

Court of King's Bench of Alberta

Citation: Houweling Farms Ltd v Alberta Milk, 2025 ABKB 232

Date: 20250416
Docket: 2201 06591
Registry: Calgary

Between:

Houweling Farms Ltd

Applicant

- and -

Alberta Milk

Respondent

- and -

The Marketing of Agricultural Products Appeal Tribunal

Respondent

**Reasons for Decision
of the
Honourable Justice C.B. Thompson**

I. Introduction

[1] The onset of the COVID-19 pandemic (“COVID”) in March 2020 forced numerous organizations, both public and private, to take unprecedented steps in response, some of which had adverse consequences for some or all parties involved. This judicial review arises from a decision made in April 2020 in relation to the dairy industry.

[2] The Applicant, Houweling Farms Ltd. (“HFL”) operates a dairy farm in Alberta as a producer licensed by the dairy industry statutory corporation, Alberta Milk. HFL filed an originating application for judicial review on June 8, 2022 (the “Application”) against Alberta Milk and the Marketing of Agricultural Products Appeal Tribunal (the “Appeal Tribunal”).

[3] Among other contentions, HFL primarily claims a significant disproportionate, discriminatory and unfair adverse impact on itself and a small minority of producers (the “discrimination claim”), arising from the Alberta Milk Quota Issuance Adjustment and Credit Restriction Notice dated April 7, 2020 (the “COVID Decision”). HFL sought a review of the COVID Decision, which resulted in the August 21, 2020 decision of the Alberta Milk Board (the

“Review Decision”) confirming the COVID Decision. HFL appealed the Review Decision, which resulted in the February 24, 2022 decision of the Appeal Tribunal (the “Appeal Decision”) confirming the Review Decision.

[4] In this Application, HFL seeks judicial review of the Appeal Decision and the following orders: (i) certiorari quashing the Appeal Decision, (ii) a declaration that the COVID Decision disproportionately, unfairly and unreasonably adversely impacted a small minority of milk producers, including HFL, while having no or negligible adverse impact on a majority of milk producers, which renders the Appeal Decision invalid; and (ii) a declaration that the Appeal Decision is invalid for bias, insofar as the Appeal Tribunal specifically and intentionally declined to deal with HFL’s foundational discrimination claim in respect of the COVID Decision.

[5] Alberta Milk argued that the Appeal Decision is reasonable and seeks a dismissal of the Application with costs in its favour.

[6] While the Appeal Tribunal took no position on the merits of the Application, it provided comments on standard of review and remedies available in a judicial review, and requested that no costs be awarded to or against it.

[7] For the reasons that follow, HFL’s Application for judicial review is dismissed.

II. Relevant Procedural Background and the Record

[8] The Appeal Tribunal was added as a Respondent to the Application pursuant to the Consent Order of the Honourable Justice D.A. Labrenz dated October 21, 2022 (filed October 24, 2022).

[9] The record for the Application is the revised and corrected Certified Record of Proceedings (the “Record”) filed by the Appeal Tribunal pursuant to paragraph 2 of the Procedural Order of the Honourable Justice G.S. Dunlop dated January 25, 2024.

[10] The Application was heard in a full-day Special Chambers.

III. Factual Background

[11] The Record contains a Statement of Agreed Facts and Agreed Exhibits provided by HFL and Alberta Milk for the appeal before the Appeal Tribunal. The Statement of Agreed Facts states as follows:

The Parties

1. [HFL] is an Alberta corporation with its registered office in Lethbridge, Alberta, carrying on business operating a dairy farm and other farming activities near Coaldale, Alberta, and in that regard is a licensed milk producer under the *Dairy Industry Act*, RSA 2000, c D-2 (the “Dairy Act”), the *Marketing of Agricultural Products Act*, RSA 2000, c M-4 (the MAP Act”), and the regulations under each Act.
2. Alberta Milk is a statutory board established by the *Alberta Milk Plan Regulation*, Alta Reg 150/2002 (the “Plan Regulation”) under the MAP Act.
3. The composition, functions and the authority of Alberta Milk, exercised through an elected Board of Directors (the “Board”), are set forth in the following legislation:

- (i) the Plan Regulation;
- (ii) the *Alberta Milk Marketing Regulation*, Alta Reg 151/2002 (the “Marketing Regulation”);
- (iii) the *Dairy Act*; and
- (iv) the *Dairy Industry Regulation*, Alta Reg 139/1999 (the “Dairy Regulation”).

The Dairy Act and Dairy Regulation are not material to this appeal.

4. Under the Plan Regulation, Alberta Milk’s authority extends to milk and dairy products, with its purpose to establish a plan:
 - (i) To provide for the effective control and regulation of the production and marketing of milk and to initiate and carry out programs to stimulate, increase or improve the production or marketing of milk;
 - (ii) Without limiting the generality of (i):
 - a. to fix and allot quota for the production and marketing of the regulated product,
 - b. to maintain a fair and stabilized price for the regulated product,
 - c. to establish and maintain pools for the distribution of all money payable to producers from the sale of the regulated product,
 - d. to develop and maintain the orderly marketing of the regulated product,
 - e. to provide a consistent supply of high quality regulated product for the market,
 - f. to promote the regulated product and agricultural product, ... to fund research and development in connection with the regulated product and agricultural product,
 - g. to fund education in connection with the regulated product and agricultural product, and
 - h. to work with marketing boards and organizations having similar objectives.

Alberta Milk is required to operate pursuant to the plan.

5. The Marketing Regulation was enacted pursuant to section 26 and 27 of the MAP Act and section 9 of the Plan Regulation.
6. Section 27(6) of the MAP Act authorizes Alberta Milk to make administrative orders and directives respecting the carrying out of any or all of its powers and duties in

respect to the regulations it passes pursuant to the authority granted by the MAP Act and the Plan Regulation.

7. The Alberta Milk Board is comprised of individuals who are licensed producers of milk or individuals who are appointed as a representative by licensed producers who are not individuals.
8. Only individual producers and the representatives of producers who are not individuals are entitled to vote for delegates and hold office as a delegate or as a director of the Alberta Milk Board.
9. Producers in the North, Central and South regions of Alberta elect delegates who form regional committees.
10. Delegates elect from among the delegates, two regional directors from each region and five directors at large who comprise the Board of Alberta Milk.
11. [HFL] and its dairy farming operations are subject to the *MAP Act*, the *Dairy Act* and *Regulation*, and particularly the *Plan Regulation* and *Marketing Regulation*, as well as any terms and conditions of its producer license issued by Alberta Milk, and any lawful administrative orders, directives and policies of Alberta Milk.

National Regulation of Milk Production and Marketing
Supply Management

12. Alberta Milk is part of the national dairy supply management system that regulates and controls the production and marketing of milk and dairy products throughout Canada.
13. Supply management regulates the production and marketing of milk and dairy products throughout Canada on a province-by-province basis, with a fundamental purpose to balance the supply of the milk and dairy products with the demand for milk and dairy products. Thus, Alberta Milk must balance the supply of raw milk produced by producers with the demand for milk and dairy products.
14. Another purpose of supply management is to provide efficient producers of milk and cream with the opportunity to obtain a fair return for their labour and investment while providing consumers of dairy products with a continuous and adequate supply of dairy products of high quality.
15. The supply management system for milk and dairy products is the product of agreements amongst the federal and provincial governments. The implementation of that system requires jurisdictional cooperation involving the inter-delegation and coordination amongst a federal agency and provincial milk marketing boards with dovetailing federal and provincial legislation.
16. The Canadian Dairy Commission (“CDC”), pursuant to federal regulatory legislation, is the federal agency responsible for regulating and controlling the interprovincial and export marketing of milk and dairy products.
17. The provincial milk boards directly regulate and control the intraprovincial production, marketing, processing and pricing of dairy products and the possession of

- dairy animals within each of the provinces pursuant to dairy production and marketing regulatory legislation enacted in all provinces.
18. The CDC calculates required volume of milk to be produced by provincial producers across Canada to meet the demand for milk and dairy products across Canada expressed in kilograms of butterfat (federal quota) and allocates federal quota to the provincial milk marketing boards in accordance with the applicable federal-provincial agreements.
 19. Alberta Milk sets its total provincial quota in an amount commensurate with its provincial allocation of federal quota (provincial quota). Alberta Milk licenses milk producers to produce and market milk. Only producers licensed by Alberta Milk may produce and market milk in Alberta in accordance with the provincial quota allocated to them.
 20. Alberta Milk is a statutory producer marketing board created under section 7 of the *Alberta Milk Plan Regulation*, Alta Reg 150/2002 (the “Plan Regulation”). Alberta Milk is authorized to implement the intraprovincial aspects of the milk supply management system in Alberta as well as acting as agent of the CDC in Alberta for the proper operation of the system.
 21. The federal-provincial agreements provide for marketing pools where provincial milk marketing boards pool revenues obtained and some of the costs incurred in supplying raw milk to processors.
 22. Processors pay for the raw milk based on prices determined by the use made of the milk by the processor pursuant to harmonized milk classifications.
 23. There are two marketing pools for milk in Canada:
 - (i) the P5 made up of the Ontario, Quebec, Nova Scotia, New Brunswick and Prince Edward Island provincial milk marketing boards; and
 - (ii) the Western Milk Pool (WMP) made up of the Alberta, British Columbia, Saskatchewan and Manitoba provincial milk marketing boards.
 24. Alberta Milk is a member of the WMP. Under the Western Milk Pooling Agreement, made between the CDC and the provincial milk marketing board members of the WMP, the prices paid by processors to producers for milk in the four western provinces are pooled among all producers for milk in those provinces as if the western provinces constituted a single market so that each producer receives the same price per kilogram of butterfat in milk sold to processors.

Regulation of Milk Production

25. A fundamental aspect of any supply management system is the limitation of the supply in a regulated agricultural product through production controls to meet consumer demand, using the concept of quota. Quota prescribes the limited amount of production of the applicable regulated agricultural product that can be produced and marketed to consumers.

26. Under the *Marketing Regulation*, quota is described in section 15 as “continuous daily quota” (“CDQ”) meaning “the number of kilograms of milk fat allotted by Alberta Milk per day pursuant to this Regulation to a producer as the producer’s share of the provincial entitlement”.
27. Alberta Milk licenses milk producers to produce and market milk. Only producers licensed by Alberta Milk may produce and market milk in Alberta to licensed processors in accordance with the continuous daily quota allocated by Alberta Milk to the producer. There are approximately 500 licensed milk producers in Alberta.
28. A producer’s CDQ is measured in daily production allotment of kilograms of butterfat.
29. For example, a producer with a continuous daily quota of 100 kg of butterfat can deliver 3,000 kg of butterfat in a 30-day month under their quota.
30. Alberta Milk manages quota on a continuous basis. On a monthly basis, Alberta Milk evaluates a producer’s production of milk to determine their production relative to their quota allotment. As monthly over and under production accumulates, Alberta Milk adjusts the producer’s cumulative daily quota position.
31. Alberta Milk may issue directives and administrative orders regarding the delivery of the producer’s daily quota. Alberta Milk allows for a degree of variance in a producer’s delivery of their daily quota to accommodate normal variations in production on the farm. Dairy farmers are prohibited from storing milk on farm for more than 2 days and so must deliver their production every day or two depending upon their volume of production.
32. Alberta Milk provides all producers with the Alberta Milk Producer Policy Handbook (the “Policy Handbook”).
33. The Policy Handbook includes section on “Continuous Quota Management and Flexibility Limits”, “Continuous Quota Management Options” and “Transferring Underproduction Credits”, which section set out the following Alberta Milk policies:
 - (i) When producers do not produce their quota allotment in a given month, their cumulative quota position decreases. A producer with a negative quota position holds under production quota credits equal in number to their negative cumulative quota position.
 - (ii) Under production quota credits are measured in “credit days”. A credit day is measured by the producer’s daily quota allotment. For example, a credit day for a producer with a continuous daily quota of 100 kg of butterfat is 100 kg of butterfat. A credit day for a producer with a continuous daily quota of 200 kg of butterfat is 200 kg of butterfat. Thus, a credit day is the equivalent of the producer’s daily quota allotment.
 - (iii) Once a producer’s cumulative quota position has reached the lower flexibility limit of negative 15 credit days, the

producer cannot accumulate any more under production quota credits.

- (iv) When producers produce in excess of their quota allotment in a given month, their cumulative quota position increases.
- (v) Producers who produce more than five credit days in excess of their quota allotment will not receive payment for any additional kilograms of butterfat they produce.
- (vi) In order to address their overproduction, the producer must
 - (i) decrease their production in a subsequent month;
 - (ii) acquire under production quota credits from another producer; or
 - (iii) buy quota to increase their quota allocation.
- (vii) The transfer of under production quota credits amongst producers is controlled by Alberta Milk having to approve the transfer, with Alberta Milk reserving the right to change underproduction credit transfer policies or procedures at any time.

34. Under production quota credits can be transferred pursuant to s. 22 of the *Marketing Regulation* which reads as follows:

Quota lease

22(1) A producer may transfer under production quota credits for any monthly period within the dairy year.

(2) A producer may transfer under production quota credits only with prior written approval of Alberta Milk.

(3) A producer applying to transfer under production quota credits must submit the application to Alberta Milk at least 14 days prior to the proposed transfer date on forms supplied by Alberta Milk or within any other time frame set by a directive or administrative order of Alberta Milk.

(4) A lease of quota is effective on the first day of a month.

(5) A producer who holds under production quota credits is subject to the service charges for the regulated product deliveries made against under production quota credits and subject to any interest for late payment under section 10.

35. In 2018, Alberta Milk allowed producers to accumulate -20 credit days and +10 credit days. In 2019, Alberta Milk revised this policy to only allow producers to accumulate -15 credit days and +5 credit days to align supply with demand for milk.

36. Under production quota credits have been available to licensed Alberta milk producers for many years to provide producers with flexibility in the planning and

operations of their dairy farms. Producers who have received increased quota through provincial quota increases may not have the capacity to produce that quota and may sell it. Under production quota credits are described in the Policy Handbook.

37. The Policy Handbook provides that: “A producer may buy any number of underproduction credits they wish, but they will still be accountable for maintaining a cumulative quota position within their flexibility limits at the end of each month.”
38. The Policy Handbook is updated annually and mailed to all producers and is also available on Alberta Milk’s website.
39. Another way in which Alberta Milk regulates the supply of milk is through the use of “incentive days”.
40. The term “Incentive Days” is not defined in the *MAP Act*, *Plan Regulation*, *Marketing Regulation* or the Policy Handbook.
41. Alberta Milk may declare incentive days where it determines there will not be sufficient production of milk to meet demand for milk at certain times of the year.
42. Incentive days allow producers to produce an additional amount of milk, measured by the producer’s daily quota allocation over a specified period of time. Incentive days are not based on a producer’s historical production and are not counted against the producer’s cumulative quota position.

Regulation of Milk Marketing

43. There are significant aspects of milk marketing covered under the *Marketing Regulation* and the *Plan Regulation* not relevant to this appeal such as issues of grading, transporting, storing, processing, and pricing of regulated agricultural products, as well as animal care and welfare, all of which may be subject to some form of regulation depending on the nature of the producing animal and its agricultural product and how that product is handled from the farm to the consumer.

Alberta Milk’s Decision Under Appeal

44. In mid-March 2020, the COVID-19 pandemic began affecting the dairy industry in Canada.
45. The province of Alberta declared a state of public health emergency due to COVID-19 on March 17, 2020 and closed K-12 schools.
46. On March 28, 2020, the Alberta Milk notified producers that it would not issue incentive days as the demand for milk was too volatile to justify issuing incentive days.
47. On March 27, 2020, Alberta ordered the closure of all dine-in restaurants. Other provincial governments made similar public health orders at this time.
48. At March 30, 2020, there had not yet been any dumping of milk in Alberta, as Alberta Milk during a Board meeting that day noted “Changes in market demand are very challenging for the industry right now and we may have to deal with milk disposal in the near future”.

49. On April 3, 2020, Alberta Milk notified producers that, as a result of closures of restaurants, it had seen a sharp decline in the demand for milk and that Alberta Milk was discarding raw milk across the province. Alberta Milk notified producers that it was looking at various options to manage the supply of milk.
50. The decrease in demand for milk occurred across Canada.
51. Alberta Milk was notified on April 6, 2020 at a WMP Members Committee conference call that 2.5 million litres of raw milk had been dumped for the week of March 29 to April 4, 2020 within the WMP, and that as of April 6, 2020, the WMP anticipated that 4 million litres of raw milk in the WMP would be dumped for the week of April 5 to April 11, 2020.
52. In response to the oversupply of raw milk, on April 4, 2020, the P5 (made up of all eastern provincial dairy boards other than Newfoundland) issued a zero credit day restriction policy effective April 1, 2020.
53. WMP estimated that to ensure there were no surpluses of raw milk, the WMP needed to reduce the supply of raw milk by approximately 10 million litres for April. Alberta Milk's proportionate share of the 10 million litres was approximately 3.2 million litres based on its allocated quota shares in the WMP.
54. Under the Western Milk Pooling Agreement, producers are compensated for raw milk that the milk marketing boards direct to be dumped. The estimated costs to the WMP and its member milk marketing boards for the projected amount of raw milk that was estimated to be dumped in April 2020 was approximately \$8.3 million. No offsetting revenues would be received for dumped milk that could not be sold to the processors.
55. The provincial milk marketing boards for Manitoba, Saskatchewan, and British Columbia determined that they would apply a zero credit day restriction policy retroactive to April 1, 2020. Credit day restrictions were implemented across Canada retroactive to April 1, 2020.
56. On April 6, 2020, following the WMP Members Committee conference call, the Alberta Milk Board met at 2:00 pm to discuss scenarios to reduce the supply of milk by 3.2 million litres for the month of April.
57. The Alberta Milk Board was presented with several scenarios to decrease the supply of milk but requested that staff provide more scenarios and decided to reconvene at 8:00 pm.
58. Staff of Alberta Milk provided the Alberta Milk Board with additional scenarios to decrease the supply of milk in a timely manner.
59. When the Alberta Milk Board reconvened at 8:00 pm, it reviewed the further scenarios prepared by staff. The Alberta Milk Board approved and implemented the Alberta Milk Quota Issuance Adjustment and Credit Restriction Notice (the "April COVID Decision") which implemented for the months of April, May and June (or until further notice)
 - (i) A 3% quota cut for Alberta producers effective April 1, 2020; and

- (ii) A 2 Credit-Day Restriction (CDR) effective April 1, 2020.
60. The April COVID Decision was aimed at reducing monthly production by 3.2 million litres/month.
61. Alberta Milk issued a notice to producers dated April 7, 2020 of the April COVID Decision.
62. “Credit-Day” is not defined in the *MAP Act*, *Plan Regulation* or the *Marketing Regulation*.
63. Alberta Milk described the effect of the 2 CDR as follows:

Frequently asked Questions with Answers and Examples of the effects of a 2 Credit-Days Restriction Policy

Q: I am at -6 days, how much milk can I ship?

A: You can ship your monthly quota plus two days. If you did so, with no credit transfers, your cumulative position at the end of the month would be -4 days.

Q: I am at +4.5 day, how much milk can I ship?

A: You can ship your monthly quota plus 0.5 days, which brings you to the maximum cumulative position of +5 days (the maximum cumulative position limit of +5-15 days still applies).

Q: How much can I be under my monthly quota?

A: There is no limit on under-shipment with this policy; however, the normal lower limit of -15 days before penalties still applies.

Q: I am at -3 days and bought credits this month to bring me to -5 days, how much milk can I ship?

A: You can ship your monthly quota plus two days. Your cumulative position at the end of the month will be -3 days.

Q: If I buy credits, can I ship more milk without restriction?

A: No, regardless of your cumulative position you may only ship your monthly quota plus two days. If you ship more, you will not be paid for the milk (and deductions will still apply), but your cumulative position will still increase.

Q: Can I still buy or sell credits?

A: Yes, you may continue to buy or sell credits but take note this will only affect your cumulative credit position and will not change your over-quota situation. You will still be subject to the Credit-Day Restriction policy and the producer flexibility limits as explained above.

64. Prior to April 6, 2020, Alberta Milk did not restrict the number of credit days that a producer could use in a month. Other members of the WMP have limitations on producers’ use of credit days. BC, SK and MB have a 10% annual credit transfer limit

a producer can buy in a 12 month rolling period and BC also limits producers to a 10% annual credit transfer a producer can sell in a 12 month rolling period. SK also has a CDR policy in place that limits the amount of credit days producers can utilize every spring.

65. This policy decision was clarified and amended in subsequent written communications to producers on April 13th, April 17th, April 22nd, and April 29th.
66. A two credit day restriction meant that producers could only produce to their quota holdings plus the equivalent of two additional days (credit days) of their daily quota allotment each month provided that they had acquired the necessary two credit days and that they remained within the production flexibility limits of +5 and -15 days.
67. Producers could still accumulate and transfer under production quota credits but a purchasing producer could only use a maximum of two credit days (determined by its own production) of under production quota credits in a month.
68. No notice from Alberta Milk prior to the April COVID Decision was provided to producers of specific decision that quota would be reduced or the use of under production quota credits limited. However, on April 3, 2020, Alberta Milk notified producers that there was an oversupply of milk and that it was looking at various options to control the oversupply of milk.
69. On April 8, 2020, Pete Houweling emailed Alberta Milk regarding the adverse impacts of the April COVID Decision.
70. On April 29, 2020, Alberta Milk indicated that the April COVID Decision would be continued for May 2020. All other milk marketing boards in the WMP and P5 also maintained the same production controls for the month of May 2020. Dairy Farmers of Ontario and Dairy Farmers of Nova Scotia subsequently in late May retroactively permitted producers to use an additional credit day for the month of May 2020 in their respective provinces.
71. On May 26, 2020, [HFL] applied to Alberta Milk for a review the April COVID Decision.
72. On May 27, 2020, after reviewing the supply and demand for milk, Alberta Milk Board revised the April COVID Decision to permit producers to use an additional credit day for the month of June 2020. Thus, Alberta producers could use up to three credit days while maintaining the three percent reduction in quota allotment for the month of June 2020 (the “June COVID Decision”).
73. The June COVID Decision was communicated to producers on May 27, 2020. All other milk marketing boards in the WMP also revised their production control decisions to permit producers to use up to one additional credit day for the month of June 2020. The P5 continued their credit day restriction but also granted one incentive day.
74. On September 25, 2020, after reviewing the supply and demand for milk, the Alberta Milk Board revised the June COVID Decision, effective October 1, 2020, as follows:
 - (i) Removal of all credit day restrictions;

- (ii) Issuance of a 3% quota increase;
- (iii) Issuance of three (3) incentive days for October; and
- (iv) Issuance of two (2) incentive days for November.

Impact of April COVID Decision CDR restrictions on [HFL's] dairy operations

- 75. In Alberta, purchasing quota generally costs around \$45,000 for the right to produce one kilogram of butterfat per day in perpetuity.
- 76. Under production quota credits are priced on a per kilogram of butterfat basis and in April 2020, one kilogram of underproduction quota credits in Alberta cost approximately \$6.00. Underproduction quota credits only allow a producer to produce that kilogram of butterfat once.
- 77. Producers can accumulate or purchase underproduction quota credits to produce and market milk in excess of their CDQ in a given month as long as they maintain their monthly cumulative quota position within their flexibility limit of +5/-15 days CDQ.
- 78. In managing its dairy operations, [HFL] both purchased and sole quota and utilized underproduction quota credits. Underproduction quota credits, acquired and paid for through arm's length transactions with other producers were approved by Alberta Milk.
- 79. [HFL] chose to make extensive use of underproduction quota credits to expand its production facilities and acquire more dairy cows so they could produce and sell more milk without purchasing additional quota.
- 80. The impact of Alberta Milk's April COVID Decision on the dairy operations of [HFL] was that it could not use all the underproduction quota credits it had purchased in April 2020 in that month. However, [HFL] could use the underproduction quota credits it had purchased in April 2020 over a period of time at a rate of 2 Credit Days per month while the restrictions were in place.
- 81. [HFL] reduced its normal average production and marketing of milk by over 30% following the April COVID Decision on April 7, 2020. [HFL] production and marketing of milk in March 2020 was 526,492 litres of milk and 341,229 litres of milk in April 2020 – a reduction of 35%.
- 82. [HFL] reduced its dairy herd by approximately 44% by selling animals and culling animals.
- 83. [HFL] commenced an action against Alberta Milk. Alberta Milk has defended that claim disputing all liability.

[HFL's] Purchase and Sale of Quota

- 84. At April 1, 2020, [HFL] held a CDQ of 431.63 kg of butterfat per day.
- 85. At April 7, 2020, after the April COVID Decision was issued and all producers' quota was reduced by 3%, [HFL] held a CDQ of 418.68 kg of butterfat per day.
- 86. In May 2020, [HFL] sold 114.10 kg of butterfat per day of quota for \$45,000 per kg privately.

87. In June 2020, [HFL] purchased 47.50 kg of butterfat per day of quota for \$44,536.25 per kg privately.
88. In June 2020, [HFL] purchased 2.00 kg of butterfat per day of quota for \$43,600 per kg on the Alberta Milk Quota Exchange.
89. In August 2020, [HFL] purchased 1.36 kg of butterfat per day of quota for \$48,335.88 per kg on the Alberta Milk Quota Exchange.
90. In September 2020, [HFL] received a 1% global increase of 3.73 kg of butterfat per day of quota.
91. In October 2020, [HFL] purchased 0.70 kg of butterfat per day of quota for \$44,719.48 per kg on the Alberta Milk Quota Exchange.
92. In October 2020, [HFL] received a 3% global increase of 11.33 kg of butterfat per day of quota.
93. In November 2020, [HFL] purchased 15.87 kg of butterfat per day of quota for \$45,200 per kg and 34.05 kg of butterfat per day of quota for \$45,100 per kg.
94. In November 2020, [HFL] purchased 5.00 kg of butterfat per day of quota for \$43,369.09 per kg on the Alberta Milk Quota Exchange.
95. In October December 2020, [HFL] purchased 1.00 kg of butterfat per day of quota for \$41,500 per kg and 34.05 kg of butterfat per day of quota for \$45,100 per kg.
96. In December 2020, [HFL] received a 1% global increase of 8.01 kg of butterfat per day of quota.
97. In January 2021, [HFL] purchased 20.00 kg of butterfat per day of quota for \$44,375.15 per kg on the Alberta Milk Quota Exchange.
98. On February 8, 2021, [HFL] held a CDQ of 472.88 kg of butterfat per day.

IV. The COVID Decision

[12] As set out in the Statement of Agreed Facts, the COVID Decision imposed a 3% quota cut for Alberta producers and a 2-day CDR, both effective April 1, 2020.

[13] While the COVID Decision was subsequently revised for the months of June and October 2020, it is only the COVID Decision issued on April 7, 2020 that is at issue. Further, HFL does not take issue with the 3% quota cut. HFL disputes only the 2-day CDR.

V. The Review Decision

[14] On May 27, 2020, HFL applied to have the Board of Alberta Milk review the COVID Decision on the following grounds, set out in its Application for Review of the April 7, 2020 Decision of Alberta Milk to Reduce the Production of Milk in Alberta (“Review Application” REC-0095 to REC-0099):

- (a) The Decision contravenes section 15(5) of the Alberta Milk Marketing Regulation.

- (b) The Decision is inequitable and discriminatory because it adversely affects disproportionately the Applicant in particular, and licensed milk producers generally (such as New Entrant producers) whose production operations rely to a significant extent on the availability of the unlimited credit-day quota leasing system that has successfully served Alberta milk producers, processors and consumers for many years.
- (c) Alberta Milk has no lawful authority to implement the Decision with retroactive effect.
- (d) The Decision is the product of bias and/or undue influence.
- (e) Insofar as the Board of Directors of Alberta Milk were aware of the adverse disproportionate effects the 2 Credit-Day Restriction would have on the Applicant and other like producers, yet made and implemented the Decision with the intent or expectation that those adverse disproportionate effects would be visited upon the Applicant, the Decision was made in bad faith.
- (f) “ProAction” regarding responsible milk production and dairy animal welfare is a central policy of Alberta Milk. The Decision was contrary to "ProAction" policies regarding animal welfare and responsible milk production.
- (g) On any of the grounds of review espoused, the Decision is inconsistent with the Values of Alberta Milk.

[15] In addition to written materials submitted, the Board held an oral hearing on July 22, 2020 and issued the written Review Decision on August 21, 2020. While the Board specifically and extensively addressed the first six grounds (a)-(f) of HFL’s Review Application, the Review Decision shortened the heading of the above 5th ground as “The Board made the April 7, 2020 Decision in bad faith.”

[16] The Review Decision held as follows in respect of grounds (a)-(e):

- a. The Board had the authority to manage underproduction quota credits and limit the use of credit days. The Board was not required under section 15(5) of the *Marketing Regulation* to implement only a quota cut. Subsection 15(5) must be read in context of the *Marketing Regulation*, the *Plan Regulation* and Alberta Milk's statutory authority to regulate the production and marketing of milk in Alberta. Section 22 of the *Marketing Regulation* does not limit Alberta Milk’s authority to manage under production quota credits and does not grant an unlimited right to use under production quota credits. Under production quota credits are not quota, and Alberta Milk can use production management tools.
- b. The COVID Decision was not inequitable or discriminatory. Producers who relied on underproduction quota credits assumed the risk that use of those credits could be limited. Any decision made by Alberta Milk would have different effects on producers based on their business model. Alberta Milk could not make a decision that impacted each producer equally. The key factor in the COVID Decision was the need for an immediate impact. The disposal of milk runs contrary to the very foundation of supply management. Neither specific producers nor relative business models of producers was the

target or focus of the Decision. The Board was not required to consult with producers prior to making the Decision.

- c. The COVID Decision was not retroactive, but was directed at future deliveries. Milk production is reconciled at the end of each month and milk is calculated, adjusted and paid for on a monthly basis. Producers are required to deliver milk in accordance with directives and administrative orders issued by Alberta Milk and there is no legislative prohibition on issuing administrative orders and directives mid-month.
- d. The COVID Decision was not the product of undue influence or bias. The Board considered information from the WMP but was not offered additional quota or any incentive by the WMP to implement specific policies.
- e. The Board made the COVID Decision in good faith. Some Board members experienced significant financial impacts as a result of the COVID Decision, which was made to address the oversupply of milk resulting from pandemic shutdowns. All members of the Board evaluated the options to consider the best decision for the dairy industry as a whole. They did not take their personal business situations or particular business model into account in making the Decision. The Board made the decisions it considered necessary to reduce the excess supply of milk and in doing so acted in what they believed were the best interests of the dairy industry.

[17] The Review Decision confirmed the COVID Decision.

VI. The Appeal Decision

[18] On September 8, 2020, HFL appealed the Review Decision to the Appeal Tribunal on eight grounds, which HFL reproduced at paragraph 49 of the within Application for judicial review. The 7th ground of appeal was HFL's discrimination claim stated as follows:

7. The Review Decision acknowledges the 2 Credit-Day Restriction in the Policy Decision specifically targeted producers utilizing leased quota through underproduction quota credits to practically bear the brunt of the production cuts required, and not all producers proportionately in accordance with their respective quota holdings (including leased quota) at that time. Thus, the COVID Decision was intentionally discriminatory and unfair.

[19] The Appeal Tribunal heard from numerous witnesses and received significant evidence over a seven-day oral hearing. The Appeal Tribunal also considered documentary evidence, written submissions, and oral arguments.

[20] The Appeal Tribunal set out the general issue before it as, "whether the Board erred in confirming the April COVID Decision", and six specific issues relevant to its analysis as:

- a) Did the Board err in finding that Alberta Milk has the power to impose a credit day restriction?
- b) Did the Board err in finding that Alberta Milk had the power to make the COVID Decision with retroactive effect?

- c) Did the Board err in finding that under production quota credits are not a form of quota?
- d) Was the portion of the COVID Decision which sought to restrict the use of credit days a policy decision, an administrative order, or a directive?
- e) Did the Board err in finding that the COVID Decision was not the product of undue influence, bias, or conflict of interest?
- f) Did the Board err in finding that the COVID Decision was not made in bad faith or in a conflict of interest?

[21] In the within Application, HFL argues that, in setting out the issues as it did, the Appeal Tribunal ignored the main thrust of HFL's Review Application and Appeal, namely, the discrimination claim.

[22] A summary of the Appeal Tribunal's findings found in the written brief of Alberta Milk is as follows:

- a. The Alberta Milk Board reasonably found it had authority to impose a credit day restriction as part of its obligation to operate, supervise and enforce the Alberta Milk Plan.
- b. The Alberta Milk Board reasonably found that the April COVID Decision was not retroactive as production is reconciled at the end of every month. There is no legislative prohibition on issuing a mid-month administrative order or directive and producers had the majority of April to align production with the April COVID Decision.
- c. The Alberta Milk Board reasonably concluded that underproduction quota credits were not a form of quota as quota is a vested right and underproduction credits are a one-time right.
- d. The Alberta Milk Board was reasonable in its conclusion that the April COVID Decision was an administrative order or directive and within Alberta Milk's statutory authority.
- e. The April COVID Decision was not a product of undue influence, bias, or conflict of interest but rather a result of the difficult circumstances. The Alberta Milk Board made a decision that negatively impacted Board members. There was no evidence that the Board specifically targeted the Applicant.
- f. The Alberta Milk Board did not make the April COVID Decision in bad faith. Rather the Board considered a number of factors in a condensed time period and made a decision that it thought was in the best interests of the Alberta dairy industry.

[23] The Appeal Tribunal confirmed the Review Decision.

VII. Standard of Review

[24] In the Appeal Decision, the Appeal Tribunal acknowledged the difference between the external standard of review that applies in judicial review, and the internal standard to be applied by a statutory appellate tribunal to the decision of a lower administrative decision-maker.

[25] The Appeal Tribunal noted the Supreme Court of Canada's approach to standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 applies to judicial review matters, that is, external review of administrative decision by a court.

[26] It also stated that the framework for determining the internal standard for its review of the Review Decision is that outlined in *Newton v Criminal Trial Lawyers Association*, 2010 ABCA 399. The Appeal Tribunal conducted the *Newton* analysis and found, among other things, that:

- (a) Alberta Milk has legislated powers with broad discretion to regulate the supply of milk in Alberta, and is empowered and obligated to operate, regulate, supervise and enforce the Alberta Milk Plan.
- (b) The legislation contemplates a marketing scheme run by producers, including the fixing and allocating of quotas and the adjustment of the CDQ when changes occur in the Canadian domestic market.
- (c) Alberta Milk has expertise in the milk industry and some experience in dealing with emergent circumstances, while the Appeal Tribunal has some expertise with respect to the marketing of agricultural products generally.
- (d) The Appeal Tribunal has no authority to replace the Review Decision with its own decision and this supports a standard of reasonableness.
- (e) While the hearing before the Appeal Tribunal is more like a *de novo* hearing than a true appeal, a *de novo* hearing does not necessarily mean no deference whatsoever to the decision of the lower tribunal.
- (f) Most of the questions before it did not engage a correctness standard set out in the *Vavilov* framework.

[27] The Appeal Tribunal concluded that its sub-issues (a) to (d) were questions of law reviewable on a standard of reasonableness, and sub-issues (e) and (f) were questions of procedural fairness reviewable on a standard of correctness.

[28] In this Application, the Appeal Tribunal noted in its written brief that in both *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 and *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at paras 4 and 58, the Alberta Court of Appeal confirmed that *Newton* remains good law in Alberta, and that the *Newton* analysis, as supplemented in *Yee* (which the Appeal Tribunal referred to as the "Newton/Yee analysis"), continues to govern the choice of an internal standard of review.

[29] The Appeal Tribunal submitted that the *Vavilov* framework applies to this judicial review Application. Therefore, this Court should apply: (i) the reasonableness standard of review to the questions of law in its sub-issues (a) to (d); (ii) the correctness standard of review to the questions of natural justice or procedural fairness in its sub-issues (e) and (f); and (iii) the reasonableness standard of review to the question of law on the Appeal Tribunal's choice of internal standard of review for the Review Decision.

[30] Alberta Milk submitted that this Court should apply the *Vavilov* presumptive standard of reasonableness to the Appeal Decision.

[31] HFL accepted the Appeal Tribunal's analysis of the *Vavilov* standard of review applicable in judicial review proceedings. However, HFL argued that Appeal Tribunal's reliance on *Newton* was misguided, as the Appeal Tribunal unreasonably gave deference to Alberta Milk's Review Decision. I address HFL's arguments on the choice of internal standard of review in my analysis below.

[32] With respect to the questions of natural justice or procedural fairness in the Appeal Tribunal's sub-issues (e) and (f), I note that it is unsettled in the jurisprudence whether the correctness standard applies to procedural fairness issues post-*Vavilov*. Some courts appear not to apply a standard of review to procedural fairness issues. See Donald J.M. Brown, John M. Evans, *Judicial Review of Administrative Action in Canada* § 2022:4 citing, among others, *Hussey v Bell Mobility Inc*, 2022 FCA 95 at para. 24.

[33] In Alberta, however, this Court held in *Dr. Mays Abdulghafoor v University of Calgary*, 2021 ABQB 187 at paras 69 to 72, that the standard of review for procedural fairness or natural justice is not "correctness" or "reasonableness", but whether the process followed met the level of fairness required by law, based on the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at paras 21-28 and repeated in *Vavilov* at para 77.

[34] The Alberta Court of Appeal has also confirmed that questions of procedural fairness and natural justice in judicial review proceedings are reviewed, having regard to the context, to determine whether the appropriate level of fairness required by the relevant legislation and the common law has been afforded: *Rebel News Network Ltd v Alberta (Election Commissioner)*, 2021 ABCA 376 at para 10, leave to appeal to SCC dismissed 2022 CanLII 38775 (SCC) citing *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at para 11; *Vavilov* at para 77; and *Baker* at para 21. The court's task is to determine whether the requisite standard of procedural fairness was met: *Penn v St Stephen's College*, 2024 ABCA 99 at para 30.

[35] That said, I note that HFL indicated in its written brief that it is no longer pursuing, in this Application, the Appeal Tribunal's sub-issues (e) and (f), which are undue influence, bias, conflict of interest and bad faith. Therefore, it is unnecessary to decide whether the appropriate level of fairness was met on the issues of undue influence, bias, conflict of interest and bad faith in the Appeal Decision.

[36] Therefore, with respect to the standard of review for the Appeal Decision, this Application does not engage any of the six categories for correctness review recognized by the Supreme Court of Canada, which are: (i) legislated standards of review, (ii) statutory appeal mechanisms, (iii) constitutional questions, (iv) general questions of law of central importance to the legal system as a whole, (v) questions related to the jurisdictional boundaries between two or more administrative bodies: *Vavilov*, at paras 17 and 69; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 26, and (vi) when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute: *Society of Composers* at para 28.

[37] In my view, the presumption of reasonableness review has not been rebutted in this case. I am satisfied that the *Vavilov* standard of reasonableness applies to the judicial review of the Appeal Decision.

[38] The Supreme Court of Canada described the reasonableness standard of review at length in *Vavilov*. This Court, in *Beniuk v Alberta (Director of SafeRoads)*, 2024 ABKB 567 at paras 12-14 summarized the focus of the *Vavilov* reasonableness review, and the Alberta Court of Appeal’s guidance on the *Vavilov* reasonableness analysis, as follows:

[12] The focus of reasonableness review is on the decision actually made by the decision maker, including both the decision maker’s reasoning process and outcome: *Vavilov* at para 83. In *Shell Canada Limited v Alberta (Energy)*, 2023 ABCA 230 at paras 20-21, the Alberta Court of Appeal recently summarized the guidance on the reasonableness analysis provided in *Vavilov*, where there are written reasons:

[20] [*Vavilov*] provides guidance on how a reviewing court is to conduct a reasonableness review of an administrative decision at paragraph 84:

...where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with “respectful attention” and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion [citations omitted].

[21] The reviewing court is to “develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”: *Vavilov* at para 99. An administrative decision-maker’s interpretation “must be consistent with the text, context and purpose of the provision”: *Vavilov* at para 120. The onus is on the party challenging a decision to demonstrate that it is unreasonable: *Vavilov* at para 100. Decisions are unreasonable where there is “a failure of rationality internal to the reasoning process” or when a decision “is in some respect untenable in light of the relevant factual and legal constraints that bear on it”: *Vavilov* at para 101.

[13] To be reasonable, a decision must be based on reasoning that is both rational and logical. While not a “line-by-line treasure hunt for error”, the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in overarching logic, and it must be satisfied that there is a line of

analysis in the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived: *Vavilov* at para 102. A decision will be unreasonable where the conclusion reached cannot follow from the analysis undertaken, or if the reasons read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point: *Vavilov* at para 103. The internal rationality of the decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise; the decision maker’s reasoning must “add up”: *Vavilov* at para 104.

[14] With respect to whether a decision is justified “in relation to the constellation of law and facts that are relevant to the decision”, it is unnecessary to catalogue all the potential legal or factual considerations that could constrain an administrative decision maker in a particular case: *Vavilov* at paras 105-106. However, a number of elements will generally be relevant in evaluating whether a given decision is reasonable: (1) the governing statutory scheme; (2) other relevant statutory or common law; (3) the principles of statutory interpretation; (4) the evidence before the decision maker and facts of which the decision maker may take notice; (5) the submissions of the parties; (6) the past practices and decisions of the administrative body; and (7) the potential impact of the decision on the individual to whom it applies: *Vavilov* at para 106.

[39] These principles guide my review of the Appeal Decision, which I turn to next. I start with the Appeal Decision, read in light of the Record and the legal and regulatory framework in which it was rendered: *Vavilov* at para 94.

VIII. Analysis

[40] The Appeal Decision is 40 pages long, organized under headings labeled sections A to J as introduction, preliminary matters, procedural steps, issues, statement of agreed facts, summary of oral evidence, the statutory and regulatory framework, the standard of review, the analysis, and the conclusion.

[41] Before getting into the merits, I first address the Appeal Tribunal’s choice of internal standard of review of the Review Decision.

A. Did the Appeal Tribunal err in its choice or application of internal standard of review?

[42] HFL argued that the Appeal Tribunal’s reliance on *Newton* was misguided because *Newton* (and also *Yee*: para 128 HFL’s written brief) is applicable only when the initial administrative decision was based on a hearing that involved a comprehensive evidential process and fulsome evidentiary record.

[43] HFL submitted that Alberta Milk’s review process was not a hearing, and the Review Decision was an “informal review” made in “practically an evidential vacuum”. HFL submitted that the Appeal Tribunal should have treated the Appeal as a hearing *de novo* and could not afford any deference to the Alberta Milk Board, given that Alberta Milk Board did not have the benefit of the fresh evidence put before the Appeal Tribunal. HFL argued that the Appeal

Tribunal was in a far better position than Alberta Milk to make findings of fact and in no worse position to interpret the *MAP Act* and the *Milk Regulations*.

[44] HFL also argued that the Alberta Milk was reviewing its own decision, and the Appeal Tribunal should have intervened fully because there is a reasonable apprehension of bias whenever a decision maker is reviewing its own decision. HFL submitted that the Appeal Tribunal's undue deference to the Alberta Milk Board in the Review Decision tainted the Appeal Decision.

[45] Alberta Milk argued that HFL cannot raise such internal standard of review arguments for the first time in judicial review, as HFL did not raise them before the Appeal Tribunal. Alberta Milk argued that in the Appeal proceeding before the Appeal Tribunal, HFL agreed that the appropriate internal standard of review was reasonableness and had relied on the Appeal Tribunal's decision in *Burnbrae Farms Ltd and Sparks Eggs Inc v Egg Farmers of Alberta Board of Directors* which applied the *Newton* factors and determined that the appropriate standard of review for an appeal under the *MAP Act* was reasonableness: REC-0992-0993.

[46] The Appeal Tribunal submitted that HFL did not raise before it the new argument that a reasonable apprehension of bias arose in the Review Decision because Alberta Milk Board reviewed its own decision. The Appeal Tribunal submitted that had that issue been raised before it, it would have necessarily found that this was not a relevant factor in the *Newton/Yee* analysis. In the Appeal Decision the Appeal Tribunal found, based on the Supreme Court of Canada's decision in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22, that the Alberta Milk Board members being milk producers did not create a conflict of interest or bias in making the Review Decision because the governing legislation mandated that composition.

[47] The Alberta Court of Appeal has severally confirmed, including recently, that determining internal standard of review involves interpreting the relevant legislative regime to discern the respective roles given to the first instance decision-maker and the appellate administrative tribunal, with reference to their relative expertise. The answer will always depend on the particular legislative regime at issue. The legislator can design any type of multilevel administrative framework to fit any particular context: *Neustaedter v Alberta (Labour Relations Board)*, 2024 ABCA 238 at para 14, citing *Moffat* at paras 54, 57; *Yee* at paras 32–34; and *Newton* at paras 42–43, 57.

[48] The Court of Appeal instructed in *Moffat* that the “guidance” in *Yee* cannot be applied mechanically because the question of internal standard of review is always dependent on the specific legislation at issue. The fact that the legislature set out a certain internal review structure under one administrative regime does not mean it intended the same to apply to another: *Moffat* at para 61.

[49] HFL is misguided in its argument, which suggests that the *Yee* analysis strips the lower decision-maker of all deference. HFL acknowledged in its written brief the Court's statements in *Ackron Egg Farms Ltd v Manitoba Egg Farmers et al*, 2020 MBQB 187 at paras 94-96, that deference is owed to lower tribunals in statutory schemes even if the appeal tribunal has the power to quash, confirm, vary or reverse all or any part of the lower decision. The mere fact that the legislature uses very broad wording in the Act, which includes the ability of the Council to consider new evidence and that the Council must hold a hearing, does not mean that no deference is owed to MEF on an appeal to the Council.

[50] The first two of the *Yee* guidelines provide that the findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference; and inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing: *Yee* at para 35; *Newton* at paras 82 and 84; *Moffatt* at paras 215 and 219.

[51] In *Neustaedter*, the Alberta Court of Appeal held at para 14 that the Alberta Labour Relations Board did not commit a reviewable error in holding that the officer's interpretation of OHS' (Occupational Health and Safety) investigative authority was owed deference as "an issue falling under the umbrella of OHS's particular policy expertise".

[52] I also reject HFL's argument that *Newton* and *Yee* apply only to decisions made with a full hearing. That position is inconsistent with Alberta jurisprudence on internal standard of review of administrative decisions. There are several administrative appeal decisions applying the *Newton* and *Yee* analysis where the initial decisions under appeal did not conduct a hearing and were based on documentary evidence of the applicants and only statements of concern of opposing parties.

[53] I reject HFL's argument that the Review Decision was not a hearing, was informal and was made with little evidence, as it is not supported by the legislative framework or the Record before this Court. There is nothing in the *MAP Act* or the *Review and Appeal Regulation*, Alta Reg 199/2016, which suggests that review of decisions under those enactments are informal. The Record indicates that the Alberta Milk Board conducted an oral hearing, HFL provided evidence of its operations at the oral hearing and documents including its monthly milk statements from August 2019 to April 2020: REC-0067. The Review Decision also includes a list of other documents considered: REC-0087.

[54] I reject HFL's argument that the Appeal Tribunal should have intervened fully because Alberta Milk was reviewing its own decision and that there is a reasonable apprehension of bias whenever a decision maker is reviewing its own decision. This is a misinterpretation of the *Yee* guidelines and the legislative framework for the milk industry. I agree with the Appeal Tribunal that *Ocean Port* applies and the governing legislative framework intended review decisions by member milk producers.

[55] Upon my review of the Appeal Decision, I find that the Appeal Tribunal applied the relevant factors, conducted a logical and reasonable analysis of the industry legislative regime, and determined the respective roles of the Alberta Milk Board and itself with reference to their relative expertise. The Appeal Tribunal's answer in this case was determined on the legislative regime of the dairy industry. Most of the factors applied supported a reasonableness review, including that the Appeal Tribunal had no legislative authority to substitute the Review Decision with its own, and that it has limited expertise in respect of milk specifically.

[56] I am satisfied that the Appeal Tribunal's choice of internal standard of review was reasonable. The analysis is rational and logical, providing intelligible and transparent justification for the choices made, which were supported by the governing statutory scheme, existing jurisprudence, and evidence before the Appeal Tribunal.

[57] Furthermore, HFL did not raise these internal standard of review issues before the Appeal Tribunal; rather, it actively led the Appeal Tribunal on the path of a reasonableness review. A party "cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal

and thereby mislead the tribunal on the necessity of providing reasons. ... Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised”: *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association* [2011] 3 SCR 654 at paras 54 and 55. In any event, as I stated above, HFL’s arguments on choice of internal standard of review are not supported in law or facts.

[58] I now turn to the merits of the Appeal Decision. HFL and Alberta Milk addressed the six sub-issues in the Appeal Decision, which the Appeal Tribunal considered relevant to its analysis. In these Reasons, I adopt a similar format addressing each of the six sub-issues in the Appeal Decision in addition to other issues raised in this Application including HFL’s overarching discrimination claim.

B. Did the Board err in finding that Alberta Milk has the power to impose a credit day restriction?

[59] The Appeal Tribunal held that Alberta Milk Board’s finding that it had the power to impose a credit day restriction was reasonable. It held that “it would be antithetical to Alberta Milk’s obligation to operate, regulate, supervise and enforce the Alberta Milk Plan if Alberta Milk was permitted to regulate one aspect of under production quota credits (ie., the transfer), but was not permitted to restrict the use of under production quota credits.”

[60] In this Application, HFL accepted that Alberta Milk had the regulatory authority to implement the credit day restriction “policy”, but asserts that it was obliged to meet the following three criteria:

1. The credit day restriction must not conflict with other policies, including the flexibility limits in the Policy Handbook.
2. The process for instituting new policy should reasonably include consultation with producers followed by adequate notice to allow them to adjust their operations and quota holdings.
3. Any new policy must treat all producers equitably.

[61] HFL argued that Alberta Milk did not have the jurisdiction to immediately create and implement a credit day restriction in the COVID Decision that was inconsistent with the existing flexibility limits policy and was highly discriminatory to a small number of producers. I address the equitable treatment criterion and discrimination argument later in these Reasons as part of HFL’s discrimination claim.

[62] Alberta Milk argues that the criteria enumerated by HFL have no basis in any of the Alberta Milk governing legislation. It submitted that while Alberta Milk consults with producers when possible, it has the ability to make quick adjustments to production levels given the reality of rapidly changing market conditions driven by consumer demand.

[63] In section G of the Appeal Decision, the Appeal Tribunal conducted its own assessment of the statutory and regulatory framework, which supports its analysis in sections H and I, and its conclusion in section J. The Appeal Tribunal included powers of Alberta Milk under the *Alberta Milk Authorization Regulation*, Alta Reg 152/2002, which gives Alberta Milk, pursuant to sections 26 and 27 of the *MAP Act*, broad regulation-making powers in section 9 of the *Plan Regulation* for the purposes of operating the Plan.

[64] The Appeal Decision noted, at para 176, that the *Marketing Regulation* was enacted pursuant to those powers under section 26 and 27 of the *MAP Act* and section 9 of the *Plan Regulation*.

[65] The Appeal Decision also considered several other provisions of the statutory and regulatory framework, including the Alberta Milk Policy Handbook, the *Interpretation Act*, RSA 2000, c 1-8, and *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 on statutory interpretation.

[66] Section 25(4) of the *Interpretation Act* states that if in an enactment a power is conferred to make regulations, the power shall be construed as including a power exercisable in a similar manner, and subject to a similar consent and conditions, if any, to repeal or amend the regulations and to make others.

[67] In my view, based on the facts and the law considered in the Appeal Decision, the Appeal Tribunal's finding that Alberta Milk had the authority to impose the CDR was reasonable and amply supported. The Appeal Decision is internally coherent and shows a rational chain of analysis that points to the conclusion the Appeal Tribunal reached on this issue.

[68] With respect to the criteria of consultation and no conflict with existing policies HFL argued for a new CDR policy, HFL did not cite any legal authority or source in support of those criteria. I see nothing in the statutory and regulatory framework to support the criteria advocated by HFL. On the contrary, the Appeal Decision referenced implied powers granted to administrative decision makers as necessary to carry out their legislative mandate, as set out in *Montreal Street Ry Co v Montreal-Terminal Ry Co*, (1905) 36 SCR 369.

[69] I agree with the statements in *Ackron* at paras 100 and 130, wherein the Court noted the powers given to specialized tribunals for various farm or agricultural products to allow for quick adjustments to production levels given the reality of rapidly changing market conditions driven by consumer demand. The Court noted, and I agree, that running a supply management plan of necessity involves multifaceted and sensitive weighing, by the various boards, of complex information using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. Therefore, the decisions of such a board are relatively unconstrained and harder to set aside: at paras 129-132, citing *Vavilov*.

[70] At paras 131 and 132, the Court in *Ackron* specifically noted the pressures of COVID on the board's supply management responsibilities. The Court stated, and I adopt with respect to Alberta Milk and the *MAP Act* regime, that:

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

[132] The [Act], using expansive language, makes the [board] responsible for implementing and operating the supply management plan for [milk] in [Alberta] for the benefit of the public and all producers in [Alberta]. [The Board] must perform this complex public function within the context of yet another complex

statutory relationship [the board] has with [CDC] Canada. It is in this complex statutory framework that [the board] evaluated the economic trends during the Pandemic, which changed consumer demand for [milk] in an unprecedented way... The fact that the [the board] is a specialty board consisting of only [milk] producers cannot be overlooked here. The [board] fully appreciated the economic pain this would impose on all of their ... fellow producers who held [quota credits].

[133] By creating a board ..., managed exclusively by other [milk] producers, the legislature has given [the board] extensive room to maneuver in achieving its stated purpose of managing the production and marketing of [milk] in [Alberta] through the special skills and expertise of a board consisting only of [milk] producers.

[71] Absent a requirement for notice and consultation in the legal framework governing the Alberta Milk Board, I find the Appeal Tribunal’s conclusion reasonable and justified in relation to the facts and law, that the Alberta Milk Board had authority to act as it did in the unique and unprecedented circumstances arising from the COVID-19 pandemic.

C. Did the Board err in finding that Alberta Milk had the power to make the COVID Decision with retroactive effect?

[72] The COVID Decision was issued on April 7, 2020, with an effective date of April 1, 2020. HFL argued that Alberta Milk has no authority to implement a decision with retroactive effect. HFL asserted that Alberta Milk acknowledged through certain witnesses that the COVID Decision operated retroactively and, therefore, was both incorrect and unreasonable.

[73] Alberta Milk argued that there is no legislative prohibition on issuing administrative orders and directives mid-month and, further, adjustments to milk production are always made on a monthly basis so that there was no retroactive effect. Alberta Milk asserted that the COVID Decision was directed at future deliveries and was therefore not retroactive. In oral submissions, Alberta Milk stated that HFL was paid for April 2020, based on its April statement in the Record. Given that milk is picked up every two days, Alberta Milk cannot accurately predict what has been delivered until the end of the month when reconciliation is done and that is how producers are paid.

[74] The Appeal Tribunal found that Alberta Milk’s conclusion on the issue of retroactivity was reasonable in light of the regulatory framework. The Appeal Tribunal agreed that there was no legislative prohibition on issuing administrative orders and directives mid-month. There was no retroactive effect because milk production is reconciled on a monthly basis and the COVID Decision was directed at future deliveries.

[75] The proper approach to questions of retroactivity and retrospectivity was canvassed in detail by the Court of Appeal in *Canmore (Town) v Three Sisters Mountain Village Properties Ltd*, 2023 ABCA 278. At para 65 of that decision, the Court set out the definitions of “retroactive” and “retrospective” adopted by the Supreme Court of Canada:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in

that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event [emphasis in original] [citing *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 127; *Épiciers Unis Métro-Richelieu Inc, division Éconogros v Collin*, 2004 SCC 59 at para 46; *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 39, 143 DLR (4th) 577.]

[76] While *Three Sisters* dealt specifically with a change in legislation, these definitions provide useful guidance in assessing the COVID Decision. The presumption against retrospectivity is only a tool of statutory interpretation. It ensures that statutes are not construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the enactment: *Three Sisters* at para 67. There is no dispute that the COVID Decision intended its effect of immediately reducing milk production.

[77] It is an agreed fact on the Record that “[o]n a monthly basis, Alberta Milk evaluates a producer’s production of milk to determine their production relative to their quota allotment. As monthly over and under production accumulates, Alberta Milk adjusts the producer’s cumulative quota position.”

[78] It is also an agreed fact that the COVID Decision provided “Frequently asked Questions with Answers and Examples of the effects of a 2 Credit-Days Restriction Policy”. This part of the COVID Decision framed all the questions as future shipping. In particular,

Q: If I buy credits, can I ship more milk without the restriction?

A: No, regardless of your cumulative position you may only ship your monthly quota plus two days. If you ship more, you will not be paid for the milk (and deductions will still apply), but your cumulative position will still increase. [Emphasis added.]

[79] The Record indicates that HFL shipped milk from April 1 to 8, 2020 in relatively similar quantities and at reduced volumes thereafter (REC-0670). It also shows that HFL was paid for its April 2020 delivery. From the recorded shipped volumes, and the prohibition from storing milk on farm for more than 2 days, the COVID Decision was neither retroactive nor retrospective to HFL’s already produced milk.

[80] In my view, the Appeal Decision that the COVID Decision was not retroactive considering the statutory and regulatory framework was reasonable.

[81] In any event, the statutory and regulatory framework permits and shows an instance where a Regulation requires a regulatory decision to be effective the beginning of the month regardless of which date in the month it occurred. An example is section 22(4) of the *Marketing Regulation* which states that “[a] transfer of under production quota credits approved by Alberta Milk is effective on the first day of a month in which the transfer occurs.” The Policy Handbook explained this provision as follows: “For example, for credit transfers effective July 1st, the deadline for transfer requests will be at 4:30 p.m. on at least 7 days prior to August 1st...”

[82] I find that the Appeal Decision on this issue is based on an internally coherent and rational analysis and is justified in relation to the facts and law.

D. Did the Board err in finding that underproduction quota credits are not a form of quota?

[83] The Appeal Decision noted that the positions of HFL and Alberta Milk diverge on the meaning or interpretation of the concept of quota in the context of the supply management system.

[84] HFL argued that leased quota in the form of under production quota credits is still quota. At paras 142 and 143 of its written brief, HFL argued that CDQ is a right allotted to producers allowing the production and marketing of a specified volume of milk/butterfat on a daily basis, a right that can be leased to another producer on a single-use basis. It argued that a lease of CDQ in the form of under production quota credits, transfers production and marketing rights from one producer to another; thus, it is a transfer of that right, not a transformation of the right into something else. It submitted that quota leased remains quota, just in the hands of a different producer allowing the limited amount of production leased to take place at a different dairy farm subject to the receiving producers' flexibility limits.

[85] HFL further argued that since underproduction credits are quota, they can be regulated only in the same manner as quota and cannot be separately restricted. HFL argued that the Appeal Tribunal's conclusion that under production quota credits are not quota was both incorrect and unreasonable.

[86] Alberta Milk argued that under production quota credits are not quota. Quota is a vested right to produce a specific amount of milk daily on a continuous basis, whereas under production quota credits allow a producer to produce milk in excess of their quota on a one-time basis only. Alberta Milk argued that quota and under production quota credits are fundamentally different. It points to the price differential, noting that an under production quota credit costs less than \$10 per kilogram of butterfat, while quota to produce a kilogram of butterfat daily costs \$45,000. Accordingly, Alberta Milk argues that the Appeal Tribunal's conclusion was reasonable.

[87] In the Appeal Decision, the Appeal Tribunal noted the Alberta Milk Board's finding that under production credits are simply a "production management tool that allows certain flexibility to producers." The Appeal Tribunal analyzed the various statutory provisions relating to quota. It noted that the *Plan Regulation* defines "quota" as the "privilege allocated by Alberta Milk to a producer to market regulated product."

[88] The Appeal Tribunal determined that the reference to "lease of quota" in the context of the transfer of under production quota credits is not sufficient to show that the Legislature intended under production quota credits to be treated as quota, considering the legislation as a whole, and the differences between quota and under production quota credits.

[89] It is an agreed fact that The Policy Handbook includes sections on "Continuous Quota Management and Flexibility Limits", "Continuous Quota Management Options" and "Transferring Underproduction Credits". The agreed facts state that producers who produce more than five credit days in excess of their quota allotment will not receive payment for any additional kilograms of butterfat they produce.

[90] The agreed facts also state that, in order to address their overproduction, the producer must use one of the "Continuous Quota Management Options", which is to "acquire under production quota credits from another producer."

[91] HFL’s Application at paras 21 to 25, and written brief at paras 42-43, set out these pre-existing policies in the Policy Handbook. At para 44 of its written brief, HFL stated that “producers producing more milk than their CDQ (“Over-CDQ Producers”) will eventually have their cumulative quota position exceed the flexibility limit of +5 CDQ and they will not be paid for their over-production without regularly acquiring Quota Credits to cover that over-production.”

[92] Apart from the fundamental differences between quota and under production quota credits noted in the Appeal Decision, and argued by the parties, the Policy Handbook provides that Alberta Milk allows lenders to secure loans against the value of a producer’s quota, by appointment of attorney. However, a lender may not seize quota as quota remains an asset of the Crown.

[93] HFL accepted that under production quota credits assist Over-CDQ Producers to comply with the regulatory flexibility limit of +5 CDQ, hence the title “Continuous Quota Management Options”. Based on the agreed facts and the regulatory framework analyzed in the Appeal Decision, under production quota credits are compliance credits that may be tradeable among producers to assist them in complying with their various regulatory obligations (over/under production). In other words, under production quota credits are simply compliance credits, which are generated from the regulated operations, may be tradable among the regulated entities, and used solely to comply with their regulatory obligations and nothing more.

[94] The Appeal Tribunal found that underproduction credits were fundamentally different from quota and CDQ and could be regulated separately, with different restrictions applicable to each. I find that the Appeal Decision that under production quota credit is not quota but a production management tool is reasonable.

[95] The Appeal Decision was consistent with the governing statutory and regulatory framework and the purpose of supply management. The decision is based on an internally coherent and rational analysis and is justified in relation to the facts on the record and the law. To use the language of para 99 of *Vavilov*, I find that this decision “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and ... is justified in relation to the relevant factual and legal constraints that bear on the decision.”

E. Was the portion of the COVID Decision which sought to restrict the use of credit days a policy decision, an administrative order or a directive?

[96] The Appeal Decision noted that the parties agreed that Alberta Milk has the power to make administrative orders and directions but did not agree as to whether the COVID Decision was a policy decision, an administrative order or a directive.

[97] HFL took the position that the COVID Decision was not an administrative order or directive, but a policy decision. It asserts that Alberta Milk did not have a credit-day restriction policy in place prior to the COVID Decision and could not implement the COVID Decision without first following a reasonable process of producer consultation and approval, notwithstanding the urgent circumstances.

[98] HFL asserted that neither Alberta Milk nor the Appeal Tribunal drew any meaningful distinction between a policy, an administrative order and a directive, which it says would have been “constructive and instructive”.

[99] In oral submissions, Alberta Milk argued that it has no obligation to consult producers in making administrative orders or directives and that the COVID Decision is an administrative order or directive. Alberta Milk argued that the COVID Decision is binding because if it is not complied with, the producer cannot be paid. Further, Alberta Milk argued that in an emergency situation, an elected producer Board does not have to consult with producers.

[100] The Appeal Decision noted Alberta Milk's position that the COVID Decision was an administrative order similar to those by which Alberta Milk issues incentive days. It noted that Alberta Milk's system of dealing with underproduction credits, whether in approval of transfers or restriction on their use, is established through its policies, which are administrative orders or directives and are set out in the Producer Handbook. The Appeal Decision also noted that the Policy Handbook "reserves the right to change under production credit transfer policies or procedures at any time."

[101] The Appeal Decision noted that there are no definitions in the *MAP Act* or the Regulations of any of the terms "policy", "administrative direction", "administrative order", "direction", "under production quota credit" or "credit days". However, the Appeal Tribunal acknowledged that Alberta Milk, with its broad regulatory powers, established the system of dealing with under production quota credits and the use of Credit Days through the Policy Handbook, which sets out Alberta Milk's orders and directives.

[102] The Appeal Tribunal determined that, given Alberta Milk's overarching mandate to manage the dairy industry in Alberta and the ability to implement administrative orders or directives to do so, it is counterintuitive for Alberta Milk to have the ability to issue credit days and approve the transfer of under production quota credits, but not to restrict their use, especially in light of Alberta Milk's obligation to respond to changes in the dairy industry. The Appeal Tribunal accepted the Review Decision that the 2-day credit restriction in the COVID Decision was an administrative order or directive as reasonable, considering the facts of the case and the applicable law.

[103] It is an agreed fact that the *MAP Act* authorizes Alberta Milk to make administrative orders and directives respecting the carrying out of any or all of its powers and duties in respect of the regulations it passes pursuant to the authority granted by the *MAP Act* and the *Plan Regulation*.

[104] The *Marketing Regulations* implements this by permitting most of Alberta Milk's powers to be carried out by directives or administrative orders, including section 16, "a licensed producer must deliver the producer's continuous daily quota in accordance with the directives and administrative orders of Alberta Milk" and section 22 "time frame set by a directive or administrative order of Alberta Milk."

[105] The *MAP Act* sections 26(3) and 27(6) state that the *Regulations Act* does not apply to an administrative order or directive of Alberta Milk.

[106] In *Johnston v Alberta (Director of Vital Statistics)*, 2008 ABCA 188 at para 17, the Alberta Court of Appeal held that the general rule is that regulations, rules, by-laws and orders are legally binding, but policy statements and guidelines are not, unless "[a] functional and purposive approach to the nature of [the] guidelines reveals that they are a form of law, akin to regulations": *Bell Canada v Canadian Telephone Employees Assn*, 2003 SCC 36, [2003] 1 SCR 884 at para. 37; *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at 6-7, 137 DLR (3d)

558; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 596, 114 DLR (4th) 385; *Skyline Roofing Ltd v Alberta (Workers' Compensation Board)*, 2001 ABQB 624, 292 AR 86 at paras 75-8.

[107] The COVID Decision has two parts. The first part, which imposes a 3% quota cut and a 2 Credit-Day Restriction, is imperative. The second part, while it provides frequently asked questions and answers, and is labeled “2 Credit-Day Restriction Policy”, is directive.

[108] In this case, the statutory and regulatory framework provides broad regulatory-making powers to Alberta Milk, as well as the power to execute its functions by orders and directives, to which the *Regulations Act* does not apply. There is legislative intent for Alberta Milk’s orders and directives to be immediate and binding. There is nothing in the legal and regulatory framework that requires consultation and adequate notice of producers for such administrative orders and directives exempted from the *Regulations Act*.

[109] Given the above context, the Record and the applicable law, I find reasonable the Appeal Decision that Alberta Milk’s overarching mandate to manage the dairy industry affords it the ability to issue the COVID Decision as an administrative order or directive, in response to the COVID emergency impacts.

F. Did the Board err in finding that the COVID Decision was not the product of undue influence, bias or conflict of interest?

[110] In its written brief, HFL indicated that it was no longer pursuing this issue. Accordingly, I need not address it.

G. Did the Board err in finding that the COVID Decision was not made in bad faith or in a conflict of interest?

[111] Like the previous issue, HFL also indicated that it is no longer pursuing this issue. Accordingly, it is not necessary for me to address it.

H. Did the Appeal Tribunal fail to address HFL’s claim that the COVID Decision was discriminatory and unfair?

[112] HFL asserts that the Appeal Tribunal failed to address HFL’s primary argument, namely that the COVID Decision was discriminatory and unfair. HFL’s 7th ground of appeal is stated as follows:

7. The Review Decision acknowledges the 2 Credit-Day Restriction in the Policy Decision specifically targeted producers utilizing leased quota through underproduction quota credits to practically bear the brunt of the production cuts required, and not all producers proportionately in accordance with their respective quota holdings (including leased quota) at that time. Thus, the COVID Decision was intentionally discriminatory and unfair.

[113] HFL asserted that the Appeal Decision was unreasonable because it failed to address this fundamental issue. It contends that this is sufficient to overturn the Appeal Decision. HFL argued that the crux of its appeal was that all milk producers must be treated equitably by the Alberta Milk Board. Equitable treatment means that the Alberta Milk Board cannot make decisions or implement policies that will significantly adversely impact dairy farms disproportionately. That is particularly so where the Alberta Milk Board is acutely aware of that disproportionate adverse impact on only some producers prior to making the decision or implementing a policy.

[114] HFL asserted that there were reasonable and equitable approaches the Alberta Milk Board could have considered, but it did not. An emergency is not an appropriate justification for severely discriminating against some dairy farmers for the benefit of other dairy farmers, when there are other, potentially less discriminatory options.

[115] Alberta Milk argued that the Appeal Tribunal addressed this issue in its conclusion that the April COVID Decision was not made in bad faith. It argued that the Appeal Tribunal found no evidence that the Alberta Milk Board targeted HFL and no evidence that any member of the Alberta Milk Board put their own interests ahead of the Alberta dairy industry as a whole.

[116] Alberta Milk argued that the Appeal Tribunal expressly acknowledged HFL's argument that the COVID Decision disproportionately impacted HFL and other similar producers at para 306 of the Appeal Decision. It submitted that the Appeal Tribunal found that the Alberta Milk Board made the April COVID Decision after considering a number of factors in a condensed time period and made a decision it thought was in the best interest of the industry as a whole.

[117] As I noted earlier in these reasons, HFL's Review Application before the Alberta Milk Board had two similar issues in (b) and (e), which were addressed separately in the Review Decision, but became conflated in the Appeal Tribunal's review of the Review Decision:

(b) The Decision is inequitable and discriminatory because it adversely affects disproportionately the Applicant in particular, and licensed milk producers generally (such as New Entrant producers) whose production operations rely to a significant extent on the availability of the unlimited credit-day quota leasing system that has successfully served Alberta milk producers, processors and consumers for many years.

(e) Insofar as the Board of Directors of Alberta Milk were aware of the adverse disproportionate effects the 2 Credit-Day Restriction would have on the Applicant and other like producers, yet made and implemented the Decision with the intent or expectation that those adverse disproportionate effects would be visited upon the Applicant, the Decision was made in bad faith.

[118] In sections E and F, the Appeal Decision summarized the Statement of Agreed Facts and the oral evidence of witnesses. These two sections include evidence on the discrimination claim.

[119] In section I, the Analysis, the Appeal Decision addressed sub-issues "(e) Did the Board err in finding that the April COVID Decision was not the product of undue influence, bias, or conflict of interest?"; and "(f) Did the Board err in finding that the April COVID Decision was not made in bad faith or in a conflict of interest?"

[120] Under these sub-issues, the Appeal Decision stated as follows in respect of HFL's discrimination claim:

306. Houweling Farms argued that Alberta Milk should have known that the April COVID Decision would have a disproportionate effect on Houweling Farms and other similar producers. Further, that Alberta Milk made the decision with the intent or expectation that these disproportionate effects would be visited on Houweling Farms. As such, the April COVID Decision was made in bad faith.

313. The Board found that the April COVID Decision was not inequitable nor discriminatory because it adversely affected Houweling Farms and other

producers who rely on the availability of the unlimited credit day quota leasing system.

314. In coming to this conclusion, the Board noted the difficult and urgent circumstances with which the Board was faced and noted that any decision made by Alberta Milk would have different effects on producers based on their business model.

315. The Board also noted that contrary to the allegations of Houweling Farms, the Board's concerns in April of 2020 were much larger than the operations of the specific farms and the decision was never focussed on specific farms. Rather the focus was on having an immediate impact on the production of milk in the system. This view was reiterated in oral evidence by Messrs. Boeve, Kootstra and Haarman.

323. Further, it was the evidence of Mr. Boeve that many of the Board members who supported the decision would also be negatively impacted by the decision.

324. The Appeal Tribunal finds that there was no evidence that any member of the Board of Alberta Milk put his or her own interests ahead of the interests of the Alberta dairy industry as a whole.

325. Rather, the evidence led indicated that some of the Board members who supported the April COVID Decision were negatively impacted by the decision.

326. There was also no evidence that indicated that in making the April COVID Decision, the Board specifically targeted Houweling Farms. Rather, the evidence submitted indicated that in making the April COVID Decision, the Board did not have access to the names of individual farms.

330. Alberta Milk witnesses testified that the majority of the Board believed that the April COVID Decision was best for the industry. This was despite the fact that the April COVID Decision was also difficult for some of the individual Board members' farms.

331. Alberta Milk argued that no decision by Alberta Milk would affect every producer in exactly the same way. The Board adopted what it thought was the most balanced approach given Alberta's flexibility - a quota cut mixed with a credit day restriction.

338. The Appeal Tribunal finds that while there may have been other decisions that the Board could have made, the Board considered a number of factors in a condensed time period, and made a decision that it thought was in the best interests of the Alberta dairy industry.

[121] In my view, it is clear from the Appeal Decision that the Appeal Tribunal was alive to HFL's discrimination claim and addressed it, albeit not separately. The Appeal Tribunal analyzed the discrimination claim together with bias, conflict of interest and bad faith, and applied a correctness standard to these issues.

[122] While the Appeal Decision on the discrimination claim is far from perfect, the Appeal Tribunal summarized and considered the appeal evidence, the arguments, and the Review

Decision in respect of the discrimination claim and, in confirming the Review Decision, rejected it.

[123] I have employed the *Vavilov* approach in reviewing the Appeal Decision throughout, to understand the reasoning process followed by the Appeal Tribunal to arrive at the conclusions it reached. In doing so, I find that the Appeal Decision on the discrimination claim, while interwoven in other issues in the Review Decision, was sufficiently transparent, intelligible and justified in relation to the relevant facts and law, and therefore reasonable. Once isolated from the other issues under which it was addressed, I find that the Appeal Decision on the discrimination claim has sufficient degree of rational and logical analysis and demonstrate a line of reasoning that leads to a reasonable conclusion.

[124] In arriving at this conclusion, I am guided by the Supreme Court of Canada’s statement in *Vavilov* at para 91 that “[a] reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do ‘not include all the arguments, statutory provisions, jurisprudence or other details that the reviewing judge would have preferred is not on its own a basis to set the decision aside...’.”

[125] My review of the Appeal Decision, in light of the history and context of the proceedings and the legal and regulatory framework in which it was rendered, indicate that the Appeal Tribunal conflated similar issues from the Review Decision under appeal and addressed them with other issues on a correctness standard of review. I find that the apparent shortcoming of the Appeal Decision, in addressing the discrimination claim together with other issues, is not, in fact, a failure of justification, intelligibility or transparency: *Vavilov* at para 94.

[126] I note that, at the start of its analysis in section I, the Appeal Tribunal described the materials it considered and what its Reasons represent. The Appeal Tribunal stated at paragraphs 227 and 228 of the Appeal Decision:

In reaching the determinations set out in this decision, the Appeal Tribunal has considered all relevant materials comprising the record of the hearing, including the testimony of witnesses, written submissions presented on behalf of Houweling Farms and Alberta Milk, together with the oral argument heard at the conclusion of the hearing. There can be no question, the length of the hearing, the breadth of the testimony and volume of materials covered all aspects of the issues in a comprehensive, detailed manner.

Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Appeal Tribunal’s reasoning relating to a particular matter and should not be taken as an indication that the Appeal Tribunal did not consider all relevant portions of the record with respect to that matter.

[127] Ultimately, the Appeal Tribunal confirmed the Review Decision, which addressed the Appeal Tribunal’s general issue of “whether the Board erred in confirming the April COVID Decision”.

[128] I did not find the recognized fundamental flaws that would make the Appeal Decision unreasonable: (a) a failure of rationality internal to the reasoning process; or (b) the decision is untenable in light of the factual and legal constraints that bear on it: *Vavilov* at para. 101.

[129] On the contrary, I find that the Appeal Decision on the discrimination claim was reasonable and justified on the facts, evidence, and the legal and regulatory framework in which the decision was made. I find that the Appeal Decision on the discrimination claim flowed from the Appeal Tribunal's findings on the earlier sub-issues: (a) that the Alberta Milk Board has broad regulatory mandate and the powers to issue the CDR, (b) which was not retroactive, (c) that the quota credits are not quota therefore can be regulated separately from quota, and (d) that COVID Decision was an administrative order or directive requiring no consultation with or notice to producers.

[130] The Appeal Tribunal then found no conflict of interest in the Board members as their composition was mandated by legislation, found no undue influence as the Western Milk Pool had no authority to allocate quota and the Board adopted the least restriction among other provinces. It found no bias in the individual board members as they were also affected.

[131] On discrimination, the Appeal Tribunal found that the Alberta Milk Board did not specifically target HFL, the Alberta Milk Board did not have access to the names of individual farms, the Alberta Milk Board noted that any decision made by Alberta Milk would have different effects on producers based on their business model, and no decision made by the Alberta Milk Board would affect every producer in exactly the same way. The Appeal Tribunal found that the Alberta Milk Board adopted what it thought was the most balanced approach. It accepted that while there may have been other decisions that the Alberta Milk Board could have made, the Alberta Milk Board considered a number of factors in a condensed time period, and made a decision that it thought was in the best interests of the Alberta dairy industry.

[132] I find that, effectively, the Appeal Tribunal rejected HFL's claim that the Alberta Milk Board erred in failing to find that the COVID Decision was discriminatory and unfair.

[133] Subsequent to this judicial review hearing, the Supreme Court of Canada released the companion cases of *Auer v Auer*, 2024 SCC 36 and *TransAlta Generation Partnership v Alberta*, 2024 SCC 37. In *TransAlta*, the Supreme Court stated at para 41 that administrative discrimination "relates to the drawing of distinctions between persons or classes that are discriminatory in a 'non-pejorative but most neutral sense of the word', in that they simply 'do not apply equally to all those engaged in the activity that is the subject of the enactment'."

[134] Given HFL's claim that the Appeal Tribunal failed to address its claim that the COVID Decision was discriminatory and unfair, and the parties' written and oral arguments before this Court that provided no legal authority on administrative discrimination, I thought it prudent to give the parties an opportunity to speak to the Supreme Court's definition of administrative discrimination. Each of HFL, Alberta Milk and the Appeal Tribunal filed a supplementary submission.

[135] All parties took the position that *Auer* and *TransAlta* are of limited application to this case. They correctly point out that the issue before the Supreme Court of Canada in both of those cases was the *vires* of subordinate legislation. They all agree that, in this case, HFL does not dispute the *vires* of any of the relevant enactments. Rather, its complaint is about the COVID Decision, an administrative decision made by the Alberta Milk Board and that has undergone internal administrative review and an appeal. All the parties agree that none of them argued that the COVID Decision was subordinate legislation.

[136] HFL's supplementary submission exceeded the required scope of commenting on *Auer* and *TransAlta*. I decline to consider HFL's comments and arguments on *Doré v Barreau du Québec*, 2012 SCC 12.

[137] The onus is on HFL to prove that the Appeal Decision failed to address its discrimination claim and, if it did, that the Appeal Decision was unreasonable. HFL has not met that onus.

IX. Conclusion

[138] For the reasons set out above, I find that the Appeal Decision addressed all the issues raised by HFL before the Appeal Tribunal and that the Appeal Decision was reasonable.

[139] HFL's Application for judicial review is dismissed.

[140] Notwithstanding this conclusion, I address the remedy sought by HFL. In its written brief, HFL referred to section 23 of the *Review and Appeal Regulation*, and sought the following:

Houweling Farms respectfully requests the court set aside the Appeal Decision, rescind the COVID Decision on the basis of lack of jurisdiction, or because it is inequitable, and as considered appropriate refer the matter back to the Appeal Tribunal or Alberta Milk with directions and recommendations that they must compensate Houweling Farms adversely impacted by the decision in a fair and reasonable manner commensurate with their financial losses, the amount to be determined in the Statement of Claim.

[141] Both Alberta Milk and the Appeal Tribunal objected to this proposed remedy. Alberta Milk argued that compensation is not a remedy available on judicial review, nor is it consistent with the scheme of the *Act* or *Regulation*.

[142] The Appeal Tribunal argued that by asking this Court to rescind the COVID Decision, the Applicant is asking this Court to substitute its own opinion for the opinion of the Appeal Tribunal that the COVID Decision should be confirmed. The Appeal Tribunal then points to the Supreme Court of Canada's statement at para 142 of *Vavilov* that this substitution of opinion is appropriate only in the limited circumstance when it "...becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose...".

[143] The Appeal Tribunal also objected to HFL's request for damages, noting that the Appeal Tribunal is not named as a party in HFL's Statement of Claim and that damages were not sought in the Originating Application for judicial review.

[144] I agree with Alberta Milk and the Appeal Tribunal that ordering compensation would not be appropriate in these circumstances.

[145] Alberta Milk shall have its costs of this judicial review Application pursuant to the appropriate column on Schedule C of the *Alberta Rules of Court*. Pursuant to its request, no costs are payable to the Appeal Tribunal.

Heard on the 23rd day of February, 2024, additional written submissions December 23, 2024.
Dated at the City of Calgary, Alberta this 16th day of April, 2025.

C.B. Thompson
J.C.K.B.A.

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