IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL AGRIFOODS INTERNATIONAL COOPERATIVE LTD. FROM A DECISION CONCERNING A TRANSPORTATION CONTRACT

BETWEEN

AGRIFOODS INTERNATIONAL COOP LTD.

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

VEDDER RESOURCES LTD.

DECISION

For the British Columbia Farm Industry Review Board	Chris Wendell, Presiding Member
For the Appellant:	Stephen Antle Borden Ladner Gervais LLP
For the Respondent:	Robert Hrabinsky Affleck Hira Burgoyne LLP
For the Intervener	Barry Fraser Fraser Litigation Group
Place of Hearing	By written submission

INTRODUCTION

1. This decision addresses two cross-applications. One is an application by the Appellant, Agrifoods International Cooperative Ltd. (Agrifoods) for a stay pending its appeal of "the termination of the existing milk hauling contract between Agrifoods and the British Columbia Milk Marketing Board for Zones 4, 6 and 7 and requiring Agrifoods and the British Columbia Milk Marketing Board to continue to honour the terms of that contract until further order of the British Columbia Farm Industry Review Board".[1] The other is an application by the British Columbia Milk Marketing Board (Milk Board) to summarily dismiss Agrifoods' appeal on the basis that (a) the appeal was not filed within the applicable time limit; (b) the appeal is frivolous, vexatious or gives rise to an abuse of process; and (c) there is no reasonable prospect that the appeal will succeed.

2. Agrifoods filed its August 12, 2015 appeal after a July 13, 2015 letter the Milk Board provided to Agrifoods stating, among other things, that "the Board will not seek another contract with Agrifoods for zones 4, 6 and 7 after the current contract term expires". Agrifoods refers to this contract as the Unwritten Contract, reflecting that while the Agrifoods and the Milk Board were party to written transportation contracts since 2005 for the three zones in question, the last written contract expired on October 31, 2014. Agrifoods did not sign the contract the Milk Board tendered for its signature in November 2014 governing 2014-15, and it has been transporting milk since November 1, 2014 without having signed that contract.

3. The Milk Board states that the July 31, 2015 letter was given based on its view that the term of the transportation agreement would expire on October 31, 2015. It submitted that despite several quality of service issues it had previously raised with Agrifoods, it did not terminate the contract early on any of the grounds listed in Article 27 of the November 2014 tendered agreement. Instead, the July 13, 2015 letter provided notice to Agrifoods that it would not be seeking another contract with Agrifoods for those three zones "after the current term expires". The Milk Board has made written contractual arrangements with Vedder Resources Ltd. (Vedder Resources)[2] for milk transportation in these zones effective November 1, 2015.

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[1] Zones 4, 6 and 7 refer to certain geographic areas outside Vancouver Island and the Lower Mainland. They are located in Creston, the Okanagan and Prince George/Bulkley Valley. Zone 1 is located in the Fraser Valley, where the majority of BC milk production occurs.

[2] Vedder Resources Ltd. Is a separate company from Vedder Transport Ltd., which transports milk in zone 1 (Fraser Valley). Vedder Resources is not a subsidiary of Vedder Transport and was incorporated at the request of the Milk Board, which also required a separate labour agreement, to eliminate the risk that a strike in zone 1 would affect the transportation of milk in zones 4, 6 and 7. The two companies do share common ownership. As will be discussed further below, the common ownership of Vedder Resources and Vedder Transport is one of the issues the Appellant seeks to raise on the appeal.

AGRIFOODS' APPEAL

4. On August 12, 2015, Agrifoods filed a Notice of Appeal seeking an order reinstating the Unwritten Contract or alternatively, compensation for lost profits and wasted expenses caused by "the termination". In its stay application, Agrifoods identifies the three issues it intends to raise on appeal, summarized as follows:

    (a) Whether the Milk Board's decision to terminate the Unwritten Contract breached the terms of that contract, including its terms about its term and the required notice of termination.

    (b) Whether the decision contravenes the "SAFETI" principles[3] in the governance of the Milk Board because it shifts hauling revenue away from farms in these zones to processing plants, it places 90% of haulage into the hands of one hauler thus increasing risk to the industry, it was made without consulting with producers or processors and it is not fair or transparent because the Milk Board raised performance issues without first setting performance standards and is contrary to the Milk Board's having "represented to Agrifoods that it would give it time to address these issues that, if Agrifoods did address these issues, the parties' contract would continue", on which representations Agrifoods relied.

    (c) Whether the decision contravenes sound marketing policy by putting approximately 90% of the milk haulage in BC into the hands of one hauler, and by making it unlikely that any other hauler will ever come to light to make a competitive bid should the Milk Board ever decide to go out to tender for milk haulage.

THE MILK BOARD'S SUMMARY DISMISSAL APPLICATION

5. The grounds for the Milk Board's summary dismissal application, made pursuant to s. 31(1) of the *Administrative Tribunals Act* which applies to this appeal by virtue of s. 8.1(1) of the *Natural Products Marketing (BC) Act* (*NPMA*), are summarized below:

    (a) That pursuant to s. 31(1)(b) of the *ATA*, the appeal is "not filed within the applicable time limit" in s. 24 of the *ATA* (30 days from the date of the decision being appealed) because the Milk Board's July 13, 2015 notice that another contract would not be entered into was not a "notice of termination" and thus was not appealable decision. The only appealable decision would have been the November 13, 2014 decision of the Milk Board to offer a contract with a one year term, a position Agrifoods has

[3] The "SAFETI" principles have been developed by BCFIRB to support a principles based approach to decision-making by commodity boards to carry out their responsibilities. The acronym refers to "Strategic", "Accountable", "Fair", "Effective", "Transparent" and "Inclusive".

known since at least November 13, 2014. The August 12, 2015 notice of appeal was too late to appeal that decision.

(b) That pursuant to s. 31(1)(c) and (f) of the *ATA* the appeal is frivolous, vexatious, trivial, an abuse of process and has no prospect of success because it is founded on the untenable legal position, a position also advanced without any evidence, that the Appellant was operating under a unwritten contract that fundamentally altered the previous written contractual relationship – that the unwritten contract had an indefinite term and was terminable only for cause. Moreover, if the July 13, 2015 letter was not a "notice of termination", the appeal has no reasonable prospect of success.

(c) That this situation is distinguishable from BCFIRB's March 31, 2004 decision in *Pan-O-Ramic* in part because *Pan-O-Ramic* involved a contract that was automatically renewable except for cause, and partly because *Pan-O-Ramic* has, in law, been overtaken by the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, which overruled *Knight v. Indian Head School Division (No. 19)* (1990), 69 D.L.R. (4th) 489 (S.C.C.), which was the law on which *Pan-O-Ramic* was based.

6. Agrifoods argues in response that the Milk Board mis-states its position. Agrifoods asserts that there is a contract, just not a contract on the terms of the November 2014 tendered agreement (the Unsigned Contract), as Agrifoods did not objectively express to the Milk Board its agreement to *be* bound by that agreement. Agrifoods argues that it is frivolous and vexatious for the Milk Board to argue that the parties are bound by a written contract that neither of them signed. Agrifoods argues:

> The content of the Unwritten Contract is formed partly by the parties' conduct, partly verbally and (perhaps) partly in writing. Parts of the Unsigned Contract may form part of the Unwritten Contract. But what parts, if any, needs to be determined by BCFIRB at the full hearing of the appeal.
>
> What we do know now is that there is no evidence of any agreement between the parties about the term, or method of termination, of the Unsigned Contract. The Unwritten Contract is therefore, as a matter of law, a contract of indefinite term. It is therefore, as a matter of law, only terminable for cause (which is not alleged in this case) or on reasonable notice....
>
> On that basis, the **effect** of the Milk Board's July 13, 2015 notice – regardless of what it said – was to give three and a half months' notice of termination of the indefinite Unsigned Contract.
>
> In light of the history between the parties, reasonable notice of that termination was 12 months.

7. Agrifoods argues that there is no material difference between the renewable contract in *Pan-O-Ramic* and a contract of indefinite term, terminable on reasonable notice. Agrifoods also argues that it does not rely on *Pan-O-Ramic* insofar as that decision relied on *Knight* and any subsequent impact of *Dunsmuir*. "Agrifoods relies on *Pan-O-Ramic* as a situation analogous to this case in which BCFIRB granted a stay pending appeal because, should a stay not be granted and the appellant be successful, "serious remedial issues would flow. The *Knight* and *Dunsmuir* decisions have nothing to do with that point". Agrifoods argues that it does not now need to establish the entire content of the Unwritten Contract. It has raised a serious issue on that question.

8. Agrifoods argues that the Milk Board has not even responded to its grounds that the Milk Board represented that the contract would continue if it took steps to address its concerns, and has not responded to its additional standalone grounds that the decision to terminate contravened the SAFETI principles, sound marketing policy or fair and transparent dealing, particularly now that it is apparent now that even while the Milk Board was making these representations it was negotiating a new contract with Vedder Resources. Agrifoods also argues that despite the distinct corporate status of Vedder Resources, the common ownership "also gives rise to the risk of consolidation".

9. In reply, the Milk Board argues that one party's failure to sign an agreement does not mean the contract is made on other terms without some evidence to support the existence of those other terms. Further, in this case, Agrifoods' conduct reflects that it at all times conducted itself in accordance with that agreement. The Milk Board submits that Agrifoods is inviting BCFIRB to create a *de facto* contract of indefinite term under the guise of a stay order.

10. Vedder Resources also filed a reply and an affidavit, which were objected to by Agrifoods. In my view, that objection is sound. Vedder Resources was not granted a right of reply to the Milk Board's summary dismissal application. Its right was limited to responding to Agrifoods' stay application.

AGRIFOODS' STAY APPLICATION

11. Agrifoods submits, for the reasons set out in its stay application and its response to the Milk Board's summary dismissal application, that it has filed an appeal that stands a reasonable prospect of success and warrants a full appeal hearing. It also argues that the balance of convenience favours granting a stay.

12. On the balance of convenience issue, Agrifoods submits that it will be irreparably harmed because Vedder Resources will take its place effective November 1, 2015. Agrifoods submits that "After significant investment in, and changes to, its business organization to address the Milk Board's concerns, Agrifoods will again have to substantially reorganize its business, by winding down operations in Zones 4, 6 and 7 at a loss." These losses are said to include layoffs (up to 49

drivers and severance costs of $477,394), equipment transfers or sales as a result of leasing 6 new tractors at a cost of $905,570, throw-away costs ($27,981 related to redeployment of a manager) and loss of profits. Agrifoods submits that if a stay is not granted, BCFIRB will thereafter be unable to grant any practically effective remedy as it will have laid off employees, transferred equipment and not realistically be able to resume operations. Agrifoods argues that this is essentially the same situation as existed in *Pan-O-Ramic*. It also argues that losing this contract "will cast doubt" on its ability to serve customers in the three other western provinces where it has transportation contracts. It notes that the members of Agrifoods are dairy farmers and that "the loss of the Unwritten Contract will cast doubt on the managerial abilities of Agrifoods and its ability to service the needs of its producer-owners". Agrifoods argues:

> The Milk Board changed the status quo of Agrifoods hauling this milk. The Milk Board induced Agrifoods to make financial and human resources investments to improve its performance by promising Agrifoods their relationship would continue if it did so. The Milk Board fundamentally misunderstood its contractual relationship with Agrifoods. It thought the Unsigned Contract was in force, when it wasn't. It thought the parties' contract expired on October 31, 2015, when it didn't. The Milk Board then contracted with Vedder Transport to haul the same milk it was already committed to allowing Agrifoods to haul...
>
> Vedder Transportation may also have employee and equipment costs if the order sought is granted but it will be entitled to compensation from the Milk Board. In any case, that is an issue between Vedder and the Milk Board, not Agrifoods.
>
> The Milk Board changed the status quo. The Milk Board should bear any consequences of that decision.

13. The Milk Board disagrees on the balance of convenience. Citing *RJR – MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, the Milk Board argues that where a party seeks to stay the order of a public authority, it is assumed that staying that decision will irreparably harm the public interest where the authority is charged with protecting the public interest and the impugned decision as taken pursuant to that responsibility. It argues that the onus is on the Appellant to demonstrate how a stay would provide a public benefit, and that the public interest consideration should carry particular weight where, as here, the applicant seeks to suspend the new contractual arrangement with Vedder Resources rather than exempt itself from some order, decision or determination. Further, the Milk Board submits that the harm to the proposed new transporter, Vedder Resources, if a stay is granted, must also be taken into account. The Milk Board submits as follows:

> The Milk Board respectfully submits that no "irreparable" harm will befall the Appellant by virtue of the expiration of the contract in accordance with its terms. There is no evidentiary basis to suggest that the Appellant's expectations concerning the expiration of the contract should have been any different from what it is in Article 25. In this respect it bears repeating that the Appellant itself

has been unwilling or unable to provide any factual or jurisprudential basis for the "contractual" rights that it implies should exist after the expiry of the contract term.

In fact, it should be evident that the Appellant is not seeking to avoid harm at all. The Appellant is seeking to secure a financial advantage by persuading the BCFIRB to "create" a new (perpetual?) contract on unspecified terms....

[An] order of the kind sought by the Appellant would clearly disrupt the public interest. Such an order would suggest that transporters (generally) need not consider themselves constrained by the terms of their contracts. In other words, if BCFIRB were to recognize the Appellant's assertion that it has contractual rights that persist after the expiry of the contract term (an assertion made without any factual or jurisprudential basis), then is there any reason to think that other transporters should consider themselves bound by the terms of their own contracts? To make an order would effectively deprive the regulator of any effective and predictable means of dealing with transporters. An order of that nature would clearly not promote the public interest.

14. Vedder Resources, granted leave to participate on the stay application prior to its intervener status being finally determined, submitted as follows with respect to the balance of convenience:

(a) When an application is seeking a mandatory injunction, the strength of the applicant's case must be considered a second time under the "balance of convenience", and that here, the position that the contract had an indefinite term is advanced without any evidence and does not raise a serious question.

(b) With respect to harm to the public interest, the Milk Board must be taken to have acted in the interests of milk producers and the public generally in the safe and orderly collection and transportation of milk. The Appellant has not provided any evidence that a stay would itself benefit the public. While it refers to a concern about putting milk transportation into the hands of one company, it does not appreciate that Vedder Resources is a new company, with a new labour agreement, or that Vedder Resources will agree to the route based formula and provide $357,000 annual savings to the Milk Board using its natural gas powered tractors.

(c) Vedder will incur substantial harm should a stay be granted. It has spent over $7.7 million to acquire equipment and $100,000 in administrative expenses. It will have to sell the equipment at a discount and suffer costs thrown away.

(d) Agrifoods would not suffer the degree of irreparable harm it has suggested. Vedder Resources has offered employment to 47 of the 51 drivers and staff and the others are pursuing other opportunities. Thus, it is unlikely Agrifoods will incur severance costs of $477,394. As to the equipment, all of which was purchased while Vedder was under a signed, one year contract, Agrifoods has refused to sell it to Vedder Resources. With respect to the employee reassignment, that employee resigned in July 2015 to take employment elsewhere. With regard to loss of profits "none of these questionable losses

> or costs would constitute irreparable harm. They are matters which are readily compensable in an award of damages should BCFIRB subsequently determine that the Appellant had a contract of indefinite duration". With respect to loss of reputation, Agrifoods' concern is speculative.

15. In reply, Agrifoods argues that, in addition to raising a serious issue, it has demonstrated irreparable harm (being put out of business in these zones) and that the balance of convenience favours preserving the status quo. In response to Vedder Resources' arguments about the harms Agrifoods will suffer, it submits that (a) its employee resigned in July 2015 precisely because the Milk Board terminated the contract and (b) common law mitigation principles are not relevant to a collective bargaining context. Agrifoods also argues that Vedder Resources has not leased several of the properties it claims to have leased.

16. Agrifoods also takes issue with the reliability of the Milk Board's affidavit evidence, arguing that its affidavits are not framed in the voices of the witnesses, state facts on which the witnesses can have no personal knowledge and are full of legal conclusions as opposed to evidence.

DECISION – SUMMARY DISMISSAL APPLICATION

17. The Milk Board's summary dismissal application is properly addressed first.

18. The Milk Board argues that there is no plausible basis on which the Appellant could succeed in convincing BCFIRB on appeal that an agreement which previously operated on a year to year basis had suddenly undergone a "sea change from one year, fixed term contracts to contracts of indefinite term that are terminable only for cause". That submission speaks most directly to the first of the issues the Appellant seeks to raise on the appeal, as framed by the Appellant:

> Whether the Milk Board's decision to terminate the Unwritten Contract breached the terms of that contract, including its terms about its term and the required notice of termination.

19. I agree with the Milk Board and find that there is no serious issue on this ground and no reasonable prospect of success.

20. First, even if one agrees with the Appellant that the Unsigned Contract does not bind the parties in all respects, the Appellant has not discharged the burden of advancing any serious argument that the new unwritten agreement (by words or conduct or otherwise) was to enter into a contract for an indefinite period of time that was terminable only on reasonable notice.

21. There is a world of difference between arguing that the November 2014 draft is not binding (or, as Agrifoods suggests here, is partly binding) and arguing that there was new unwritten agreement as to term made in the wake of ongoing allegations of service problems, dialogue about those problems, a recent history of

one year term written agreements and the fact that the Milk Board plainly advised when it sent the November 2014 agreement that it was only offering a one year term. To argue in this context that the parties implicitly agreed to a provision that fundamentally alters the term nature of the previous contracts to one of "indefinite duration" that is terminable only on 12 months reasonable notice would require some evidence or clear authority. The Appellant has provided neither. The fact that the Appellant did not sign the Milk Board's contract goes no distance to showing that the Milk Board accepted an indefinite contract that required 12 months' notice. In my view, there is no reasonable basis for the contention that the new unwritten agreement required notice to terminate that is as lengthy as any of the several previous written contracts.

22. The Appellant submitted that the Milk Board "represented that the contract between them would continue if Agrifoods took steps to address what the Milk Board saw as issues in its performance. Why would the Milk Board promise Agrifoods their *contract would continue* if it automatically expired on October 31, 2015?" [my emphasis]. This submission, however, differs in an important respect from the supporting affidavit of Mr. Glatt, the Appellant's witness. Mr. Glatt stated that "Since the expiry of the last written contract, representatives of the Milk Board have said several times that, if Agrifoods took steps to address what the Milk Board considered issues with its performance under the Unwritten Contract, that the *relationship* between them would continue" (my emphasis). In my view, that representation, even if accepted, would not in the circumstances here have any reasonable prospect of convincing BCFIRB that the parties intended, as Agrifoods asserts, a fundamental change in their previous year to year relationship. It would at most speak to a willingness to enter into a new contract, which is not what the Appellant is asserting here.

23. The other difficulty I have with this ground is that it appears to be founded solely in contract law. As framed, it seems disconnected from the larger public and marketing policy concerns with which BCFIRB is concerned. I am not suggesting that BCFIRB has no proper role in speaking to the terms of contracts entered into by commodity boards where, for example, those contract terms raise questions of policy, statutory authority or proper governance. But the mere assertion by a contractor that his private rights have been breached does not by itself entitle that contractor to a remedy from BCFIRB. That is particularly so where, as here, the context is so different from a case such as *Pan-O-Ramic*, where the contract was required by the Consolidated Order, was inextricably linked with a licence and the licencee was asserting a public law right to be heard, which right is not being relied on here, where the Appellant has made clear in its reply to the summary dismissal application that it does not rely on that point, and thus makes no submissions on the impact of *Dunsmuir*. The assertion of private rights, without a clear rationale as to what is the public law reason BCFIRB should grant a remedy, has no reasonable prospect of success, and becomes a matter for another forum to finally adjudicate. Further, as will be noted further below, no plausible argument

has been advanced that the "unwritten contract" here was indefinite or akin to the nature of the agreement that was at issue in *Pan-O-Ramic*.

24. I now turn to the second and third grounds of appeal as summarized above:

> Whether the decision contravenes the "SAFETI" principles in the governance of the Milk Board because it shifts hauling revenue outside the industry, it places 90% of haulage into the hands of one hauler, it was made without consulting with producers or processors, it is not fair and transparent because the Milk Board raised performance issues without first setting performance standards, and it is contrary to the Milk Board's having "represented to Agrifoods that it would give it time to address these issues that, if Agrifoods did address these issues, the parties' contract would continue", on which representations Agrifoods relied.
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> Whether the decision contravenes sound marketing policy by putting approximately 90% of the milk haulage in BC into the hands of one hauler, and by making it unlikely that any other hauler will ever come to light to make a competitive bid should the Milk Board ever decide to go out to tender for milk haulage.

25. The first paragraph raises several issues, some of which speak specifically to the *Appellant's* rights. These issues pertain to whether the "decision" was "fair and transparent" because the Milk Board had raised performance issues without first setting performance standards, and whether it was proper for the Milk Board to have represented to Agrifoods a continuation of the relationship even as it was negotiating a new contract with Vedder Resources.

26. In my view, these issues have no reasonable prospect of success. They are in my judgment issues that focused once again on asserting the private law rights of the Appellant; no breach of procedural fairness is relied upon. Moreover, even as a private law matter, they are predicated on the unsupported proposition that there was a "decision to terminate" the contract rather than a contract that simply expired. Further, other than by a generic reference to "SAFETI" (discussed further below), they do not provide any serious statement as to why or how the "SAFETI" principles apply to those allegations if, as found above, there is no serious argument that the agreement here was akin to that in *Pan-O-Ramic*.

27. I do note that, in *Pan-O-Ramic*, BCFIRB held that in addition to considering a breach of procedural fairness, it would also consider whether "[the Milk Board] having advised the Appellant that 'overall performance matters' triggered the notice, the Appellant should receive a remedy if the Panel finds the overall performance matters referred to by the Milk Board are not valid or did not justify giving notice not to continue the Appellant's ability to operate as a transporter." However, as noted above, those statements were made in the context of Consolidated Orders requiring a transporter licence, a licence, and an automatically renewing agreement which were found in their very nature to be akin to a licence which had essentially been terminated:

> The agreement, consistent with the regulatory approach used in many types of licences and permits, operates on a presumption of automatic renewal. "Expiry" requires a positive act by the Milk Board to interrupt that cycle.

28. The underlying regulatory structure today is very different. There is no regulatory requirement for a licence or agreement. There is no licence. There is no automatically renewing agreement that is akin to a licence. The argument that the "unwritten contract" was an agreement or something akin to a licence of indefinite duration has no evidentiary foundation. There is accordingly no basis on these grounds for BCFIRB to enter into what would inevitably be a process of adjudicating private rather than public law rights.

29. There are aspects of the latter two grounds of appeal that do on their face raise marketing policy questions. While the Milk Board did not address them in its submissions, or perhaps more accurately took the view that they could not arise if its main submission was accepted, I have seriously considered them as they were advanced as distinct issues. These issues are whether, separate and apart from the alleged "rights" of the Appellant, the Milk Board acted contrary to sound marketing policy in moving to Vedder Resources as a new hauler, viewed from a broader systemic perspective with regard to the governance of the industry. These systemic issues concern whether the judgment to move to a new milk transporter in these zones should be set aside because they put "90% of the haulage into the hands of one hauler", was made without consulting the industry, shifts hauling revenue outside the industry and makes any further competitive bidding process unlikely.

30. I have carefully considered these "systemic" grounds in order to assess whether they would have a reasonable prospect of success from a marketing policy perspective – whether they warrant the time and expense of a full hearing and whether there is any reasonable prospect that they would give rise to the remedy the Appellant is seeking in this case.

31. The Notice of Appeal identifies the remedy as "a declaration that the Board's decision to terminate the contract was improper and an order reversing the decision and reinstating the contract". The Appellant's stay application adds to this "or alternatively, compensation for lost profits and wasted expenses caused by the termination".

32. It can be stated immediately that the remedy of "compensation for lost profits and wasted expenses" – while reinforcing the heavy contractual flavour of the appeal – has no prospect of success. BCFIRB has no ability to award financial compensation.

33. With respect to the remaining relief, I have concluded that there is no reasonable prospect that it would be granted. First, BCFIRB would not grant any declaration that the "decision to terminate" the contract was improper because no reasonable case has been made that there was a termination. Second, BCFIRB would only

"reinstate the contract" on systemic policy grounds if it were satisfied that such a step was necessary – not because there was breach of the Appellant's private rights, but because it was necessary to prevent a state of affairs where there were fundamental public policy concerns involved in the arrangement with a new transporter. With regard to the latter:

(a) There is no reasonable likelihood of success arising from the argument that the move to a different hauler puts "the haulage of approximately 90% of BC's milk in the hands of one hauler". For one thing, the record is clear (and was not challenged by the Appellant on reply) that the 90% figure is factually incorrect, because the Milk Board's proposed new agreement is with Vedder Resources, not Vedder Transport. Vedder Resources is a separate company (not a subsidiary), albeit with common ownership. As Vedder Resources has conceded, "If the Milk Board has an issue with the manner in which Vedder Resources is performing the Rural Contract, it can address those issues without affecting the transportation of Milk in Zone 1". Further, even accepting the Appellant's 90% figure due solely to the common ownership, that fact alone would not in my view be a plausible basis for allowing the appeal. Many aspects of the regulated marketing system operate based on service provided by only a few producers, processors or transporters. The nature of the system is precisely why marketing boards exist – to provide the necessary regulatory oversight. In this case, it is not contested that the Milk Board took concrete steps to ensure that any disruption caused in the three zones here would not impact transportation or the agreement in Zone 1.

(b) The argument that moving to a different hauler will transfer revenue outside the industry (Agrifoods' shareholders are growers) also has no reasonable prospect of success. There is no principle of marketing policy that entitles companies whose shareholders are growers to receive preferential treatment in respect of revenue generated from the transportation of milk.

(c) I see nothing on the facts as asserted by the Appellants to plausibly support the argument that the circumstances here were so serious as to oblige the Milk Board to consult with the entire industry before moving to a different hauler in the three zones in question. The SAFETI principles are not applied blindly and mechanistically. Whether and to what extent industry consultation is required depends in part on the nature of the decision. There is no suggestion that there is anything in the track record of Vedder Transport or Vedder Resources, or in the nature of the new agreement itself, that is contrary to marketing policy. There is no allegation of conflict of interest by the Milk Board. In all the circumstances, I have no hesitation in concluding that BCFIRB would not grant a remedy to restore (or

extend) the Appellant's agreement based on the failure to consult the industry with regard to changing the identity of a transporter where there are otherwise no significant detrimental changes in cost or service to the industry and no identified issues concerning the ability or competence of the transporter to carry out the task to ensure orderly marketing.

(d) I see no plausible basis on which BCFIRB would set aside the Milk Board's judgment based on speculation about the impact of its actions on a possible future competitive bidding process.

34. For all of these reasons, the appeal is dismissed as having no reasonable prospect of success.

DECISION – STAY APPLICATION

35. Given my conclusion above, it is strictly speaking unnecessary to address the stay application, which would in event have failed on the first branch of the test for a stay ("serious issue to be tried").

36. For completeness, however, I wish to emphasize that even if I had dismissed the summary dismissal application in whole or in part – and thus found that one or more of the issues raised by the Appellants passed the "serious issue" test for purposes of a stay – I would still have denied the stay based on my assessment of the balance of convenience.

37. In my view, the Milk Board's decision to change haulers, whether or not it resulted in a private breach of contract, was made in relation to transportation in the milk industry. As such, I find that granting a stay would be presumed to damage the public interest. While the Appellant argues that the Milk Board and Vedder Resources should bear the risk of harm because the Milk Board changed the status quo, I am unable to accept that submission because any private rights held by the Appellant (which rights were far from being established before us in any event) cannot trump the public interest in Milk Board decision-making. The Appellant has not shown how granting a stay would provide a public benefit.

38. As to the latter point, it is not contested that milk will continue to flow, uninterrupted, on the same terms and conditions for growers and processors, even if a stay is refused. Whether there Appellant will really suffer irreparable harm (or irreparable harm to the extent it has suggested) has also been shown to be very much an open question. Agrifoods' concern about loss of reputation is speculative, particularly as the Milk Board has not said that it has acted "for cause" and Agrifoods continues to transport milk for the Milk Board elsewhere. The Appellant has not in my view raised a reasonable argument that it had a right to a contractual relationship beyond October 31, 2015, but even if it did have such a private right, it has not shown why that would not be compensable in damages if

it could be established. In all the circumstances, I find that the balance of convenience favours the Milk Board.

CONCLUSION

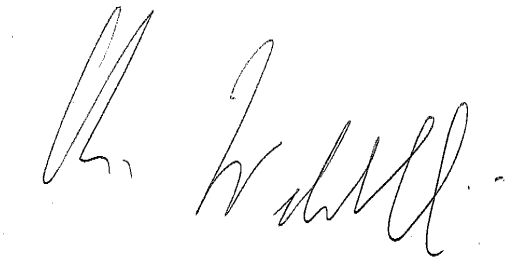
39. For the reasons given in this decision, the appeal is dismissed as having no reasonable prospect of success.

40. In the alternative, the application for a stay is denied.

41. In the circumstances, it is unnecessary to address the applications for intervener status.

Dated at Victoria, BC, this 30th day of October, 2015.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:



Chris Wendell, Presiding Member