IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Primary Poultry Processors Association of British Columbia v. British Columbia Farm Industry Review Board,* 2025 BCSC 1561

Date: 20250813
Docket: S244887
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Primary Poultry Processors Association of British Columbia

Petitioner

And

British Columbia Farm Industry Review Board

Respondent

Before: The Honourable Mr. Justice Brongers

On judicial review from: An order of the British Columbia Farm Industry Review Board, dated May 22, 2024

Reasons for Judgment

In Chambers

Counsel for the Petitioner, Primary Poultry Processors Association of British Columbia:	D. E. Gruber E. Cribb
Counsel for the Respondent, British Columbia Farm Industry Review Board:	K. R. Phipps
Counsel for the British Columbia Chicken Marketing Board:	C. E. Hunter, K.C. A. P. Calvert
Counsel for the British Columbia Chicken Growers Association:	P. D. McLean

Place and Dates of Hearing:	Vancouver, B.C. March 10–12, 2025
Place and Date of Judgment:	Vancouver, B.C. August 13, 2025

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I. OVERVIEW

[1] Before the Court is a petition for judicial review of a decision of the British Columbia Farm Industry Review Board ("Farm Board"). The decision, dated May 22, 2024, was made in the Farm Board's capacity as the senior regulatory body responsible for overseeing the provincial supply management regime that applies to the poultry industry in British Columbia.

[2] One aspect of that regime is the setting of prices for live broiler chickens that are paid by chicken processors to chicken growers. The issue is contentious as the main protagonists see it as essentially a zero-sum game. Lower prices are viewed as favouring processors, while higher prices are viewed as favouring growers. Advocacy on the issue is spearheaded by each group's industry association: (1) the Primary Poultry Processors Association of British Columbia ("Processors Association"); and (2) the British Columbia Chicken Growers Association ("Growers Association").

[3] The specific Farm Board decision challenged here is one whereby it approved a recommendation of the British Columbia Chicken Marketing Board ("Chicken Board") that the live broiler chicken price be set according to a "Cost of Production" formula. This recommendation was the culmination of a lengthy process of study and consultation conducted by the Chicken Board with industry stakeholders under the supervision of the Farm Board.

[4] The Growers Association is generally supportive of the Farm Board's decision to use a pricing formula based on the cost of producing broiler chickens in British Columbia. The Processors Association is not, preferring instead a "Differential" formula based on the price of broiler chickens in Ontario. It is apparent that their respective preferences are based in large part on their perceptions of which formula better serves the financial interests of the industry segment they represent.

[5] The Processors Association now seeks judicial review of the Farm Board's decision, on procedural fairness and substantive grounds.

[6] In its petition, the Processors Association submits that the procedure that led to the Farm Board's decision was unfair because: (1) its legitimate expectations were breached; (2) its right to be heard was denied; and (3) there was a reasonable apprehension of bias against it on the part of the Chicken Board. The Processors Association also says that the Farm Board's decision is patently unreasonable because the Cost of Production pricing formula that was adopted does not accord with sound marketing policy, and does not fulfil the goals and objectives set out in the terms of reference for the underlying pricing review.

[7] The petition is opposed primarily by the Chicken Board, in its capacity as the junior regulatory body that recommended the Cost of Production pricing formula. It says that the Farm Board's approval of this formula is not patently unreasonable and was not done in a procedurally unfair manner. The Growers Association agrees with the Chicken Board. The Farm Board does not take a position on the outcome of the judicial review, but is participating to make submissions on such issues as standard of review and the admissibility of the evidence tendered.

[8] Having now had an opportunity to review the court record and the parties' arguments, I am not persuaded that the Farm Board's decision is procedurally or substantively flawed to the point that court intervention is warranted. The petition will therefore be dismissed. My detailed reasons for reaching these conclusions are set out below.

II. BACKGROUND

A. Operation and Regulation of the British Columbia Poultry Industry

[9] Adjudication of this judicial review requires a basic understanding of how the poultry industry operates and is regulated in British Columbia. A helpful explanation of the key aspects of the chicken supply chain and the provincial regime that governs it is set out in the "Factual Basis" section of the petition filed by the Processors Association. None of the respondents have taken issue with the fundamentals of this explanation, which I adopt and summarize here.

[10] Chickens raised for meat are known as broiler chickens. Their production occurs in four stages. First, broiler hatching egg farms produce broiler eggs, which are sold to broiler hatcheries for incubation. Second, after broiler chicks hatch, they are vaccinated and transported to farms operated by chicken growers. Third, these growers care for the broiler chickens as they are raised for a period of about 35 to 40 days. Fourth, fully grown broiler chickens are sold to processing plants (i.e., abattoirs) for transformation into a variety of chicken products. The processors then sell these products to various customers, including retailers, wholesalers, distributors, other processors, and food providers (e.g., grocery stores, restaurants, etc.).

[11] The interests of the main chicken supply chain stakeholders in British Columbia are represented by four organizations. The first is the British Columbia Broiler Hatching Egg Producers Association (“Producers Association”). The second is the British Columbia Egg Hatchery Association (“Hatcheries Association”). The third and fourth are the aforementioned Growers Association and Processors Association. Collectively, these four organizations will be referenced as the “Chicken Industry Associations” going forward.

[12] Production and sale of broiler hatching eggs and live chicken is regulated under a supply management regime which includes both a federal and a provincial component.

[13] At the federal level, the volume of broiler hatching eggs and broiler chickens that can be produced in each province is determined by the Chicken Farmers of Canada, using a quota system known as “domestic allocation”. Once the quotas are set, provincial marketing boards further allocate them among individual regulated entities within their respective provinces. Provincial marketing boards also set the minimum price at which regulated products may be sold. This can result in a differential between prices for the same regulated product in different provinces.

[14] British Columbia’s supply management regime for live broiler chickens is prescribed by the *British Columbia Chicken Marketing Scheme, 1961,* B.C. Reg

188/61 [“*Chicken Marketing Scheme*”]. The province’s regime for broiler hatching eggs is prescribed by the *British Columbia Broiler Hatching Egg Scheme,* B.C. Reg 432/88 [“*Hatching Egg Scheme*”]. These regulations were both established pursuant to the *Natural Products Marketing (BC) Act,* R.S.B.C. 1996, c. 330 [“*NPMA*”].

[15] The regimes provide for two first instance regulators. One is the Chicken Board. It oversees the production and marketing of broiler chicken in accordance with the *Chicken Marketing Scheme.* The other is the British Columbia Broiler Hatching Egg Commission (“Egg Commission”). It oversees the production and marketing of broiler hatching eggs and broiler chicks in accordance with the *Hatching Egg Scheme*.

[16] Both the Chicken Board and the Egg Commission are subject to regulatory oversight by the Farm Board pursuant to the *NPMA.* The Farm Board exercises this authority through its general supervisory jurisdiction (s. 7.1 of the *NPMA*), and through its appellate jurisdiction in respect of specific orders, decisions, and determinations issued by agricultural marketing boards and commissions (s. 8 of the *NPMA*). A further description of this regulatory scheme can be found in *Patton v. British Columbia Farm Industry Review Board,* 2021 BCCA 75 at paras. 7–20.

B. The Farm Board’s Chicken Pricing Review Process

[17] On March 17, 2020, the Farm Board announced that it was creating a supervisory panel (the “Review Panel”) under s. 7.1 of the *NPMA* to address certain poultry industry pricing issues. On April 29, 2020, a Farm Board appeal panel directed that one of the specific issues the Review Panel would consider is the establishment of a long-term chicken pricing formula for British Columbia. This review was prompted by difficulties and dissatisfaction with earlier pricing decisions of the Chicken Board and the Egg Commission, as well as concerns with the pace of the Chicken Board’s efforts to develop a new price determination formula.

[18] On June 8, 2020, the Review Panel sought input from the four Chicken Industry Associations on how to promote industry stability through interim pricing while long-term solutions were being developed. The Chicken Board and the Egg

Commission were also given an opportunity to respond to these submissions. They did so by letter dated June 26, 2020. It indicated that the two regulators were prepared to work together to resolve chicken industry pricing for the longer-term.

[19] On July 3, 2020, the Farm Board decided, on an interim basis, that the existing pricing formula for live chickens that had been in place since June 2018 would be maintained while the review process was pending (the "Interim Pricing Decision"). This formula is based on three components: (1) the Ontario price for live chickens; plus (2) an adjustment for British Columbia chicken "catching costs" (the cost of catching grown chickens for transport to processors); plus (3) an adjustment reflecting the differential between the cost of feed and chicks in Ontario and their cost in British Columbia.

[20] On July 13, 2020, the Review Panel directed the Chicken Board and the Egg Commission to carry out, as first instance regulators, a cross-sectoral review of chicken sector pricing that considers and balances all perspectives and interests for the overall well-being of the industry. However, it also decided that final authority to approve any changes to the pricing structure would lie with the Farm Board. The Chicken Board and the Egg Commission were further directed not to make any interim pricing changes without Farm Board approval.

[21] On August 28, 2020, the Review Panel issued a final pricing review process outline, involving three phases. The first two phases – (1) data collection and (2) development of pricing recommendations – were to be conducted by the Chicken Board and the Egg Commission. The third phase – (3) review of the recommendations and issuance of final pricing decisions – was to be conducted by the Review Panel. It was also announced that a professional agrologist would be appointed as a third-party contracted project liaison to support the pricing review.

[22] The Review Panel's terms of reference were issued on October 28, 2020 (the "Terms of Reference"). A first draft was prepared by the Chicken Board and the Egg Commission with the assistance of the project liaison, and feedback was

solicited from industry stakeholders. The final version of the Terms of Reference indicate that the "goals/outcomes" of the price review are to be:

> -A long-term pricing approach for regulated products in the mainstream chicken and broiler hatching egg sectors in BC, including a decision on the appropriateness of a price linkage agreement between the two sectors that address the policy objectives of:
>
> > -Verified [Cost of Production] / reasonable returns-based pricing mechanisms for BC hatching egg producers and chicken growers.
> >
> > -BC chicken processors being competitive in the Canadian market for chicken.
> >
> > -BC hatcheries receiving a "reasonable" margin for hatching services.
>
> -The confirmation of a breeder chick pricing formula.
>
> -The confirmation of a breeder vaccination program pricing formula for hatcheries.

[23] The Terms of Reference also state that the Chicken Board and the Egg Commission are to conduct the review jointly, but are to exercise independent decision-making over matters falling within their respective areas of authority under the applicable marketing schemes. They also set out the scope of the project liaison's work, and confirmed the Review Panel's roles and responsibilities. The latter included management of confidential information, and making the final decision on pricing.

[24] The Chicken Board and the Egg Commission then began their data collection work, which included a series of roundtables with industry stakeholders facilitated by the project liaison.

[25] The Chicken Board circulated a PowerPoint presentation titled "Pricing and Linkage Review – Preliminary Decision, Key Issues and Considerations", dated April 19, 2021. It listed pros and cons of various pricing options, and recommended development of a British Columbia-based Cost of Production pricing model. This prompted a strong objection from the Processors Association, along with a request that it be able to make submissions on pricing directly to the Review Panel. That request was denied by the Farm Board on May 19, 2021, and the Processors

Association was directed to provide feedback to the first instance regulators as part of the established review process.

[26] On January 7, 2022, the Chicken Board and the Egg Commission jointly issued a letter which included a draft pricing review decision. However, they were advised by the Review Panel on January 14, 2022 that the draft decision was unacceptable since, among other deficiencies, it failed to include a long-term pricing approach for broiler chicken beyond an aspirational concept and work plan.

[27] The two regulators followed up with another joint letter on March 4, 2022. While it contained the Egg Commission's final long-term pricing recommendations for producers and hatcheries, the Chicken Board only set out a plan to develop a long-term cost-based pricing formula for live broiler chickens in the future.

[28] The Egg Commission's pricing recommendations were approved by the Review Panel on June 3, 2022. The Chicken Board's recommendations remained outstanding, however. In this decision, the Review Panel also stated that it supports, in principle, the Chicken Board's proposed cost-based approach to long-term pricing as it aligns with the Terms of Reference.

[29] On August 8, 2022, the Review Panel issued directions to the Chicken Board on a revised plan for the review going forward, including the continued use of a "Cost Recovery Model Committee". These developments were of further concern to the Processors Association, and it wrote a letter the next day to say that it would only continue participating in the pricing review as an observer and under protest.

[30] Further directions were issued by the Review Panel to the Chicken Board on November 1, 2022 in an attempt to address the increasingly adversarial nature of the pricing formula development process. This led to discussions between the Chicken Board and the Processors Association regarding conditions under which the latter might be willing to increase its level of engagement.

[31] In early 2023, the Chicken Board restructured the Cost Recovery Model Committee into what became known as the "Joint Working Group". In addition, two

independent consulting firms – Serecon Inc. and MNP LLP – were engaged to collect data and review methodology. While the Processors Association was involved in the process, it continued to express concerns about whether its interests were being fairly considered.

[32] All of this work culminated with the issuance of the Chicken Board's recommendation for a long-term pricing formula on October 30, 2023 (the "Pricing Recommendation"). Specifically, the Chicken Board recommended that mainstream chicken be priced using a British Columbia-made Cost of Production-based live price formula related to farm size, bird weight, barn density, feed conversion rate updates, and annual volume adjustments. In the Chicken Board's view, such a formula will encourage efficient chicken production and contribute to processor competitiveness. The Chicken Board also proposed that this model be phased in over six periods to allow stakeholders to adjust their operations and permit monitoring by the Chicken Board.

[33] Over the next seven months, the Review Panel proceeded to review the Chicken Board's Pricing Recommendation. The process initially established for this review provided for written submissions regarding the Pricing Recommendation to be filed by the four Chicken Industry Associations and the Egg Commission, as well as a written reply to be filed by the Chicken Board. However, the review process was modified somewhat in order to accommodate the desire of the Processors Association to submit additional "Customer and Operations Information" that had not been previously shared with the Chicken Board. That information related in particular to the impact of the Chicken Board's October 30, 2023 Pricing Recommendation on processors' customers and business operations, and gave rise to confidentiality concerns.

[34] On December 15, 2023, the Processors Association brought a "non-disclosure" application to the Review Panel, the purpose of which was to enable Customer and Operations Information to be submitted on a confidential basis.

Counsel for the Processors Association who prepared the application defined the Customers and Operations Information as relating to:

> (a) customers that have been lost since the [Pricing] Recommendation was announced, and the volume of excess capacity that producers have been left with as a result; and
>
> (b) changes to business operations as a result of the [Pricing] Recommendation, including changes to plans for constructing new facilities or reductions in processing capacity.

[35] On January 18, 2024, the Review Panel decided that it would not consider information that was available prior to the Pricing Recommendation. However, new information could be submitted to the Chicken Board for an assessment of whether it warrants making changes to the Pricing Recommendation. The Review Panel also directed the Chicken Board and the Processors Association to develop a mutually agreeable mechanism for the sharing of confidential information, which they did. Customers and Operations Information prepared by members of the Processors Association was then provided confidentially to the Chicken Board on February 7, 2024.

[36] On February 14, 2024, the Chicken Board filed supplemental submissions with the Review Panel in respect of the Customers and Operations Information. The Chicken Board advised that while it had considered this additional information, the Pricing Recommendation would remain the same.

[37] On March 4, 2024, the Review Panel resumed the review process by requesting supplemental submissions from the Chicken Board, and inviting further submissions from the Chicken Industry Associations and the Egg Commission.

[38] The submissions of the Processors Association were filed on March 18, 2024. It took the position that the Pricing Recommendation was not in accordance with sound marketing policy, and that the Interim Pricing Decision should remain in effect. The Processors Association argued that the Pricing Recommendation favours growers at the expense of other industry stakeholders and consumers. It also argued that the Pricing Recommendation should be rejected because it was

supported by unreliable data, developed without independent oversight, and reflected a pre-determined outcome.

C. The Farm Board's Pricing Decision

[39] On May 22, 2024, the Farm Board's Review Panel issued the decision (the "Pricing Decision") that is the subject of the present application for judicial review.

[40] Broadly stated, the Review Panel approved the Chicken Board's Pricing Recommendation, and ordered that it be gradually implemented over six periods from June 2024 to June 2025. In addition to providing the Farm Board with progress reports, the Chicken Board was also directed to collaborate with the Egg Commission to monitor and mitigate implementation impacts on producers, hatcheries, growers, and processors.

[41] In its reasons for the Pricing Decision, the Review Panel stated that it supports the use of a British Columbia Cost of Production-based live chicken price formula tailored to provide a reasonable return to an "efficient grower". It decided to use this metric as it is currently measurable, while "processor competitiveness" is not. The Review Panel was also satisfied that the use of efficiency factors to determine price can maintain the competitiveness of British Columbia's processors in the Canadian market. The Review Panel further noted that the Processors Association was given an opportunity to provide transparent and verifiable data as a measure of processor competitiveness, but failed to do so.

D. The Petition

[42] The Processors Association's petition for judicial review was filed on July 22, 2024. The primary relief sought is twofold:

1. an order quashing the Review Panel's May 22, 2024 Pricing Decision; and
2. an order reinstating the Review Panel's July 3, 2020 Interim Pricing Decision.

[43] In the alternative, the Processors Association requests an order requiring the Farm Board to reconsider its assessment of the Chicken Board's Pricing Recommendation, and that the Interim Pricing Decision be reinstated while that reconsideration is pending.

[44] The Processors Association provided notice of the petition to the Farm Board, the Chicken Board, the Growers Association, the Producers Association, and the Hatcheries Association. Responses to petition were only filed by the first three of these entities. As has been noted, the Chicken Board and the Growers Association oppose the petition. The Farm Board only makes submissions on the extent of the record and arguments that can be considered, the applicable standard of review, and costs.

[45] The petition was heard over three days, from March 10 to 12, 2025. During the hearing, two other applications were presented as well.

[46] The first was an application by the Processors Association for a sealing order in respect of the confidential Customer and Operations Information. It was not opposed by any of the other parties. After having considered the test set out in *Sherman Estate v. Donovan,* 2021 SCC 25, I was satisfied that this is an exceptional case where a derogation from the open court principle is justified to protect the commercial and proprietary information in question. The sealing order sought was therefore granted at the hearing.

[47] The second was an application by the Farm Board for an order striking out certain evidence tendered by the Processors Association on the basis that it is inadmissible on this judicial review. At the conclusion of the hearing, I took that application under reserve, along with the petition itself, so that I could consider all of the voluminous material presented by the parties.

III. FRAMEWORK FOR ANALYSIS

[48] Given the manner in which the parties presented their submissions, the following issues will be addressed, in this order:

I. standing;

II. standard of review;

III. the Farm Board's application to strike portions of the Processors Association's evidence;

IV. the Processors Association's challenge to the Pricing Decision based on procedural fairness concerns;

V. the Processors Association's substantive challenge to the Pricing Decision;

VI. remedies (if necessary); and

VII. costs.

IV. ANALYSIS

A. Standing

[49] There was no objection taken to the standing of any of the parties that participated in the petition. However, this is not determinative. A court conducting a judicial review must be satisfied that all of the litigants before it have the requisite standing, and that they confine their advocacy to within the scope of their standing.

[50] I have no hesitation in finding that the Processors Association and the Growers Association have full standing in this case. Given their longstanding role as representatives for their respective industry stakeholders, as well as their participation in the pricing review process, they are unquestionably entitled to appear and fully advocate before the court on this judicial review.

[51] The same cannot be said for the Farm Board and the Chicken Board, however. Both are administrative tribunals with statutory decision-making authority. As was noted by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44 ["*Ontario Power*"] at paras. 41–62, such

tribunals are not presumptively entitled to participate in judicial review applications. Instead, the court conducting the review must determine tribunal standing in accordance with the applicable legislation and, if necessary, through a principled exercise of discretion: *Ontario Power* at para. 57.

[52] In exercising that discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality, using the following factors identified at para. 59 of *Ontario Power*:

> [59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:
>
> > (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
> >
> > (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
> >
> > (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[53] I turn now to a consideration of these principles in respect of the Farm Board and the Chicken Board.

[54] As a starting point, s. 15(1) of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 ["*JRPA*"] provides:

> **Notice to decision maker and right to be a party**
>
> 15(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power

> (a) must be served with notice of the application and a copy of the petition, and
>
> (b) may be a party to the application, at the person's option.

[55] In this case, the Processors Association's petition is in relation to the Farm Board's exercise of its supervisory power under s. 7.1 of the *NPMA* whereby it established and oversaw the pricing review which culminated in its May 22, 2024 Pricing Decision. As such, the Farm Board may be a party to this petition as of right by operation of s. 15(1) of the *JRPA.*

[56] However, this does not mean that the Farm Board may advance any and all arguments that it might wish to make: *British Columbia (Human Rights Tribunal) v. Gibraltar Mines,* 2023 BCCA 168 at para. 49. In particular, the Farm Board does not have an automatic entitlement to defend the reasonableness or fairness of its own decisions. Counsel for the Farm Board acknowledged this at the hearing, and undertook not to present such arguments. Instead, the Farm Board promised in its written submissions to confine its advocacy as follows:

> 10. [The Farm Board] will speak to the legislative scheme, focusing on the respective jurisdiction of the Chicken Board and the [Review] Panel, the background and the record before the Panel, and the standard of review. [The Farm Board] will also make submissions with respect to whether [the Processors Association] can advance new issues and evidence on judicial review. Those issues concern the integrity of the record before the tribunal and are appropriately addressed by tribunal counsel [citing *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner*), 2019 BCSC 1132 at paras. 25 and 26].

[57] On this limited basis, I find that the Farm Board should be granted standing to make these submissions, as to do so accords with the principles set out in *Ontario Power*.

[58] With respect to the Chicken Board, however, the analytical framework is different, for two reasons. First, the Chicken Board is seeking full standing to oppose all aspects of the Processors Association's petition. Second, s. 15(1) of the *JRPA* does not apply to the Chicken Board. This is because there is no decision, order, or other exercise of statutory power by the Chicken Board that is properly under review

in this petition. Therefore, the Chicken Board does not have the right to be a party, and the question of whether it ought to have standing falls to be determined exclusively in accordance with the factors identified at para. 59 of *Ontario Power.*

[59] Having considered these factors, I find that the Chicken Board should be granted the standing it seeks, for four reasons.

[60] First, there is no other party that is fully willing and able to oppose the petition. The Farm Board's participation is constrained and does not entail an actual defence of the Pricing Decision. While the Growers Association filed a cursory response to petition and presented very brief written and oral submissions at the hearing, they were largely confined to impugning the motivations and conduct of the Processors Association during the pricing review. As such, and with respect, they were of limited utility to the Court. On the other hand, counsel for the Chicken Board provided thorough and comprehensive submissions that are responsive to the similarly well-prepared and helpful submissions provided by counsel for the Processors Association. In my view, the Chicken Board's participation is therefore crucial for ensuring a fully informed adjudication of this petition

[61] Second, the Chicken Board's role in the pricing review was regulatory in nature, and not adjudicative. In particular, it was the Farm Board that rendered the Pricing Decision, not the Chicken Board. While it is true that this decision followed a recommendation by the Chicken Board that the Farm Board ultimately adopted, the Farm Board was not bound to do so. As such, I do not find that the Chicken Board's role in the pricing review gives rise to unacceptable impartiality concerns that would warrant denying it standing to appear and advocate before the Court on this petition

[62] Third, as has already been noted, no party, including the Processors Association, has objected to the Chicken Board's standing.

[63] Finally, there are precedents for first instance commodity marketing boards being afforded full standing by the Court and our Court of Appeal, albeit without any explanation of why: *Global Greenhouse Produce Inc. v. British Columbia (Marketing*

Board), 2003 BCSC 1508, aff'd 2005 BCCA 476; *Patton v. British Columbia Farm Industry Review Board,* 2020 BCSC 554, rev'd 2021 BCCA 75; and *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board,* 2023 BCSC 1150.

[64] In sum, the Processors Association, the Growers Association, and the Chicken Board are granted full standing to address and advocate in respect of all issues arising in this petition. The Farm Board is granted limited standing to provide background information and an explanation of the record, as well as to advocate in respect of standard of review, the scope of the evidence and arguments that may be raised, remedies, and costs.

B. Standard of Review

[65] There is no dispute regarding the standard of review to be employed in this case.

[66] Section 3.1(o) of the *NPMA* provides that Farm Board decisions are to be judicially reviewed in accordance with the standards set out at s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ["*ATA*"], as follows:

> **Standard of review with private clause**
>
> 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
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> (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.

[67] It should also be noted that s. 9 of the *NPMA* contains a privative clause in respect of Farm Board decisions, orders or determinations concerning matters over which the Farm Board has exclusive jurisdiction. Section 58 of the *ATA* would therefore be applicable even if its use was not prescribed by s. 3.1(o) of the *NPMA*.

[68] Accordingly, s. 58(2)(a) of the *ATA* requires that a standard of patent unreasonableness be applied to the Processors Association's challenge to the Farm Board's findings of fact, findings of law, and exercises of discretion in respect of matters over which the Farm Board has exclusive jurisdiction. Section 58(2)(b) requires that a standard of fairness be applied to the Processors Association's challenge to the procedure employed by the Farm Board in this case.

C. Farm Board Application to Strike Processors Association Evidence

[69] The genesis of the Farm Board's application to strike a portion of the evidence filed by the Processors Association (the "Application to Strike") is the parties' dispute over the proper scope of the material that can be considered by the Court on this judicial review application. There are two elements to their disagreement.

[70] The first pertains to the extent of the tribunal record. The Farm Board (with the support of the Chicken Board and the Growers Association) says that this record is limited to the material that was before the Farm Board's Review Panel. The Processors Association says that the record should also be deemed to include material that was before the Chicken Board while it fulfilled its role during the pricing review, even if that material was not also provided to the Review Panel.

[71] The second pertains to extrinsic information relating to historical context and the prospective impact of the Pricing Decision which the Processors Association would like to present to the Court. The Farm Board (with the support of the Chicken Board and the Growers Association) objects to portions of this material because it was not tendered as any part of the Farm Board's pricing review, and much of it either pre-dates the review's inception or post-dates the review's conclusion. The Processors Association argues that the material should be admissible regardless since it provides relevant background information and relates to remedial issues.

[72] To the parties' credit, an informal consensus was effectively reached on how to resolve this evidentiary dispute.

[73] Specifically, the Farm Board tendered a clerical affidavit prepared by Kim Woytowich (a legal assistant employed by counsel for the Farm Board) containing 240 documentary exhibits that were before the Review Panel. It is agreed that this represents the core of the tribunal record, and that it is admissible.

[74] At the same time, the Processors Association tendered three affidavits containing certain material that was not before the Review Panel, but which the Processors Association nevertheless wants the Court to consider. These affidavits were made by: (1) Blair Shier (the chair of the Processors Association); (2) Kerry Towle (a board member of the Processors Association); and (3) Ellana Chau (a legal assistant employed by counsel for the Processors Association).

[75] The Farm Board subsequently filed the Application to Strike. It targets the affidavits of Ms. Towle and Ms. Chau in their entirety, as well as a portion of Mr. Shier's affidavit. The parties have implicitly agreed that their dispute over the proper scope of the material to be considered on judicial review can be effectively addressed through adjudication of the Application to Strike. I will do so here.

[76] The impugned evidence of the Processors Association falls under three categories: (1) evidence that was before the Chicken Board, but not the Farm Board ("Chicken Board Only Evidence"); (2) evidence of harm to processors from the

Pricing Decision that was not tendered during the pricing review ("Processor Harm Evidence"); and (3) historical evidence that was not tendered during the pricing review ("Historical Evidence"). The admissibility of each will be considered in turn.

1. Chicken Board Only Evidence

[77] The following evidence is said by the Farm Board to be inadmissible because it was only presented to the Chicken Board, and was never before the Farm Board's Review Panel:

> (a) Ms. Chua's affidavit made January 2, 2025; and
>
> (b) portions of Mr. Shier's affidavit made July 22, 2024, namely: paragraphs 45, 46, 50 and 61; and exhibits O, P, T and DD.

[78] The Processors Association acknowledges that, strictly speaking, this evidence was not placed in front of the Review Panel's members. However, it submits that this material ought nevertheless to be considered part of the tribunal record given that the Farm Board directed the Chicken Board to consult with and gather information from the Chicken Industry Associations, and to then make the Pricing Recommendation which ultimately led to the Pricing Decision. As the material was before the Chicken Board when it developed and reconsidered its Pricing Recommendation, the material should therefore be deemed to have been before the Farm Board's Review Panel as well. The Processors Association also argues that if the material is excluded from the Court's record, the Pricing Decision will be shielded from meaningful judicial review as a result of the Farm Board's choice to structure its decision-making process in the particular manner it did here.

[79] None of the parties directed me to any jurisprudential authority that has dealt squarely with the issue of whether information provided to one tribunal for the purpose of developing a recommendation about a decision to be made by another tribunal is admissible on a judicial review of the latter's decision.

[80] That said, our Court of Appeal provided binding guidance on how to determine generally whether an affidavit is admissible on judicial review in *Air Canada v. British Columbia (Workers' Compensation Tribunal*), 2018 BCCA 387 at paras. 34–43. It states that while the default rule is that only evidence that was before the decision-making tribunal can be considered by the reviewing court, additional evidence may also be admitted if to do so would be consistent with the court's limited supervisory jurisdiction. Such evidence may include material explaining how the tribunal made its decision, and general background information presented in a non-argumentative way. Paragraphs 39–40 of the *Air Canada* decision are instructive:

> [39] In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court. Evidence that was before the tribunal is clearly admissible before the court. Evidence that casts light on the manner in which the tribunal made its decision will also be admissible within tight limits. Factual evidence setting out the procedures followed by the tribunal, or providing information showing that the tribunal was not impartial will also be admissible.
>
> [40] With respect to "general background information", such information will be admissible only if it is confined to what the tribunal actually knew or acted upon. Thus, an affidavit may educate the court on matters that are within the specialized expertise of a tribunal, or which form the common understanding of those who operate in a particular field. Courts must be vigilant, however, not to accept affidavits that simply seek to shore up weaknesses in the record, or serve to provide a revisionist version of the tribunal's reasons.

[81] Applying this principled approach to admissibility explained in *Air Canada,* I agree generally with the Processors Association that information presented to the Chicken Board as directed by the Farm Board's Review Panel for the latter's pricing review process is admissible for the purposes of this judicial review.

[82] In particular, I accept that this information "casts light on the manner in which" the Farm Board's Pricing Decision was made, and is not being tendered to "shore up weaknesses in the record" or to "provide a revisionist version of the tribunal's reasons". Ms. Chua's affidavit is of particular utility since it contains the Customer and Operations Information whose treatment during the pricing review forms a

significant part of the Processors Association's challenge to the Pricing Decision. At the same time, I am cognizant that "tight limits" will have to be applied on the use of this evidence since it was not considered directly by the Farm Board, but rather through the filter of the Chicken Board's assessment of it. With that caveat in mind, I conclude that Ms. Chua's affidavit and the impugned portions of Mr. Shier's affidavit listed above at paragraph 77 of these reasons are admissible notwithstanding the fact that the information contained therein was not directly before the Farm Board's Review Panel.

[83] This aspect of the Farm Board's Application to Strike is therefore dismissed.

2. Processor Harm Evidence

[84] The following evidence of alleged harm to processors stemming from the Pricing Decision is said by the Farm Board to be inadmissible because it was not tendered during the pricing review at any point during the process (to either the Farm Board or to the Chicken Board):

> (a) Ms. Towle's affidavit made July 22, 2024; and
>
> (b) portions of Mr. Shier's affidavit made July 22, 2024, namely: paragraphs 6 to 11, 85, and 86; and exhibit TT.

[85] The Farm Board also notes that much of this evidence post-dates the Pricing Decision, providing a further basis for its exclusion.

[86] The Processors Association, on the other hand, submits that this evidence should be admitted as background information, and because it is relevant to the remedy being sought.

[87] In assessing the admissibility of this evidence on judicial review, it is helpful to keep in mind the explanation of the scope of the "general background" exception that was formulated by the Federal Court of Appeal in *Delios v. Canada (Attorney General),* 2015 FCA 117 at para. 45 (quoted with approval by our Court of Appeal in *Air Canada* at para. 41):

> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.

[88] Starting with Ms. Towle's affidavit, I agree with the Processors Association that paragraphs 1 to 5 contain useful general background information regarding the "domestic allocation" that is performed by the Chicken Farmers of Canada (discussed above at paragraph 13 of these reasons). In my view, their admission is consistent with the limited supervisory jurisdiction of the court.

[89] However, the balance of Ms. Towle's affidavit (paragraphs 6 to 9, and all three of the exhibits) does not contain general background information. In particular, paragraphs 6 to 8 and exhibits A and B reference specific events that post-date the Pricing Decision and are therefore not helpful or relevant to assessing its lawfulness. Similarly, paragraph 9 and exhibit C reference a specific communication between the Farm Board and the Chicken Board that took place on March 18, 2016, long before the pricing review in issue. Furthermore, I do not see how any of this material could possibly be relevant to the relatively straightforward question of fashioning a remedy in the event the judicial review application is allowed. I therefore find that these portions of Ms. Towle's affidavit are inadmissible and must be struck.

[90] Turning to the impugned paragraphs of Mr. Shier's affidavit (paragraphs 6 to 11, 85 and 86), I find that they do not constitute acceptable evidence of general background information either. They are infused with contentious statements regarding alleged harms and competitive disadvantages faced by processors, which purport to be "facts" but are set out in a manner that constitutes impermissible advocacy and spin. I am also not persuaded that these paragraphs have any bearing on the issue of remedies, should it arise. As such, the paragraphs in

question will also be struck, along with exhibit TT (referenced at paragraph 85 of Mr. Shier's affidavit).

3. Historical Evidence

[91] The following evidence is said by the Farm Board to be inadmissible because it pre-dates the pricing review and was not tendered at any point during the process (to either the Farm Board or the Chicken Board):

> (a) portions of Mr. Shier's affidavit made July 22, 2024, namely: paragraphs 23 and 28; and exhibits A and D.

[92] As described by the Processors Association, this is past evidence prepared or commissioned by the Chicken Board about chicken pricing. It relates to a report authored by a consulting firm in May 2009, and a PowerPoint presentation made by the Chicken Board in May 2017.

[93] The Processors Association argues that this is historical evidence that should be admitted pursuant to a pronouncement of the Supreme Court of Canada found in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 ["*Vavilov*"] at para. 94:

> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.
>
> [Emphasis added, not in original]

[94] It is important to note that this passage is found in the portion of the *Vavilov* judgment that instructs courts on how to perform judicial review when using a reasonableness standard, under a sub-heading titled: “Formal Reasons for a Decision Should Be Read in Light of the Record and Due Sensitivity to the Administrative Setting in Which They Were Given”. However, it does not purport to deal with the scope of admissible evidence on judicial review.

[95] As such, I do not accept that para. 94 of *Vavilov* stands for the proposition that a tribunal’s historical documents are automatically admissible even if they were not tendered during the specific process that led to the decision under review. This is particularly the case for documents that belong to another tribunal that is distinct from the one that made the decision. In my view, the principled approach to admitting extrinsic evidence set out in *Air Canada* must still be followed by courts in British Columbia when they conduct judicial review, *Vavilov* notwithstanding.

[96] Applying that approach to this case, I am not satisfied that the report prepared for the Chicken Board in 2009 or the presentation it made in 2017 are of any assistance in understanding the Farm Board’s pricing review that started in 2020 and ended with the Pricing Decision in 2024. I therefore conclude that the Farm Board’s objection to the historical evidence in the impugned portions of Mr. Shier’s affidavit listed above at paragraph 91 of these reasons is well-founded, and they will also be struck.

D. Procedural Fairness of the Pricing Review

[97] Prior to considering the Processors Association’s procedural fairness arguments, the extent of the duty of procedural fairness that was owed to it by the Farm Board must be determined.

[98] This will be done in accordance with the principles established by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (S.C.C.), at para. 22:

> [22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected,

> it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[99] Paragraphs 23–27 of *Baker* set out five factors that inform the content of the duty of procedural fairness.

[100] The first factor is the nature of the decision made, and the process followed in making it. The more closely they resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness: *Baker* at para. 23. In the case of the pricing review process established by the Farm Board, it bears no resemblance to the adversarial trial process. This factor therefore militates for a lower level of procedural fairness.

[101] The second factor is the nature of the statutory scheme. Greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative and no further request can be submitted: *Baker* at para. 24. There is no right of appeal from Farm Board decisions made pursuant to an exercise of its supervisory power bestowed by s. 7.1 of the *NPMA.* Thus, this factor militates for a higher level of procedural fairness.

[102] The third factor is the importance of the decision to the affected party: *Baker* at para. 25. Pricing decisions made by regulatory agencies empowered to administer supply management regimes obviously have financial repercussions on individuals and corporations who are subject to such authority. However, as an industry stakeholder advocacy organization, the Processors Association is not directly impacted by the Farm Board's decisions. I therefore find that this factor militates for a moderate level of procedural fairness.

[103] The fourth factor is the legitimate expectations of the party challenging the decision: *Baker* at para. 26. There is no suggestion that the Farm Board promised the Processors Association that it would be afforded any specific procedural rights or privileges that differ from those that were generally applicable to all of the Chicken Industry Associations who participated in the process. This factor is a neutral one for this analysis.

[104] The fifth and final factor requires the court to take into account and respect the procedural choices made by the decision-maker: *Baker* at para. 27. By operation of ss. 7.1 and 8.1 of the *NPMA*, along with s. 11 of the *ATA,* the Farm Board has broad discretion to shape and control its own processes. As a specialized tribunal with expertise in regulating agricultural industries in British Columbia, deference must be generally afforded to the Farm Board's procedural choices so long as they do not negate the duty of fairness. This factor militates for a lower level of procedural fairness.

[105] Weighing all of the *Baker* factors, I conclude that, as an industry association participating in a Farm Board supply management pricing policy determination process, the Processors Association was entitled to procedural fairness at the lower end of the mid-range of the spectrum.

1. Legitimate Expectations

[106] The Processors Association's first procedural fairness argument is that its legitimate expectation that the Terms of Reference of the chicken pricing review would be fulfilled was breached by the Farm Board.

[107] In particular, the Processors Association submits that the Terms of Reference provide that the Pricing Decision is to include a definition of "processor competitiveness in the Canadian market for chicken" that would be a component of the pricing formula. The Processors Association says that the Farm Board then failed to do so.

[108] The Chicken Board (with the support of the Growers Association) submits that this argument is unfounded, for two reasons. First, it is a substantive challenge to the Pricing Decision, not a procedural one. Second, the Pricing Decision made by the Farm Board does contain a definition of "processor competitiveness", albeit one that the Processors Association does not support.

[109] I agree generally with the Chicken Board's position, especially its first ground for opposing the Processors Association's argument.

[110] While framed as a matter of procedural fairness, the Processors Association's assertion that its legitimate expectations were breached because the Pricing Decision allegedly did not include "processor competitiveness" as a defined component of the pricing formula is in effect a substantive challenge to the Pricing Decision. Indeed, the Farm Board's pricing formula was not formally determined until the issuance of the Pricing Decision, and therefore its content is not a matter of tribunal procedure. It is a substantive outcome.

[111] The doctrine of legitimate expectations is limited to matters of procedure, and does not create substantive rights: *Baker* at para. 26. In other words, it is not open to an unsuccessful party to argue that a tribunal decision is procedurally unfair simply because the party expected the process to result in a different final outcome.

[112] Furthermore, to allow the Processors Association to advance this argument as a question of procedural fairness would permit it to effectively circumvent the highly deferential patent unreasonableness standard of review that applies to substantive challenges to Farm Board decisions. This would be contrary to the Legislature's intention in adopting s. 3.1(o) of the *NPMA* and s. 58 of the *ATA*.

[113] This first aspect of the Processors Association's procedural fairness challenge to the Pricing Decision is therefore unfounded.

2. Right to be Heard

[114] Secondly, the Processors Association submits that it was denied a reasonable opportunity to make submissions to the Farm Board in respect of its Pricing Decision, contrary to the principle of *audi alteram partem* (i.e., the right to be heard by the decision-maker).

[115] While there are several facets to this argument, at its core the Processors Association takes issue with the mechanism used by the Farm Board to structure the review. In particular, the Processors Association says that it entailed an improper delegation by the Farm Board to the Chicken Board of the procedure for accepting and considering evidence and submissions on chicken pricing. This is alleged to have impeded the Processors Association from providing its perspective on the pricing review issues under consideration, notably in respect of how the pricing formula should account for processor competitiveness.

[116] The Chicken Board (with the support of the Growers Association) submits to the contrary that the mechanism developed by the Farm Board for the pricing review was procedurally acceptable. It says that there was nothing unfair about a process whereby: (1) the Chicken Board was responsible for consulting stakeholders, gathering information, and formulating a recommendation; and (2) the Review Panel was responsible for overseeing the process, evaluating the Chicken Board's recommendation, and making a final decision. The Chicken Board also says that the Processors Association was not precluded by the process from effectively advancing and advocating its views on processor competitiveness.

[117] In considering this issue, it must be kept in mind that I have found that the extent of procedural fairness to which the Processors Association was entitled is at the low end of the mid-range of the spectrum. Given that threshold, I conclude that it was open to the Farm Board to use a bifurcated system involving a separate administrative tribunal – the Chicken Board – to conduct the investigatory phase of the live chicken pricing review, while the Farm Board retained final decision-making authority. There is nothing inherently objectionable with such a process being used

in a regulatory context, and I am not prepared to accede to the Processors Association's general criticism of it.

[118] In order to demonstrate a violation of *audi alteram partem*, the Processors Association must show that the pricing review mechanism actually prevented it from fairly presenting evidence or argument that could have impacted the Farm Board's pricing decision. This was noted by our Court of Appeal in *Campbell v. The Bloom Group,* 2023 BCCA 84 at para. 48:

> [48] The foundation of procedural fairness is the principal of *audi alteram partem:* to hear the other side, or let the other side be heard … This encompasses both the right to be heard, and the right to an unbiased decision-maker ... Fairness is a concept fundamentally concerned with appropriate procedures, rather than the guarantee of particular outcomes … With respect to participatory rights, the key question for a reviewing court is "whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly" … In the absence of a statutory instruction, a tribunal's decision can be set aside for procedural unfairness only if it resulted in a manifest unfairness, or actual prejudice, to the applicant's right to be heard …
>
> [Supporting citations omitted]

[119] The Processors Association says that it has shown that its right to be heard was violated in relation to the treatment it was afforded in respect of the Customer and Operations Information, which allegedly demonstrates that using a Cost of Production pricing formula will hurt the competitiveness of processors in British Columbia. However, the Processors Association was in fact permitted to tender this material, as noted above at paragraphs 33 to 36 of these reasons for judgment.

[120] It is also apparent from the record that the Review Panel was alive to the Processors Association's wish to present such evidence so long as this could be done confidentially. The Review Panel received a "non-disclosure" application filed by counsel for the Processor's Association on December 15, 2023 seeking relief to that effect. The Review Panel then decided on January 18, 2024 to permit members of the Processors Association to confidentially tender Customer and Operations Information to the Chicken Board for consideration as to whether it might justify modifying the Pricing Recommendation. Several of the Processors Association's

members availed themselves of this opportunity, as can be seen from Ms. Chua's affidavit. Accordingly, I do not accept that the Processors Association was not given a chance to present evidence regarding processor competitiveness during the pricing review process.

[121] I also do not agree that the Farm Board's Review Panel was somehow required to consider the Customer and Operations Information directly, as opposed to relying on its assessment by the Chicken Board, in order to afford the requisite level of procedural fairness to the Processors Association. As was noted by counsel for the Chicken Board, there is no suggestion that the Chicken Board mischaracterized or misconstrued the confidential information in its February 14, 2024 report to the Review Panel.

[122] The Processors Association has also argued in its petition that it was prejudiced by constraints on its submissions imposed by the Farm Board's Review Panel, both in terms of page limits and content. However, the Processors Association never raised before the Farm Board any specific and clear objection to the scope and extent to which it was permitted to tender material and advocate its position in respect of the pricing review. As such, this aspect of its procedural fairness argument runs afoul of the well-established principle that denials of procedural fairness should be raised at the earliest possible opportunity in the forum where they arise so that the decision-maker has an opportunity to address them (Blake S., Administrative Law in Canada, 6th ed., [Toronto: LexisNexis Canada, 2017, at 9.64], referenced in *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission),* 2021 BCCA 67 at para. 72). If they are not, the party is then precluded from raising them on judicial review. This principle was succinctly explained by the Federal Court of Appeal in *Hennessey v. Canada*, 2016 FCA 180 at para. 21:

> A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce.

[123] I am therefore not persuaded that the Farm Board's pricing review entailed manifest unfairness that caused actual prejudice to the Processors Association's right to be heard. This second aspect of the Processors Association's procedural fairness challenge to the Pricing Decision is therefore unfounded as well.

3. Apprehension of Bias

[124] The Processors Association's third and final procedural fairness argument is that there was a reasonable apprehension of bias on the part of the Chicken Board's officials who prepared the Pricing Recommendation that was adopted by the Farm Board when it made the Pricing Decision. This bias is said to be apparent from two factors: (1) the composition of the Chicken Board; and (2) the manner in which the Chicken Board assessed potential pricing models.

[125] The Chicken Board (with the support of the Growers Association) submits that this argument should be summarily dismissed because the Chicken Board is not the decision-maker whose decision is under review. Even if it were permissible to direct a bias argument against the Chicken Board, however, it says that the Processors Association has not substantiated one here.

[126] The threshold for establishing a reasonable apprehension of bias is stringent. An applicant must meet the following test formulated and set out multiple times by the Supreme Court of Canada (see, for example, *Wewaykum Indian Band v. Canada,* 2003 SCC 45 at para. 60):

> … [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. … [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[127] When assessed against this yardstick, I find that neither of the two grounds advanced by the Processors Association justify setting aside the Farm Board's Pricing Decision for bias.

[128] With respect to the first, the Processors Association points primarily to the fact that certain members of the Chicken Board are registered growers with large-scale chicken growing operations, and have a financial interest in the Chicken Board's decisions. However, the composition of the Chicken Board – including the requirement that two of its five members be growers and the absence of a corresponding requirement for processors – is a feature of the *Chicken Marketing Scheme.* As the impugned background and qualifications of these members are prescribed by legislation, the Processors Association cannot invoke them as a basis for arguing that there is a reasonable apprehension of bias. This principle was noted by the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch*), 2001 SCC 52 at para. 22:

> However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. … Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.
>
> [Supporting citations omitted]

[129] The Processors Association also asserts that the Chicken Board had recourse to the services of various stakeholders who, given their background, may have had pre-determined opinions that differed from those of the Processors Association. At the same time, the Processors Association asserts that certain appointed officials and intermediaries whose views may have been more aligned with those of the Processors Association had their engagement limited or minimized as the review process unfolded. From my review of the record, however, there is no clear evidence to substantiate these allegations so as to elevate them beyond mere speculation and innuendo. They certainly do not overcome the presumption of regularity which holds that public officials will act fairly and impartially in discharging their adjudicative responsibilities: *University of British Columbia v. University of British Columbia Faculty Association,* 2007 BCCA 201 at para. 84.

[130] With respect to the second aspect of the bias argument, the Processors Association says that the Chicken Board did not objectively assess alternative pricing models to the Cost of Production model that favours growers.

[131] In its March 18, 2024 submission to the Review Panel, the Processors Association flagged this concern. In particular, it alleged that the Chicken Board's decision to adopt a Cost of Production model early in the process led to a pattern whereby the Chicken Board used data and information selectively to support and promote its inclusion in the Pricing Recommendation.

[132] However, the Review Panel did not accept this assertion in its May 22, 2024 decision. Since there is no suggestion that the Review Panel members themselves were biased or engaged in pre-judgment, I agree with counsel for the Chicken Board's submission that this is curative of any bias issue. What remains is a substantive determination by the Farm Board in the form of the Pricing Decision, made by an impartial tribunal. While that decision is subject to being challenged on its merits, I can see no valid basis for impugning it indirectly through the alleged bias of the Chicken Board, a separate tribunal that simply gathered information and prepared a preliminary recommendation.

[133] In sum, I do not accept that a reasonable informed person, viewing the matter realistically and practically, would conclude that the Farm Board's Pricing Decision was reached unfairly because of the composition or actions of the Chicken Board.

[134] The third aspect of the Processors Association's procedural fairness challenge to the Pricing Decision is therefore unfounded too.

4. Conclusion on Procedural Fairness

[135] In conclusion, the Processors Association has not shown that it was denied procedural fairness during the process that led to the Pricing Decision.

E. Substantive Merits of the Pricing Decision

[136] The Processors Association's challenge to the substantive merits of the Farm Board's Pricing Decision entails two allegations. The first is that the Pricing Decision does not accord with sound marketing policy. The second is that the Pricing Decision does not fulfill the goals and objectives of the Terms of Reference established for the pricing review. These deficiencies are said to render the Pricing Decision patently unreasonable, and it should therefore be quashed by the Court.

[137] The Chicken Board (with the support of the Growers Association) disagrees. It characterizes this challenge to the Pricing Decision as being founded simply on the Processors Association's concern that the pricing model chosen will favour the financial interests of growers to the detriment of processors. However, this does not mean the Pricing Decision is unsound marketing policy, contrary to the Terms of Reference, or otherwise patently unreasonable. Given the significant deference that must be afforded to the Farm Board when it exercises its regulatory authority, the Chicken Board urges the Court not to interfere with the Pricing Decision.

[138] When assessing this aspect of the petition, it is indeed important to keep in mind that the patent unreasonableness standard of review applies. In *Prokam Enterprises Ltd. v. British Columbia Farm Industry Review Board,* 2023 BCSC 403; aff'd 2024 BCCA 151 ["*Prokam*"], I had occasion to apply that standard while conducting a judicial review of another decision of the Farm Board made pursuant to its supervisory jurisdiction under s. 7.1 of the *NPMA.* I reiterate here the comments I made about patent unreasonableness in *Prokam* at para. 91.

[139] The *ATA* does not define patent unreasonableness. As such, guidance regarding its meaning must be sought from the case law. Our Court of Appeal in *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 ["*Red Chris*"] at para. 29, noted that the standard of patent unreasonableness continues to mean what it meant when the *ATA* came into being, notwithstanding the Supreme Court of Canada's subsequent decision in *Vavilov*. In addition, at para. 30 of *Red Chris*, the Court of Appeal adopted the explanation of patent

unreasonableness originally penned by Justice Ballance in *Victoria Times Colonist v. Communications, Energy, and Paperworkers*, 2008 BCSC 109 at para. 65:

> When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
>
> [Supporting citation added]

[140] The patent unreasonableness standard has also been expressed in terms requiring a demonstration that the tribunal's decision "almost border[s] on the absurd": *Voice Construction Limited v. Construction and General Workers' Union, Local 92*, 2004 SCC 23 at para. 18. Clearly, this is a highly deferential and onerous standard which will not easily be met by an applicant.

[141] Of further importance is the need for courts to use a "reasons first" approach when conducting patent unreasonableness judicial review. This means that the reviewing court begins its analysis with the reasons of the decision-maker. The court must not start with its own perception of the merits, as doing so creates a risk that the court might inadvertently try to decide the issue itself. This is what is known as "disguised correctness review". The Supreme Court of Canada held in *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21 at paras. 58–63 that such review is not permitted when the standard is reasonableness. Obviously, it is also

forbidden when the even more deferential standard of patent unreasonableness applies.

[142] I will therefore begin my assessment with a consideration of the Review Panel's reasons for making those aspects of the Pricing Decision that have been impugned by the Processors Association.

[143] The Review Panel summarized the Chicken Board's Pricing Recommendation at paragraph 35 of the Pricing Decision in these words:

> [35] In brief, the Chicken Board recommends that mainstream chicken be priced using a BC-made [Cost of Production] based live price formula to account for reasonable returns to an efficient grower. The concept of an efficient grower incorporates efficiency factors into the [Cost of Production] - based live price formula related to farm size, bird weight, barn density, feed conversion rate updates, and annual volume adjustments. It encourages efficient chicken production in BC and thereby contributes to processor competitiveness. The Chicken Board proposes that the transition to the new [Cost of Production] formula where chicken growers achieve 100% of the efficiency adjusted [Cost of Production] should take in a phased-in approach over six periods (starting in A-190) to ensure all stakeholders have an appropriate period to adjust and to allow for Chicken Board monitoring.

[144] At paragraphs 96 to 100 of its reasons, the Review Panel concluded that the Pricing Recommendation accords with sound marketing policy and fulfills the objectives of the Terms of Reference. Within these paragraphs, the Review Panel highlighted several aspects of the Cost of Production based pricing formula that, in the tribunal's view, justify this conclusion:

> [96] The Chicken Board has, in a strategic and accountable manner, balanced significant competing interests with the best available information currently available to recommend a [Cost of Production] formula that meets the goals and objectives of the Terms of Reference.
>
> [97] The Chicken Board's [Cost of Production] formula is based on structured producer surveys and third-party verification and uses transparent and verifiable mechanisms to provide a reasonable return to chicken growers, while accounting for processor competitiveness.
>
> [98] The [Review] Panel is of the view that the recommended [Cost of Production] formula has incorporated methodological assumptions that favour processor competitiveness. This includes efficient grower inputs such as bird size, barn density, building and labour costs, all of which will require additional analysis in subsequent [Cost of Production] surveys.

> …
>
> [100] The [Review] Panel finds the Chicken Board's [Pricing] Recommendation accords with sound marketing policy.
>
> [Emphasis added]

[145] The Processors Association argues that the Cost of Production formula is not sound marketing policy because it only incorporates factors related to growers, as opposed to processors. Specifically, the Processors Association complains that the formula employs the notion of "grower efficiency" to ostensibly ensure "processor competitiveness", without a metric that compares the situation of processors in British Columbia to their lower cost counterparts in central Canada, especially Ontario. This stands in contrast with the Differential pricing formula that was previously in effect by operation of the Interim Pricing Decision explained above at paragraph 19 of these reasons, which the Processors Association prefers.

[146] In addition, the Processors Association notes that the Terms of Reference required the Farm Board to adopt a pricing model that achieves certain objectives, including that British Columbia chicken processors be competitive in the Canadian market for chicken. The Processors Association submits that the Cost of Production formula will not meet this objective since its factors are unrelated to processors' operations and viability. As such, the Pricing Decision does not comply with the Terms of Reference.

[147] However, the reasons of the Farm Board's Review Panel reveal that it was cognizant of the Processors Association's concerns, and addressed them at length. Under the heading "Analysis", the Review Panel wrote:

> [63] The [Review] Panel acknowledges the concerns expressed by [the Processors Association] about the definition of processor competitiveness in the [Pricing] Recommendation. However, since the 2010 supervisory decision, parties have acknowledged the need for a transparent pricing model that balances reasonable returns to growers and processor competitiveness. In their March 18, 2024 submission, [the Processors Association] argues the [Review] Panel should not approve the [Pricing] Recommendation as it is incomplete and poses significant risk to their businesses and competitiveness. However, the Chicken Board has presented what it sees as

a transparent, verifiable, and measurable metric for processor competitiveness.

[64] Further, the [Review] Panel observes that [the Processors Association] was given ample opportunity throughout the lengthy review process to provide transparent and verifiable data as a measure of processor competitiveness, and it did not do so. [The Processors Association's] request to defer the implementation of a new pricing formula to allow it to engage in further process, after failing to take advantage of the opportunities already provided, rings hollow and appears to be an attempt to delay the implementation of a new formula that reflects the cost of production in BC and preserve the status quo of the interim formula.

…

[66] Accordingly, the [Review] Panel must now consider whether the use of the efficient grower is an appropriate, transparent, verifiable, and measurable metric for processor competitiveness.

…

[69] The [Review] Panel sees the use of an efficient grower as a lean and dynamic model, responsive to market fluctuations, and includes producer efficiency as part of the equation. This dynamic nature can be seen by comparing the current Ontario formula with the proposed BC formula, minus the cost of feed, where the use of efficient grower factors result in a lower BC price. Likewise, if the cost of feed in BC were to go down, the proposed BC formula results in a lower price which would also in turn promote processor competitiveness.

…

[72] The [Review] Panel is satisfied that the data determined through the Chicken Board's [Cost of Production] development process, which included review by both Serecon and MNP, as well as [Cost Recovery Model Committee] and [Joint Working Group] consultation, is transparent and verifiable. [The Processors Association's] criticisms, which are not supported by verifiable data, about numbers being overstated or outdated are insufficient to rebut the validity and defensibility of the Chicken Board's approach or warrant further delay in implementation. Further, and understanding that processors own a significant portion of broiler quota in BC, the [Review] Panel finds that [the Processors Association] had ample opportunities to provide their own verifiable grower data and analysis to support their view that numbers were in fact overstated.

[73] The [Review] Panel acknowledges that the price of feed in BC has been a primary driver of the current price differential between the BC and Ontario live price, resulting in increased industry tension and many BC growers not receiving cost of production through the interim pricing formula for some time.

…

[75] The [Review] Panel recognizes the hardships imposed on all parties by the feed cost differential and appreciates the Chicken Board's attempt to balance the interests of all stakeholders in the [Cost of Production] and share

> the burden associated with BC's high-cost operating environment. The [Review] Panel finds that the inclusion of grower efficiencies is a reasonable attempt to share the burden of the feed price differential, balances stakeholders' interests, and is a verifiable, transparent model that is responsive and fair.
>
> [76] Overall, the [Review] Panel concludes that the Chicken Board has met the Terms of Reference requirement to identify a verified [Cost of Production] for reasonable returns to growers, that balances processor competitiveness, by using an efficient grower in the cost of production formula.

[148] The reasons of the Review Panel reveal that it carefully considered the Processors Association's objections to the Pricing Recommendation, and concluded nevertheless that the proposed Cost of Production pricing formula (1) constitutes sound marketing policy and (2) conforms with the Terms of Reference. Having reviewed the voluminous court record and the submissions of the parties, I can see nothing patently unreasonable about either of the Farm Board's conclusions.

[149] With respect to whether the Cost of Production formula constitutes "sound marketing policy", it is apparent that this is a complex and multi-faceted socio-economic question over which reasonable informed people can and will disagree. Indeed, one can well understand the Processors Association's objection to the formula as its counsel has presented an arguable case as to why this formula might have an adverse financial impact on its members. However, that is not the test. In order for the Court to set aside a pricing formula set by an expert tribunal entrusted by the Legislature to regulate British Columbia's agricultural industries, that formula must "border on the absurd".

[150] The Cost of Production formula cannot be fairly described in these terms. This is especially the case when there is a cogent explanation in the Pricing Recommendation as to why recourse to grower efficiency factors may be expected to both encourage the efficient production of chicken in British Columbia, and to

provide a degree of processor competitiveness at a national level (Woytowich affidavit #1, exhibit 201, at pages 1906 to 1912).

[151] Similarly, I find no fault in the Farm Board's conclusion that the Cost of Production pricing formula complies with the Terms of Reference, as noted at paragraphs 76 and 97 of the Pricing Decision (quoted above at paragraphs 144 and 147 of these reasons). In particular, it cannot be seriously disputed that the formula is at least designed and intended to provide producers and growers with "a verified Cost of Production/reasonable returns-based pricing mechanism" while ensuring that processors are "competitive in the Canadian market for chicken". Simply because the Processors Association is skeptical that the formula will achieve the latter objective is not a basis for finding that the Terms of Reference have not been met. Also, the Terms of Reference do not specify the actual pricing formula metric that must be used to promote processor competitiveness, nor do they preclude the use of "grower efficiency" as that metric.

[152] In conclusion, the Processors Association has not shown that the Pricing Decision is patently unreasonable.

F. Remedies

[153] As I have rejected all of the grounds raised by the Processors Association in support of its application for judicial review, there is no need to consider the hypothetical issue of what remedies might have been appropriate had I found otherwise.

G. Costs

[154] Ordinarily, costs follow the event. Therefore, the respondents are presumptively entitled to costs awards since the petition will be dismissed.

[155] In this case, however, the Farm Board says that no costs should be awarded to or against it, "consistent with the usual rule that costs are not awarded for or against a tribunal except in exceptional circumstances".

[156] The Chicken Board submits that it should be awarded costs notwithstanding the fact that it is also a tribunal, given that it fully opposed the petition as an "ordinary respondent". However, the authorities cited to me at the hearing do not clearly assist in answering the question of whether the Chicken Board is indeed a tribunal whose circumstances are so exceptional that it should be awarded costs and, if so, at what scale.

[157] The Growers Association's submissions are silent on costs, but this may simply have been an oversight.

[158] In these circumstances, I am not prepared to decide the question of costs at this time. If the parties cannot resolve the matter among themselves, they may contact the Registry within 30 days of these reasons for judgment to schedule a costs hearing before me.

V. DISPOSITION

[159] For all of these reasons, two orders are issued.

[160] First, the Farm Board's application to strike portions of the Processors Association's evidence is allowed, in part. The following paragraphs and exhibits of the evidence filed by the Processors Association are declared inadmissible and are struck:

> (a) paragraphs 6, 7, 8 and 9, and exhibits A, B and C of the affidavit of Ms. Towle made July 22, 2024; and
>
> (b) paragraphs 6, 7, 8, 9, 10, 11, 23, 28, 85 and 86, and exhibits A, D and TT of the affidavit of Mr. Shier made July 22, 2024.

[161] Second, the Processors Association's petition for judicial review is dismissed.

"Brongers J."