IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING THE NON-RENEWAL OF A TRANSPORTER AGREEMENT

BETWEEN:

PAN-O-RAMIC FARMS (1990) LTD.

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

VEDDER TRANSPORT LTD.
AGRIFOODS INTERNATIONAL COOPERATIVE LTD.
BC MILK PRODUCERS ASSOCIATION
HAPPY DAYS DAIRIES LTD.

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine J. Elsaesser, Vice Chair Satwinder Bains, Member Wayne Wickens, Member
For the Appellant	David L. Schaefer, Counsel
For the Respondent	Robert Hrabinsky, Counsel
For the Intervenors	
Vedder Transport Ltd.	Steve Islaub, Vice President–Operations
Agrifoods International Cooperative Ltd.	Myron Glatt, General Manager
BC Milk Producers Association	Louis Schurmann, Director Heather Douglas, Executive Director
Happy Days Dairies Ltd.	Donat Koller, President
Date of Hearing	May 25, 2004
Place of Hearing	Kelowna, British Columbia

INTRODUCTION

1. Pan-O-Ramic Farms (1990) Ltd. ("Pan-O-Ramic") is appealing the decision of the British Columbia Milk Marketing Board (the "Milk Board") to not renew its Transporter Agreement (the "Agreement") to the British Columbia Farm Industry Review Board (the "Provincial board"). This appeal raises the issue of whether the Milk Board has a duty to act fairly prior to notifying a Transporter that the Agreement will not be renewed. As stated in our May 20, 2004 interim decision (P. 2):

> The Appellant appealed to the Provincial board under s. 8(1) of the *(Natural Products Marketing (BC) Act)* on the basis that the Milk Board did not notify the Appellant in advance as to what were the "overall performance matters" of concern, thus denying the Appellant the opportunity to respond to those concerns before the decision was made.

2. Pan-O-Ramic applied for a stay of the Milk Board's decision pending appeal. On March 31, 2004, the Panel granted the stay application. In the same decision, the Panel dismissed a cross application by the Milk Board for an order summarily dismissing the appeal. The Milk Board argued that its decision to give notice to not renew a Transporter Agreement did not render the Appellant "aggrieved or dissatisfied" within the meaning of s. 8(1) of the *Natural Products Marketing (BC) Act*, (the "*Act*"). It cautioned that the Provincial board would be descending down a "slippery slope" if it chose to make "private contracts freely entered into" the subject of an appeal. For the reasons given in that decision (pp. 7-8), the Provincial board held that the Milk Board's decision is reviewable:

> The sole finding we make at this stage is that this is an appealable decision, and that the appeal does not meet the test for summary dismissal.

3. On April 19, 2004, the Milk Board wrote the Provincial board, referring to various facts not previously referenced and submitting that the reviewability of its decision should be open to further argument. On May 20, 2004, the Panel ruled as follows (p. 3):

> We … recognise that it is somewhat unusual to agree to allow further argument on a point addressed in previous reasons. However, the argument so vigorously advanced before us by the Milk Board is novel and has not been expressly raised in any previous appeal decision. This issue raises fundamental questions involving the appellate jurisdiction of the Provincial board and its relationship with commodity boards. A final decision on such a jurisdictional question should not be advanced in the context of a "stay" or "summary dismissal" application on a simple exchange of letters. Such a decision should have the benefit of the complete argument before the Panel ensuring the fullest opportunity to properly interpret the jurisdiction conferred upon us by the Legislature, and ensuring that any reviewing court will not be confronted with the disadvantage of encountering entirely new arguments regarding our jurisdiction that were not advanced before us.

4. Our May 20, 2004 decision ordered that the parties address this issue at the hearing of the appeal. The Panel advised as follows (p. 5):

A careful review of all the submissions suggests that the parties might be assisted by the following summary of the issues arising from their arguments:

- Did the Milk Board have a duty to give the Appellant notice and an opportunity to be heard before advising the Appellant that it would not renew the Agreement, and if so (a) what is the source of that duty, and (b) was that duty satisfied in this case?

- Did the Milk Board's action of refusing to renew the contract adversely affect the transporter licence, and if so how? If the transporter licence was adversely affected by the Milk Board's action, did the Milk Board, despite the contract language, have jurisdiction under the *Act* and the *Milk Marketing Regulation* to adversely affect the licence without a reason grounded either in the conduct of the transporter or other regulatory reasons such as the need to rationalize services?

- If the Milk Board is limited by the requirement that it was not entitled to take this action without reason, were the "overall performance matters" referred to by the Milk Board the actual reason or sufficient reason, or should the Provincial board grant a remedy as a matter of law or sound marketing policy?

5. At the outset of our hearing, the Milk Board's position regarding these issues was described as follows:

> …the Milk Board reiterates that it relies only on Section 15 of the Transporter Agreement as the basis for the notice given to the appellant that the Milk Board had elected not to renew the contract without cause or other reason for so doing. The Milk Board simply does not rely on any element of cause or other reason for that election.
>
> Should the FIRB rule that the Milk Board cannot rely on the provisions of the Transporter Agreement and that there must be reasons not to elect to renew the contract which must be communicated to the appellant so as to provide an opportunity to respond, then the appellant would necessarily succeed on its appeal.

6. Vedder Transport Ltd. ("Vedder"), Agrifoods International Cooperative Ltd. ("Agrifoods") and the BC Milk Producers Association ("BCMPA") were granted Intervenor status to appear in support of the Milk Board on this appeal. Happy Days Dairies Ltd. ("Happy Days Dairies"), a small dairy which relies on the Pan-O-Ramic's services to transport goat milk, was granted Intervenor status in support of the Appellant.

BACKGROUND

7. Pan-O-Ramic has operated as a transporter of milk in the interior of BC since 1999. Its operation consists of yard facilities with a tank trailer washer, a tractor-trailer unit and a food grade milk trailer. At the time of the hearing, it employed three drivers and was picking up milk for several small dairies from seven dairy farms regulated by the Milk Board as well as goat milk from three goat farms for the Happy Days Dairies operation.

8. Transporters require two licences. The first is a Tank Milk Receiver Licence issued by the Minister of Agriculture, Food and Fisheries under s. 12(1)(b) of the *Milk Industry Act*. Section 54 of the *Milk Industry Standards Regulations*, BC. Reg.

464/81 provides: "No person shall operate a tank truck for transporting milk unless the tank of that truck is certified by an inspector as conforming to 3A Standards and a permit is issued for that tank." The second licence required is a Transporter Licence issued by the Milk Board pursuant to its *Consolidated Order*, enacted pursuant to the *British Columbia Milk Marketing Board Regulation*, B.C. Reg. 167/94 (the "*Scheme*").

9. Upon commencing its business, Pan-O-Ramic acquired its licences and contracted directly with several small dairies for the pick-up and transportation of milk.

10. In the spring of 2001, Agrifoods International Co-operative Ltd. ("Dairyworld") was sold to Saputo Inc. ("Saputo"). Saputo announced that it would not assume responsibility for the transportation of milk to its plants. This was a major change for producers as historically Dairyworld handled its own freight.

11. In response to Saputo's decision, the Milk Board made the significant regulatory decision that effective October 1, 2001, it would become the "first receiver" of all milk. Subsequently and further to the Milk Board's power to "promote, regulate and control" milk transportation "in any and all respects" found in s. 7(1) of the *Scheme*, it developed an equalisation program to address the costs of milk transportation within the province.[1]

12. The Milk Board's decision to become first receiver required the exercise of regulatory judgment to ensure that the milk it purchased was collected and properly transported from dairy farms to processors. As the hearing evidence demonstrated, transportation is an essential link in the regulated milk marketing chain. To this end, the Milk Board made the further regulatory decision, as expressed in s. 7 of its *Consolidated Order*, that any holder of a Transportation Licence must, as a condition of that licence, enter into an Agreement with the Milk Board.

13. Part II of the *Consolidated Order* is concerned with the licensing of persons regulated in the supply managed milk industry. Section 4(1) states as follows:

> 4(1) No Person shall act as a Vendor, Producer, Producer Vendor or *Transporte*r unless in possession of a *Valid Licence* issued by the Board…
> [emphasis added]

14. Section 3 defines "Transporter" to mean "a Person who owns or operates a vehicle or vehicles for the transportation of milk in bulk." Section 3 defines "Valid Licence", as follows:

> "Valid Licence" means a current and subsisting licence of the applicable class issued by the Board to a Person *in good standing with respect to each and every requirement therefor*.
> [emphasis added]

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[1] The Milk Board's equalisation program was subsequently appealed to the Provincial board, and was the subject of an extensive hearing and recent appeal decision: *Northern Interior Dairyman's Assn. v. British Columbia Milk Marketing Board et al* (January 19, 2004, British Columbia Marketing Board).

15. Section 7(e) then states:

> 7. The Board may issue annual licences as follows:
>
> (e) Class "H" Transporter Licence and Class "H-FED" Transporter Licence to a Transporter who:
>
> (i) has a valid and subsisting tank milk receiver licence issued under the *Milk Industry Act*;
> (ii) transports or delivers milk only from Persons who are licensed by the Board;
> (iii) employs only tank milk receivers who comply with the provisions of the current Manual for Tank Milk Receivers in British Columbia prepared by the ministry responsible for the enforcement of the *Milk Industry Act*; and
> (iv) *has entered into a written agreement with the Board concerning the terms and conditions of transport*.
> [emphasis added]

16. Thus, a written agreement with the Milk Board is a precondition to obtaining a Transporter Licence. Further, if a person is not "in good standing" with regard to that requirement, he does not hold a Valid Licence in the eyes of the Milk Board. If the Agreement ends, the Transporter Licence is not valid. The Milk Board's insistence at our hearing that the Appellant's Transporter Licence "is in good standing" even though the Milk Board has ended the Agreement runs contrary to the language and purpose of the *Consolidated Order*.

17. The inextricable link between the Transporter Licence, the Agreement and the Milk Board's regulatory responsibilities is reflected in the recitals to Pan-O-Ramic's Agreement:

> WHEREAS:
>
> A. The Board is a marketing board continued pursuant to section 3 of the *British Columbia Milk Marketing Board Regulation* (B.C. Reg. 167/94) made under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330;
>
> B. The Company owns or operates a vehicle or vehicles for the transportation of Milk in bulk;
>
> C. Pursuant to the Board's *Consolidated Order*, as amended from time to time, no Person shall act as a Transporter unless in possession of a current and subsisting licence of the applicable class issued by the Board to a Person in good standing with respect to each and every requirement therefor; and
>
> D. Pursuant to the Board's *Consolidated Order*, as amended from time to time, the holder of a Class "H" and Class "H-FED" Transporter licence must, with respect to the transportation of Milk other than Commercial Export Milk, enter into a written agreement with the Board concerning the terms and conditions of transport;
>
> NOW THEREFORE the parties hereto agree as follows….

18. The Agreement contains various terms, including paragraphs 3 and 4, which impose obligations on the Company to "attend at the dairy farm of such Producers [or other location] *as may be assigned to the Company by the Board* from time to time…" and

paragraph 9 which requires the Company to "*abide by all Board directions*", and to "abide by all applicable provisions of the *Milk Industry Act*, the *Natural Products Marketing (BC) Act*, … and the Board's *Consolidated Order*, all as amended from time to time." Paragraph 14 provides that the Milk Board will in turn pay the company at rates determined under Schedule "A" of the Agreement. The language of these paragraphs, when read with the recitals, confirms that the terms of the Agreement are a regulatory mechanism by which the Milk Board ensures the regulatory objective of seamless and efficient transportation of milk in the milk marketing chain. In his evidence, Pan-O-Ramic's President Rod Palfrey confirmed that the Milk Board has issued directions to Pan-O-Ramic changing its routes and also advising Pan-O-Ramic that if it wished to buy bigger trailers, milk would be made available to fill them.

19. It is also useful in this context to describe the way in which the Agreement was developed. As noted by Mr. Palfrey, whose evidence we accept on this point, the Milk Board presented the Agreement to Pan-O-Ramic. After reviewing the Agreement with its lawyer, Pan-O-Ramic advised the Milk Board that it was concerned with the 60-day notice of non-renewal provision. Mr. Palfrey asked if the Agreement could be changed: "And I was told was sign it or don't go to work. So we didn't really have a lot of choice."

20. It is interesting to note at this point that other Transporters are not subject to this provision. The two Transporters intervening in this appeal, Vedder and Agrifoods confirmed that they also objected to the 60 day notice of non-renewal provision in the Agreement originally presented to them. Agrifoods operated for approximately two years without an Agreement and only recently signed a revised Agreement with a one year notice provision. In the case of Vedder, Steve Islaub's recollection was a little fuzzy but he believes that while Vedder did sign the Agreement as it was required to do so by regulation, it did so on the understanding that the Agreement was interim and that a better deal would be forthcoming. Recently, Vedder signed a revised Agreement with a one year notice of non-renewal provision.

21. The notice provision, contained in paragraph 15, states that the Agreement operates on three-month terms, and "shall automatically be renewed" unless either party gives two months notice of non-renewal. Paragraph 16 provides that the Agreement may also be terminated at any time on notice being given of any of the circumstances set out in that paragraph:

> **Commencement and Term**
>
> 15. This Agreement shall come into effect on October 1, 2001 and, subject to the terms hereof, shall continue for a term of 3 months and thereafter shall automatically be renewed for further consecutive terms of 3 months each unless either party gives to the other written notice of non-renewal at least 2 months prior to the end of the current term.
>
> **Termination**
>
> 16. This agreement may be terminated by notice in writing given to the Company by the Board:

(a) in the event of any default by the Company of its obligation to abide by any Board direction regarding the transportation of Milk, or its obligation to abide by any applicable provision of the *Milk Industry Act*, the *Natural Products Marketing (BC) Act*, or the Board's *Consolidated Order*, all as amended from time to time;
(b) in the event that the Company has notified the Board of any possible or impending strike by the Company's employees, agents or Operators;
(c) upon the attempted assignment by the Company of this Agreement or any of its rights or obligations hereunder without the previous written consent of the Board; or
(d) in the event that the Company ceases to function as a going concern, or otherwise continues to operate through a receiver appointed with respect to it, or in the event that the Company makes a proposal or an assignment for the benefit of creditors.

22. A careful review of these provisions reveals how simple it would have been to insert these terms and conditions (including the termination provisions) into the Transporter Licence. Read as a whole, the obligations imposed on the Appellant are not standard "commercial terms"; they are regulatory requirements.

23. The Milk Board pays out money to Transporters (Agreement, para. 14) in the order of $12 million annually. Out of this $12 million, Pan-O-Ramic will receive about $200,000 annually since a directed route change in April 2004.

24. Just as the Milk Board exercises the regulatory power to dictate the price of milk, the Milk Board could very easily have established the rate it would pay to compliant Transporters (see Agreement, Schedule "A") in its *Consolidated Order*, or within the Licence itself. However, the Milk Board concluded that, because it was paying out money, it was better to structure these arrangements by entering into "agreements". The Milk Board wished to have the added advantage of contractual remedies available through court enforcement.

25. It is one thing to frame a regulatory relationship in the form of an agreement so that the Milk Board can gain court enforcement rights. It is quite another to assert, as does the Milk Board, that the contractual relationship is outside the regulatory relationship, and that when it acts under a contract whose terms it has determined, the Milk Board is immune from the public law duty of fairness and appellate review.

26. Pan-O-Ramic operated under the terms of the Agreement from September 2001 to January 2004. However, by letter dated January 22, 2004, the Milk Board advised Pan-O-Ramic that:

> Consistent with Section 15 of the agreement commonly referred to as the Transporter Contract…notice is hereby provided that the "agreement" will not be renewed at the end of the current term – March 31, 2004….
>
> The reasons for the BCMMB deciding that the "agreement" is not to be renewed are best characterized as ones that pertain to overall performance matters.

27. Prior to receiving this letter, Pan-O-Ramic received no notice of any concerns relating to its provision of services under the Agreement. When Mr. Palfrey

contacted Milk Board staff about the matter, he was told that he would not have an opportunity to appear before the Milk Board. Rather, he was told to contact the Provincial board and file an appeal.

28. Pan-O-Ramic appealed the Milk Board's decision by a letter dated February 19, 2004.

SUBMISSIONS OF THE APPELLANT

29. The Appellant's primary position is that the Milk Board owed Pan-O-Ramic a duty of fairness before making the decision not to renew the Agreement. The Appellant submits that the duty arises because the effect of the decision was to revoke the Transporter Licence. The Appellant then goes further and argues that as the *Act* (s. 11(1)(i)) does not permit the Milk Board to cancel a licence without cause, paragraph 15 of the Agreement is *ultra vires* the Milk Board. It should be severed as an attempt by the Milk Board to contract out of its legislative power.

30. The Appellant says that the duty of fairness applies whether or not the decision is simply as an exercise of "contractual rights". It has serious and final financial consequences to the Appellant and because the contract, properly viewed, is an exercise of the Milk Board's regulatory power.

31. The Appellant also says that even if this duty does not arise by virtue of the doctrine of procedural fairness that would arise on judicial review, it can be imposed as part of the Provincial board's statutory appeal role. The *Act* gives the Provincial board an absolute supervisory role over all commodity board decisions; as this involves a full hearing on the merits, this is different standard from judicial review.

SUBMISSIONS OF THE RESPONDENT

32. In addition to relying on its earlier submissions dated May 10 and 13, 2004, the Milk Board argues that the Provincial board must determine this appeal according to the same principles that would govern a court on judicial review. The Milk Board argues that the Provincial board has no jurisdiction to determine the rights and obligations of parties to a contract as between themselves and that is precisely what the Appellant's appeal invites.

33. The Milk Board submits that a public body exercising contractual powers is not subject to review on public law grounds except where (a) the question is whether the contracting authority has exceeded its powers, or (b) the contract is not truly commercial but is merely "superfluous" to the rights and obligations prescribed by statute.

34. The Milk Board argues that the Agreement here cannot properly be characterised as a form of regulation by contract. According to the Milk Board, regulation is inconsistent with the payment of money. Payment of these sums entitles the Milk Board to enforceable contractual rights. The Milk Board also submits that while the

regulatory requirement to have a contract as a licence pre-requisite would properly be subject to appeal, the terms and conditions of the Agreement itself are not regulatory, any more than they were before the Milk Board became the first receiver of milk. The Milk Board argues that: "the essential commercial character of the arrangement remains unchanged".

SUBMISSIONS OF THE INTERVENORS

35. The Intervenors made submissions with respect to the operational impact of the Milk Board's decision as opposed to the legality of the decision.

Happy Days Dairies Ltd.

36. Mr. Koller, the President of Happy Days Dairies attended at the hearing and spoke in support of the Appellant. If the Milk Board's decision is upheld and the Appellant ceases to be a Transporter of milk, Happy Days Dairies will be significantly impacted. Currently, the Appellant hauls goat milk from three producers to the Happy Days Dairies' Salmon Arm plant. Goat milk production occurs on a small scale and as such it is not cost effective for the producer or Happy Days Dairies to do their own hauling and meet the rigorous standards set by the Milk Board.

37. The Appellant, who already operates as a Transporter with a food grade milk trailer can haul goat milk every second day when the truck is not needed to haul cow milk. Without the Appellant, Happy Days Dairies will have few options for hauling its goat milk.

Vedder Transport Ltd.

38. Vedder supports the Milk Board's decision to not renew the Appellant's Agreement. During the course of the appeal and in response to suggestions by the Milk Board of alleged infractions by Pan-O-Ramic, Mr. Palfry suggested that Vedder, the Transporter replacing Pan-O-Ramic, had also committed certain alleged infractions. Mr. Islaub on behalf of Vedder took issue the Appellant's allegations of improper conduct stating that Vedder has worked hard at maintaining and keeping its reputation in the food industry.

39. Mr. Islaub disagrees with Pan-O-Ramic's suggestion that a smaller Transporter can react better, stating instead that a Transporter with more capacity and more units has more flexibility.

Agrifoods International Cooperative Ltd.

40. Agrifoods also supports the Milk Board's decision. It submits that the Milk Board has to retain the authority to control contracts for hauling in British Columbia including the ability to terminate contracts on terms agreed to. The Milk Board

must be able to act is in the best interests of the dairy industry and not just the individual hauler. If the Marketing Board is limited to only terminate haulers for cause, it severely limits their ability to maintain an efficient hauling system.

BC Milk Producers Association

41. Louis Schurmann, a long time dairy producer, spoke on behalf of the BCMPA. The BCMPA supports the Milk Board's decision to not renew the Agreement with Pan-O-Ramic. The BCMPA relies on the Milk Board to act as its agent to transport milk from the farmgate to processing plants and on to the consumers. Since producers pay the bills, they expect a Transporter to have the same dedication to shipping the milk in a timely and safe manner while ensuring the highest safety, environmental protection and public health standards. The BCMPA also supports the Milk Board's right to negotiate, cancel, and/or not renew an Agreement with any Transporter who fails to meet these stringent requirements.

42. The BCMPA believes that it is good public policy to reduce red tape and manage transportation needs through contracts rather than introducing a new regulatory regime which producers will end up paying for.

DECISION

43. The Panel finds that the Milk Board had a duty to give the Appellant fair notice and an opportunity to be heard before taking the step of not renewing the Agreement. Our reasons for this decision are set out below.

Analysis

44. We begin our analysis by recalling that marketing boards are fundamentally instruments of public policy existing to carry out the purposes of regulated marketing. They are assigned the task of regulating a very specialised economic sector. The overriding public policy is set out in section 2(1) of the *Act*:

> 2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, *transportation*, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.

45. To achieve this statutory policy, the Legislature granted the Lieutenant Governor in Council the power to establish schemes "for the promotion, control and regulation in British Columbia of the production, *transportation*, packing, storage and marketing of natural products", see s. 2(2)(a). One such scheme creates the Milk Board. To ensure that the Milk Board can properly administer its *Scheme* and carry out its objects, the Milk Board is granted the powers listed in s. 7 of the *Scheme*:

> 7(1) Subject to subsection (2), the board is vested with the power to promote, regulate and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of a regulated product within British Columbia, including the prohibition of

production, transportation, packing, storage and marketing, or any of them, in whole or in part, and is vested with all powers necessary or useful in the exercise of those powers.

(1.1) Without restricting subsection (1), the board is vested with the powers set out in section 11(1)(a) to (v) of the Act.

46. Subsection 11(1) of the *Act* lists the following powers that a commodity board may be granted in relation to transportation:

> 11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:
>
> (a) to regulate the time and place at which and to designate the agency through which a regulated product must be … transported…,
>
> (b) to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be transported … by a person at any time,
>
> (c) to prohibit the … transportation … of a grade, quality or class of a regulated product…
>
> …
>
> (f) to require persons engaged in the … transporting … of a regulated product to register with and obtain licences from the marketing board or commission,
>
> …
>
> (i) to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;
>
> (j) to require full information relating to the … transporting … of a regulated product from all persons engaged in those activities, to require periodic returns to be made by those persons and to inspect the books and premises of those persons;
>
> …
>
> (m) subject to section 16(2)(b), to require the person in charge of a vehicle or other form of conveyance in which a regulated product could be transported to permit a member or employee of the marketing board or commission to search the vehicle;
>
> (n) to seize and dispose of any regulated product … transported … in violation of an order of the marketing board or commission.

47. As noted in two recent Court of Appeal decisions: "The Legislature conferred powers of essentially unlimited scope on the Lieutenant Governor in Council which has in turn has conferred those same powers … on the Marketing Board. That the Lieutenant Governor in Council, in s. 4.01 of the Scheme, enumerated specific powers does not take away from the breadth of the opening words of that section": *Money's Mushrooms Ltd. v. British Columbia (Marketing Board)*, 2001 BCCA 453, at paras. 28, 29; *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd.*, 2003 BCCA 356 at para. 10. At paragraph 27 of the *Sunrise* decision in Supreme Court, Mr. Justice Tysoe stated: "The common law right to trade freely has been taken away by clear language in the *Scheme*."

48. Marketing boards have been given sweeping regulatory powers and numerous tools by which to exercise these powers. These tools include granting licences [*Act*, s. 11(1)(f)], issuing general and specific orders [s. 11(1)(q)], and even purchasing a regulated product in relation to which it may exercise its powers: s. 11(1)(r). Thus,

while marketing boards are granted "the power and capacity of a legal person" [s. 10(2)], they are not private corporations. Marketing boards exist, under the supervision of the Provincial board, for the purpose of carrying out their statutory mandate:

> 10(1) In accordance with section 2, the Lieutenant Governor in Council may provide for the establishment of a marketing board to administer, under the supervision of the Provincial board, regulations for the marketing of a regulated product.

49. Marketing boards are not private sector businesses. They generate revenues through levies imposed on those subject to regulation. When they enter into contracts to spend money, they are spending levy monies exacted from those subject to regulation. When, added to this, they pass a law requiring a licenced actor to contract with the board as a condition of licensing, dictate the terms of that contract and impose obligations on the licenced actor, this strong regulatory flavour is indicative that this is not an ordinary commercial contract.

50. We have focused on the nature, character and purpose of marketing boards because we do not accept the Milk Board's argument that the "contractual" nature of its arrangement with the Appellant takes this matter outside our scope of review. While the fact that the Milk Board has entered into a "contract" is relevant in deciding whether its actions are open to appeal to the Provincial board, one cannot focus on the "contract" divorced from the identity and character of the Milk Board as contractor, and even more importantly, from the purpose of the contract in relation to the other contracting party. The fact that the Milk Board must, for internal management purposes, hire janitors to clean its offices and accountants to keep its books is unhelpful and even misleading in determining whether, in a contract used for a regulatory purpose, the Milk Board is open to appellate review or subject to the unique duties that apply to public as opposed to private bodies.

51. We turn now to consider the reviewability of contracts used for regulatory purposes. In Brown and Evans, *Judicial Review of Administrative Action in Canada* (Looseleaf, 2004) (p. 1-33) it is noted that under the law of judicial review, public bodies are subject to public law duties when they enter into contracts that are used to advance distinctly governmental objectives:

> Not all decisions of statutory or public bodies are subject to judicial review by way of the prerogative remedies or under the *Judicial Review Procedure Acts*. Indeed, notwithstanding the statutory origin of all powers exercisable by public bodies, courts have usually declined to review decisions which can be characterized as "commercial" as opposed to "public", on the ground that when exercising powers flowing from their contractual capacity, public bodies are not acting in a governmental capacity….
>
> More recently, however, it has been recognized that contract can be used to advance distinctly governmental objectives. Moreover, since a public authority's powers, including those with respect to contracts, are legally limited and exercisable only for statutorily authorized purposes, and since they involve the expenditure of public funds or other public assets, in principle they would seem to be subject to the courts' supervisory jurisdiction.

> Thus in one case a chambers judge's refusal to deal with decisions as to the designation as a Northern Business was reversed on the ground that "the Business Incentive Policy Monitoring Office, its officers and the committees created by the policy were part of the machinery of government decision-making." As well, it has also been held that *certiorari* will issue to quash for procedural unfairness the award of a contract made pursuant to a statutory tendering process. Similarly, an English court has quashed a legal aid contract awarded to solicitors to represent plaintiffs in a class action, for lack of procedural fairness.
>
> *Courts can be expected to apply the same reasoning to the exercise of powers by public authorities relating to their property, including the making of contracts to acquire or dispose of interests in property, especially where they are conferred expressly by statute and affect the interests of individuals and the wider public*. [emphasis added]

52. One of the cases cited by Brown and Evans is *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming & Liquor Commission)* (1999), 18 Admin. L.R. (3d) 121 (Alta. Q.B.). We cite this case not only because of its facts, but because it contains a very helpful summary of the relevant case law. The dispute in *Oil Sands Hotel* arose out of a decision by the Alberta Gaming Commission to deliver notices canceling Video Lottery Terminal ("VLT") Retailer Agreements it had previously entered into with certain Alberta hotels and restaurants, including the Petitioner. The cancellation notices were targeted at businesses in municipalities that held plebiscites voting against VLTs in their communities. The Premier of the Province had previously announced that he would honour those plebiscite results, even though there was no legal basis for Government to require the Gaming Commission to do so.

53. The Gaming Commission terminated various Retailer Agreements under a termination provision allowing it to do so "*without cause or reason* on seven (7) days notice to the casino gaming retailer". The Gaming Commission argued in Court that its termination notice was not open to challenge or review (para. 12):

> The Commission states this matter is simply an issue of contract between it and the various Applicants and as the Retailer Agreement provides for seven day termination for any reason on either side, that it has acted within its contractual rights. Its actions are therefore not subject to judicial review. It submits that this characterization of its actions as being solely of a contractual nature, and as distinct from its other regulatory or quasi-judicial functions, has been carefully crafted into the Act.

54. The Court rejected this argument. After examining the Commission's enabling statute, the Court held as follows at paras. 20-21:

> Although it is true that there are no words of licence or regulation specifically connected to authorizing VLTs, in my view that does not establish this function as purely commercial. The statutory basis and flavour of the Commission's VLT authorization function is clear.
>
> While the Retailer Agreements are phrased in and contain contractual terms, they cannot be said to be just negotiated agreements. A statutory monopoly has been created. A statutory monopoly has been created and the agreement itself recognizes that the Commission conducts, operates and manages a VLT scheme pursuant to provincial legislation and further by authority of the Criminal Code. Whatever this document is called, it amounts to an authorization, privilege or licence granted by a statutory body pursuant to statutory power. The VLT

> Agreement is merely the instrument chosen by the Commission to exercise its statutory authority over the use of VLTs in Alberta. The Commission cannot immunize itself from judicial review by this merely formal choice and cannot immunize itself by the phrasing of its statutory authorization or its termination power.

55. The Court held that the Retailer Agreements were subject to judicial review, and on judicial review the Court could scrutinise the Gaming Commission for failing to properly exercise its jurisdiction, despite the wording of the termination provisions. The Court did not confine itself to asking whether the Gaming Commission had the jurisdiction to enter into the Retailer Agreements. In administrative law, "jurisdiction" is broader than that. Thus, one such jurisdictional requirement is the duty not to exercise discretion arbitrarily or under the dictation of another: paras. 22-43. Another jurisdictional requirement is the public law duty to grant procedural fairness where a decision affects the rights, privileges or interests of an individual: paras. 44-50. The Court in *Oil Sands Hotel* found that the Gaming Commission breached both duties and set aside the termination notices.

56. *Oil Sands Hotel* makes clear that a public body cannot contract out of its public duty to act within jurisdiction even after it has entered into a contract that has a regulatory basis and flavour. This is common sense. A public body acting to carry out distinctly governmental objectives should not be allowed to enlarge its jurisdiction by purporting to negotiate (or as in this case, to require) contractual terms that allow it to act arbitrarily or unfairly toward those it is regulating.

57. The Milk Board submits that the *Oil Sands Hotel* decision is "not particularly surprising", because the Retailer Agreement was merely "regulation in the guise of a contract". The Milk Board submits that the present case is totally different. The Agreement between the Milk Board and its Transporters "is a commercial bargain of the truest kind":

> The relationship between the Milk Board and transporters, in their capacity as service providers to the Milk Board, is qualitatively different from instances in which a public body "regulates by contract". For example, a public body might "regulate by contract" by taking a signed undertaking and declaration from a person in place of a licence, the terms of which would otherwise have been set out in an order or regulation made by the public body. Such instances of "regulation by contract" have been considered by the BCFIRB on past occasions. The obvious difference between such instances of "regulation by contract" and the transportation agreements now under consideration is that in the latter case, the arrangement requires the payment of millions of dollars by the Milk Board to the transporters with whom it contracts. To suggest that the arrangement between the Milk Board and transporters in their capacity as service providers is "regulatory" in nature would beg the question: why then is the Milk Board paying these substantial sums? Clearly, the arrangement between the Milk Board and transporters as reflected in the transportation agreements could not possibly be reduced to "regulation". It is inconceivable that transporters would provide services unless they receive payment in consideration thereof. It is equally inconceivable that the Milk Board would pay these sums unless it acquires enforceable, contractual rights (including the right to elect to give notice of non-renewal without cause) in consideration thereof. This "bargain", if it is to have any meaning at all, must be enforceable according to the common law of contract.

58. The Milk Board also makes the following submission in relation to the passage from Brown & Evans quoted above:

> First, "commercial", contractual rights and obligations are not subject to review on public law grounds unless the question is whether the contracting authority has exceeded its powers. This is the exception referred to by the learned authors above where it is stated that "a public authority's powers … with respect to contracts are legally limited and exercisable only for statutorily authorized purposes." Further, where the contract is not truly "commercial", but is merely superfluous to rights and obligations prescribed by statute, or merely an attempt to regulate by means of a contract, the terms of which could otherwise have been set out in a licence, order or regulation made by the public body, the matter is properly subject to review on public law grounds. This is the exception noted by the learned authors above where it is stated that "contract can be used to advance distinctly governmental objectives.

59. The Milk Board appears to take the view that "regulation" excludes any notion of regulators paying money under a contract; that unless a public body can force someone to do something by order, it is not "regulating"; that the payment of money is what transforms a contract into a "commercial bargain of the truest kind". This submission contradicts the *Oil Sands Hotel* decision. The Gaming Commission signed Retailer Agreements precisely because the nature of the relationship would necessarily have involved the Commission providing financial consideration to those retailers who were collecting gaming revenues for the Commission. *Oil Sands Hotel*, and the cases discussed in that decision, demonstrate that the payment of money does not automatically exclude a duty to act fairly, and for proper purposes.

60. As Brown & Evans point out, the fact that public funds are involved may weigh in favour of review, because public bodies have to exercise their powers in relation to the use of these funds in a fashion authorised by the statute. This factor is certainly relevant when it comes to the Provincial board's supervisory and appellate roles, the very purpose of which is to keep the Milk Board broadly accountable for its actions relative to those persons affected by its decisions.

61. The Milk Board's position regarding the "payment of money" must also be viewed in the context of the Milk Board's ownership over the production of all BC milk. Having taken the dramatic regulatory step of intervening so deeply into the marketing chain by declaring itself first receiver of all milk produced in the province, governance of the transportation of that regulated product became a regulatory necessity. The Agreements are not a private contract carried out for private business purposes of the Milk Board. The recitals and terms of the Agreement (see the various "obligations of the company" set out at paragraph 18) all demonstrate the strong regulatory purpose and flavour of the Agreement dictated by the Milk Board for any person wishing to operate as a Transporter.

62. The Panel finds that the nature and character of the Milk Board, its regulatory action in declaring itself first receiver of all milk and requiring an Agreement as a condition of Licensing, its regulatory order requiring an Agreement in good standing as a condition of holding a valid Transporter Licence, and the terms and

conditions of the Agreement itself, all demonstrate conclusively that notice to terminate the Agreement adversely affects the Licence, and triggers both our appellate role as well as various public law duties.

63. As noted above, the mere fact that the Milk Board pays the Licencee to perform the service does not supersede every other factor rendering this a "purely commercial" arrangement. As pointed out above, the Milk Board could very easily have imposed all the requirements on Transporters through the licence, the terms of which could include payment by the Milk Board to the licencee if the licencee carried out the terms and conditions of the licence. While it was open to the Milk Board to use the mechanism of a contract and open up the possibility of pursuing private law remedies, the ability to exercise private law remedies does not exclude public law duties or appellate review by the Provincial board.

64. The Milk Board's position that public law duties apply when a public body regulates "under the guise of a contract" is also an unhelpful way of framing the question as it implies that public law applies only when the contract is a licence disguised as a contract. The question is not whether a document is "regulation under the guise of a contract"; that phrase does not appear anywhere in the authorities. The key question is whether the contract is being used to advance distinctly governmental objectives, and has a sufficient public law flavour so as to attract public law duties that the public body should not be allowed to contract out of.

65. Here, the Agreement is not only being used to advance distinctly governmental objectives; its termination adversely affects the very Licence granted by the Milk Board. The facts here are therefore much stronger than in the *Oil Sands Hotel* case where a licenced establishment could still operate without a Retailer Agreement.

66. The Milk Board has argued that if the Panel imposes public law duties, or policy standards, we will undermine the need for "certainty of contract". If this means that these duties undermine the Milk Board's ability to act unfairly and arbitrarily toward Licencees, then that is indeed the result of our decision and of the case law. By so doing, one form of certainty is replaced with another. Certainty of arbitrariness is replaced with the certainty of due process.

67. In *Knight v. Indian Head School Division (No. 19)* (1990), 69 DLR (4^{th}) 489 (S.C.C.), the Supreme Court of Canada held that the School Board was subject to a duty of fairness even in exercising contractual rights that allowed it to terminate a contract *without cause* (*Knight*, para. 21). The School Board had argued that it made no sense to impose a duty of fairness when the contract allowed dismissal for no reason. The majority, however, disagreed:

> The conclusion that the respondent's employment could be legally terminated without a showing of just cause does not necessarily entail that the procedure involved can be arbitrary…. (para. 22)

> The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. (para. 24)
>
> The justification for granting to the holder of an office a pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination…. One person capable of providing the administrative body with important insights into the situation is the office holder himself…. (para. 31)
>
> The argument to the effect that, since the employer can dismiss his employee for unreasonable or capricious reasons, the giving of an opportunity to participate in the decision-making would be meaningless, is unconvincing. In both the situation of an office held at pleasure and an office from which one can be dismissed only for cause, one of the purposes of the imposition on the administrative body of a duty to act fairly is the same, i.e., enabling the employee to try and change the employer's mind about the dismissal. (para. 31).
>
> There is also a wider public policy argument militating in favour of the imposition of a duty to act fairly on administrative bodies making decisions similar to the one impugned in the case at bar. The powers exercised by the appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by the government, should be put only to legitimate use….
>
> As pointed out by Wade … dismissal for displeasure should be all the more the object of scrutiny as it is a power of a wider discretionary nature. (para. 32).

68. *Knight* shows that private law "certainty of contract" must sometimes give way to *overriding* public law duties. *Knight* is an example of a court interfering with what the Milk Board describes as "contractual certainty" because of the public body's need to comply with higher public law duties. Just as it is appropriate to impose a duty of fairness whenever an employment relationship has a "strong statutory flavour" (para. 29), it is also appropriate to impose that duty where a public body purports to give notice to not renew an otherwise "rolling" contract with distinctly governmental objectives, where the contract is an essential condition of the Licence, and where the non-renewal would adversely affect the Licence.

69. The Milk Board says that *Knight* is a case where the contractual rights were merely "superfluous" to rights and obligations prescribed by statute. This interpretation is incorrect. The *Education Act* in *Knight* authorised the contract, but the contract was a freestanding, negotiated employment contract under which the School Board paid out monies. The Court expressly held that neither the statute nor the contract accorded a right to procedural fairness (para. 23). The question before the Court was whether it ought to impose a standard of conduct (procedural fairness) that was not written into the contract. The Court answered the question "yes".

70. The Milk Board's relationship with the Appellant (being fundamentally regulatory), the nature of the decision here (being a final decision) and the impact of the decision on the Appellant (undermining its Licence and its ability to act as a Transporter) all point to the Milk Board's decision being open to review. They also

point to a duty of fairness, which we would impose as a matter of policy to ensure fair behavior by marketing boards towards those it regulates, even if such a duty did not exist at common law. Contrary to the Milk Board's argument, these findings do not mean that the Provincial board is purporting to turn itself into a contract arbitrator or that imposing these duties renders contracts unenforceable and unpredictable**.** Contrary also to the submissions of the BCMPA, we are not imposing a "new regulatory regime" or adding unnecessary "red tape". Our findings require the Milk Board to be accountable to act within its jurisdiction and according to sound marketing policy whenever it exercises its distinctly public functions. These obligations override all others and overlay the contract. The Milk Board cannot hide behind the Agreement to escape its public law obligations.

71. The Milk Board's argument on this point is another version of the argument that this is a pure commercial contract under which the Milk Board has no accountability to the Provincial board. For the reasons given above, we reject this argument. The Provincial board has a statutory obligation to hear appeals, and a duty to ensure that marketing boards act lawfully and in accordance with sound marketing policy. If a decision is reviewable under s. 8 of the *Act*, it is irrelevant that a party may or may not be able to assert various private rights in court. The Panel's focus is with our statutory mandate and with the remedies we can grant if we conclude that a marketing board has acted contrary to either public law principles or sound marketing policy.

Non-renewal without cause

72. In *Knight*, the Court overlaid the employment contract with a duty of fairness; the Court did not interfere with the substantive power to terminate the employment contract for no reason after the School Board granted the duty of fairness. In *Oil Sands Hotel*, the Court went further in the context of a regulatory contract and held that the termination clause itself offended the public law principle against the arbitrary exercise of discretion: *Roncarelli v. Duplessis*.

73. The latter issue arises here because the Appellant argues that, over and above its claim for due process, paragraph 15 of the Agreement is *ultra vires* the Milk Board to the extent that it authorises the Milk Board to terminate the Agreement arbitrarily on 60 days notice. The argument is as follows:

- Section 11(1)(i) of the *Act* authorises the Milk Board to cancel a licence only for cause, i.e., for violation of the *Scheme* or one of its orders;

- The effect of giving notice under paragraph 15 of the Agreement is to cancel the Transporter Licence; and

- Therefore, the Milk Board, in purporting to act under paragraph 15, was acting contrary to s. 11(1)(i) of the *Act*, which has been incorporated into s. 7 of the *Scheme*.

74. We do not agree with the Appellant's submission. The power in s. 11(1)(i) of the *Act* is not exhaustive. The power to cancel a licence for a violation of a scheme or order does not exclude a power to adversely affect a licence for sound marketing policy reasons other than misconduct, i.e., the need to rationalise services for policy reasons, or because of funding limitations. In our view, the Milk Board's power under paragraph 15 of the Agreement is necessary because the Milk Board must have the ability to give notice of non-renewal for valid reasons other than those arising out of misconduct.

75. We note that paragraph 15 is silent both as to the process the Milk Board would use before giving notice, and as to the basis on which it would exercise that power, short of "cause". This raises the question as to whether, as with the duty of fairness expressed in *Knight*, the Milk Board should be allowed to give notice under paragraph 15 on a purely arbitrary basis.

76. We would leave that question open to be argued before us on another day. For present purposes, we find that the Milk Board has offered no valid rationale for why it should be allowed to end the Appellant's ability to operate under its Transporter Licence on 60 days notice.

The Provincial board's appellate role vs. judicial review

77. While this decision refers to judicial review cases showing that contractual rights must sometimes be read in light of public law duties, we wish to emphasise that this appeal is not a judicial review application. The Provincial board's appellate mandate includes ensuring that marketing boards comply with their administrative law obligations, but the Provincial board was not created merely to identify legal errors. Our mandate goes further and includes ensuring that marketing boards act in accordance with sound marketing policy: *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473. The courts' judicial review role is much more limited than the role of a specialised administrative appeal tribunal whose decisions receive a large amount of autonomy on the merits: see *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 at para. 29.

78. The Provincial board's appellate role, together with the broad right of standing granted to any person aggrieved or dissatisfied with a commodity board's order, decision or determination, makes clear that s. 8 of the *Act* was intended to grant a broad right of appeal. In this context, "decision" and "determination" should be interpreted to mean any action by the commodity board that directly or indirectly affects the regulatory rights, privileges or interests of a person subject to regulation in this closely managed economic sector. On appeal, we have the jurisdiction to determine those standards of conduct and fair dealing that commodity boards are expected to grant to those being regulated.

79. Thus, while the judicial review cases have been helpful, we would have come to the result set out in this decision in any event as a matter of sound marketing policy as it relates to fair dealings by marketing boards towards persons with little if any choice in a contract they were required to enter into.

80. The Milk Board's suggestion that this subjects the Agreement to an "unpredictable standard" is just another way of saying that it does not wish to be subject to review. It would like to decide for itself how to treat those it regulates. This perspective has been rejected by the courts in regard to relationships that have a sufficient statutory or regulatory flavour: *Knight*; *Oil Sands Hotel*. It was also rejected by the Legislature when it created a broad right of appeal to the Provincial board.

81. The Milk Board's argues that "no party can know in advance what 'sound marketing policy' might be". The same may perhaps be said for the content of the duty of fairness or, for that matter, the "reasonable person" test that applies in various areas of the common law. Just as the law requires persons to exercise common sense in determining what is reasonable or what is fair, the Provincial board expects marketing boards to exercise decency and good policy judgement in their treatment of those they regulate. The fact that disputes may arise about the content of those duties does not justify their elimination simply because it would be easier to act arbitrarily. The Legislature has created a Provincial board with a broad appeal role precisely to ensure that marketing boards are held accountable for the exercise of their significant powers.

ORDER

82. The Milk Board concedes that it did not give the Appellant notice and a chance to be heard before issuing the notice not to renew the Agreement. We find that it was under an obligation to do so, both as a matter of administrative law and as a matter of proper conduct by a marketing board toward a Transporter.

83. For the reasons given in this decision, the Milk Board's January 12, 2004 decision is reversed and set aside.

Dated at Victoria, British Columbia this 22nd day of October, 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Satwinder Bains, Member
Wayne Wickens, Member