not respond to Mr. Patton's counsel in a timely way, counsel filed all of Mr. Patton's responding material (a day late because of a transmission issue), and Mr. Patton was given the opportunity to file additional material if he felt he did not have the opportunity to make a complete response. He declined to file any additional material. Given that he was given a full opportunity to respond, it is difficult to see how the chambers judge concluded that he was deprived of procedural fairness, and that a new hearing was required.

[114] In my view, the chambers judge erred in her conclusion that the FIRB breached Mr. Patton's procedural fairness rights.

THE SUBSTANTIVE FAIRNESS ISSUE

Legal Framework: Patently Unreasonable

[115] The chambers judge did not address the main issue before her—whether the FIRB's decision was patently unreasonable. The parties have asked this Court to address that issue.

[116] Section 31 of the *ATA* outlines when a tribunal may summarily dismiss an appeal:

> 31(1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (a) the application is not within the jurisdiction of the tribunal;
>
> (b) the application was not filed within the applicable time limit;
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the application was made in bad faith or filed for an improper purpose or motive;
>
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect the application will succeed;
>
> (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
>
> (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

Standard of Review

[117] As noted above, the parties agree that the standard of review applicable to the FIRB's decision is patent unreasonableness, pursuant to s. 58 of the *ATA*.

Discussion

[118] The issue of whether chicken farmers on Vancouver Island can be relieved of their undertakings tied to the granting of their additional incentive chicken

quotas has been litigated twice recently (see *Three Gates Farm* and *Whitta*). In both *Three Gates Farm* and *Whitta*, the FIRB held that the CMB's decision to offer incentive quotas on certain conditions accorded with sound marketing policy. In those decisions, as noted earlier, the FIRB concluded that the CMB only offered the incentive quota to the respective appellant growers pursuant to certain conditions. In both cases, the FIRB held that the appellants had made a business decision on whether to accept the conditional offer of the incentive quota and could not now be released from the conditions. Doing so, the FIRB reasoned, would allow the appellants in those cases to have it "both ways".

[119] Before the chambers judge, Mr. Patton submitted three reasons why the FIRB decision is patently unreasonable, and restates them in this appeal:

a) the FIRB's ruling is not consistent with the low threshold to defeat a summary dismissal application;

b) the FIRB relied on facts not in evidence; and

c) the FIRB ignored the important fact that Mr. Patton had been directed by the processor to ship chickens to the Lower Mainland.

[120] The parties agree that the context is a summary dismissal application, and that s. 31 of the *ATA* operates as "a gatekeeping function", relying on *Edgewater Casino v. Chubb-Kennedy*, 2015 BCCA 9 at para. 10, and *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27, which reads:

> It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31.

[121] Mr. Patton says that things have changed since *Whitta* and *Three Gates Farm*. The primary change is that IFP is no longer under the Assurance of Supply. He says that the ruling is at odds with the General Order, Part 7, Section 7.3(b), and therefore, the FIRB failed to take a statute into account (s. 58(3)(d) of the *ATA*).

[122] The IFP withdrew from the Assurance of Supply under Section 7.3(b) of the General Order. For the sake of convenience, I reproduce it again. It states:

> 7.3 A processor that has been licensed by the Board prior to June 12, 2010 and is processing less than 2.0% of BC's domestic allocation may:
>
> ...
>
> (b) Request in writing to be released from assurance of supply. This would permanently remove the protection provided by assurance of supply, and would require participation in the open sign up process.

[123] In 2014, when IFP withdrew from the scheme, Assurance of Supply had been repealed for all processors except those with less than 2% of the domestic allocation. On July 1, 2016, Assurance of Supply was repealed for all processors, regardless of domestic allocation. Mr. Patton made his request in 2018.

[124] Mr. Patton's submission is that once IFP was required to participate in the open sign up process, he should no longer be bound by his undertakings to supply his chicken to IFP. He should be able to contract with processors off Vancouver Island.

[125] The CMB, on the other hand, points to Parts 40 and 49, Sections 40.1, 40.3 and 49.1, of the General Order, to provide the complete picture:

> 40.1 Quotas issued by the Board under Part 49 will be restricted to the Region as per the Undertaking of June 16, 2010.
>
> ...
>
> 40.3 In accordance with Order in Council, number 761, approved June 1, 2000, the Board must not permit a disposition or transfer of quota issued to a person to produce regulated product on Vancouver Island to any area of the Province other than Vancouver Island unless the Board sets aside quota exclusively for the purposes of the production or regulated product on Vancouver Island in an amount equal to the amount the Board permits disposed of or transferred off Vancouver Island.
>
> ...

> 49.1 All quotas issued by the Board under this Part will be restricted to the region in which they were issued as long as there is an active processing plant in operation in that region. These quotas are not eligible for transfer to another region of the province by the grower to which they were originally issued or any subsequent transferee of these quotas while there remains an active processing plant in that region.

[126] The FIRB, at para. 1 of its reasons, identified the change in circumstances argued by Mr. Patton in terms of the withdrawal of IFP from the Assurance of Supply. The FIRB canvassed the arguments of Mr. Patton in its reasons at paras. 29–31. It was well aware of Mr. Patton's argument. Quoted above, and reproduced in part below, is the FIRB's foundational reason for dismissing the appeal summarily:

> 42. [*89 Chicken Ranch Ltd*] is instructive to these circumstances as it involved a decision of the Chicken Board to move away from regional quota transfer restrictions and allow transfers on restricted grounds. The appellants (much like the appellants here) sought a repeal of the Chicken Board order in favour of "free and unrestricted transfer of quota". The panel held:
>
> ...
>
> > *...A major decision such as this requires time, thought and consultation, much of which must include participants from other agricultural sectors. Before any decision is made that has the potential of altering almost 40 years of agricultural practice on Vancouver Island, all affected parties deserve an opportunity to be heard. The BCMB sees merit in a review and believes that although the Chicken Board must review the situation within its own industry, MAF must lead the industry-wide discussion on regional issues, including those involving Vancouver Island. The future of the chicken industry on Vancouver Island is inextricably linked with the future of agriculture at large on the Island.*
>
> 43. In my view, this decision reflects the significant nature of any decision to remove conditions on incentive quota restricting transfer. This type of decision is foundational and could not be made lightly and in response to the *ad hoc* request of one grower. <u>On this basis alone, I conclude that this appeal has no prospect of success, as in my view, any move away from regional restrictions on quota transfer would require an industry-wide process where the positions of all interested parties could be heard</u>.
>
> [Italic emphasis in original; underline emphasis added.]

[127] The FIRB also concluded, at para. 47, that the IFP's withdrawal from the Assurance of Supply does not strengthen Mr. Patton's situation, but weakens it. Clearly, if the Vancouver Island growers were able to sell their quota off the Island,

it would affect the viability of IFP, which is contrary to the entire sound chicken marketing policy, discussed above.

[128] Finally, Mr. Patton places emphasis on the fact that IFP directed him to ship some of his product off Vancouver Island. While there is evidence of Mr. Patton sending some of his product to the Lower Mainland, it does not show why this occurred, that IFP told him to send it, whether the CMB approved the transfer and so on.

[129] In any event, as noted by the FIRB, allowing growers to unilaterally ship their quota off Vancouver Island requires an industry wide consultation, taking into account all of the relevant stakeholders. The fact that IFP apparently (but not clearly, as the evidence was *not* clear) asked that some product be diverted does not render the FIRB's decision to dismiss the appeal summarily patently unreasonable.

[130] The decision holds Mr. Patton to his undertakings. Ultimately, although the change in circumstances that Mr. Patton argued was novel to his appeal, the foundation to his arguments have been twice litigated, and twice dismissed. His "change in circumstances"—withdrawal from Assurance of Supply—was not accepted by the FIRB as something that would change its decision. Quite the contrary, the FIRB found that this "change in circumstances" strengthened its decision. As such, the FIRB was well aware of Mr. Patton's arguments relating to the change in circumstances. It cannot be patently unreasonable for the tribunal to refuse to hear a third challenge to the conditions of an undertaking bound to an already-accepted incentive quota offer.

CONCLUSION

[131] Despite the summary nature of the application, the FIRB's decision was a thorough examination of the regulatory framework, their previous decisions, the "sound marketing policies" that formed the basis of those prior decisions with respect to the Vancouver Island chicken industry, and the specific terms relating to the CMB. The conclusion of the FIRB was reasonably available to it on the evidence. The reasoning was coherent, and justified in the circumstances. The factors in s. 58(3) of the *ATA* are not engaged. Therefore, the decision cannot be said to be patently unreasonable.

[132] Furthermore, in my view, for the reasons mentioned above, the chambers judge erred in finding that there was procedural unfairness in the FIRB's process, thereby breaching Mr. Patton's rights to procedural fairness. The FIRB's process was fair and properly informed by the principles of natural justice and procedural fairness. Therefore, I would allow the appeal, set aside the order of the chambers judge and restore the decision of the FIRB.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Grauer"