

Federal Court



Cour fédérale

Date: 20110221

Docket: T-1475-09

Citation: 2011 FC 205

Ottawa, Ontario, February 21, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

HIGHLAND PRODUCE LTD.

Applicant

and

**EGG FARMERS OF CANADA
(FORMERLY KNOWN AS THE CANADIAN
EGG MARKETING AGENCY)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the August 5, 2009 decision (the Decision) of the National Farm Products Council (the NFPC). The NFPC dismissed the Applicant's complaint (the Complaint) alleging wrongdoing by the Canadian Egg Marketing Agency (CEMA) (now known as Egg Farmers of Canada). The NFPC found that the issues raised in the Applicant's complaint had already been addressed in earlier arbitration between the parties.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Highland Produce Ltd. (Highland), is a family run business started in 1969 that, until 2003, operated as a Canadian egg processor.

[4] The Respondent, CEMA, is responsible for administering the supply management system for eggs in Canada under the *Farm Products Agencies Act*, (RS, 1985, c F-4) (the FPAA). In their written submissions, CEMA explains that they sell eggs that are surplus to the table market in Canada to egg processors for processing into egg products. CEMA sold surplus eggs to Highland.

[5] Highland has long held concerns regarding CEMA's conduct. Highland filed a Competition Bureau Complaint in 2000 and commenced two actions in the Court of Queen's Bench of Alberta in 2000 and in 2004. The Competition Bureau did not have jurisdiction to hear the complaint, and pointed the Applicant to the NFPC's jurisdiction under paragraph 7(1) (f) of the FPAA to receive and investigate complaints. Both Alberta actions were stayed following a determination that the contract between Highland and CEMA included an arbitration clause directing all disputes to be referred to arbitration.

[6] In each instance Highland alleged that CEMA treated Highland unfairly and advanced claims against CEMA based on negligence and breach of contract, fiduciary duty, and other private law duties. Highland alleged that CEMA intended to, and succeeded in, putting Highland out of business in October 2003.

[7] The parties proceeded to arbitration following an agreement reached in December 2005. A *viva voce* hearing took place over a six week period in 2007 and 2008 before Mr. John Morden (formerly a Justice of the Court of Appeal for Ontario). The process was lengthy and included examinations for discovery and production of documents in addition to the hearing. On August 5, 2008, Mr. Morden issued a 114-page arbitration decision.

[8] Mr. Morden concluded that although CEMA was “far from perfect in many respects”, Highland failed to establish liability on CEMA’s part and also failed to prove any loss. Mr. Morden found that Highland’s decision to cease carrying on business was the result of its own actions and had no rational connection to CEMA’s conduct. Accordingly, all of Highland’s claims were dismissed.

[9] Highland did not appeal the Arbitration Award. The arbitration agreement between the parties provided at section 11(b) that the decision of the Arbitrator was to be final and binding, subject only to statutory rights of appeal, and that no collateral attack on the Arbitration Award through commencement of independent legal action would be made. It was recognized as a Judgement of the Alberta Court of Queen’s Bench on January 8, 2009. Justice Robert Graesser of

the Alberta Court of Queen's Bench then dismissed Highland's two actions which had been stayed in favour of the Arbitration. Highland did not appeal the dismissals.

[10] Mr. Morden subsequently dealt with the issue of costs. Following submissions by the parties, CEMA was awarded \$250,000. Mr. Morden noted that CEMA was successful with respect to each one of Highland's claims. The costs award was recognized as a Judgment of the Court of Queen's Bench of Alberta on October 8, 2009.

[11] On September 18, 2008, Highland submitted a formal complaint to the NFPC relating to matters that Highland claimed were not addressed in the arbitration decision and fell within the jurisdiction of the NFPC. Highland identified four issues it felt were extant following the Arbitration:

1. the extension of and non-disclosure of sub-contract pricing to certain industry participants to the exclusion of others;
2. preferential egg supply arrangements extended to some processors to the exclusion of others;
3. ongoing and manifest conflicts of interest on CEMA's Board of Directors giving rise to favourable policy/operational decisions of CEMA to the benefit of those conflicted directors;
4. the failure to collect invoices owing from select egg processors with the effect that CEMA became a *de facto* "lender" to certain egg processors.

[12] Highland sought from the NFPC, *inter alia*, a declaration that CEMA exercised its powers unreasonably, a declaration that CEMA acted during the material time period while permitting inappropriate conflicts of interest to exist; a declaration that CEMA conducted itself in a manner inconsistent with the objects set out in the FPAA or contrary to the provisions of the Canadian Egg Marketing Agency Proclamation.

[13] Highland asked the NFPC to consider whether a public hearing of the Complaint was warranted and explained that it was ready to make further submissions on this point once the NFPC reviewed the arbitration decision. Highland also noted that it was unlikely that alternative dispute resolution (ADR) would resolve the issues between the parties, but that Highland would nonetheless be willing to participate in good faith in such a process should the NFPC believe that ADR would facilitate resolution.

[14] Correspondence between the parties ensued:

- On September 22, 2008, the NFPC acknowledged receipt of the Complaint.
- On October 24, 2008 the NFPC sent Highland a letter requesting a copy of the arbitration decision as well as all background information with respect to the Complaint. The NFPC advised that they would be in a better position to discuss with Highland the best process to follow to address the Complaint once all of the documentation was reviewed.
- On November 11, 2008, Highland sent the NFPC a copy of the arbitration decision but suggested that Highland would be better able to provide relevant background information once the NFPC reviewed the arbitration decisions and decided how to deal with the

Complaint. Highland identified portions of the arbitration decision that it found to be particularly pertinent to the Complaint,

- On December 16, 2008, CEMA sent a letter to the NFPC enclosing its reply to the Complaint. CEMA opposed the relief requested by Highland on the basis that a) it was not in the public interest; and b) it was a collateral attack on an arbitration decision which fully and finally disposed of the matters raised in the Complaint. CEMA submitted that an examination of the arbitration decision and, if necessary, relevant portions of the record before the Arbitrator, would be sufficient for the NFPC to complete its inquiry. CEMA further submitted that the Complaint should be dismissed as it failed to raise new issues of current relevance to Highland's relationship with CEMA. The bulk of the submissions refuted Highland's claim that four issues remained unresolved following arbitration.
- On December 18, 2008, Highland responded to the NFPC regarding CEMA's reply taking exception to their submissions urging dismissal of the Complaint before the NFPC had decided how to procedurally deal with the Complaint. Highland noted that they would be happy to make fulsome submissions once direction was received from the NFPC. At that point CEMA would be entitled to make reply submissions.
- On December 23, 2008, CEMA wrote to the NFPC in response to Highland's December 18, 2008 letter advising that CEMA considered it appropriate to respond to a formal complaint and ensure that its position on the public hearing request went on the record. CEMA reiterated that the Complaint could be handled without a hearing.
- On January 13, 2009, Highland again wrote to the NFPC taking issue with CEMA's reply submissions and again advised that Highland would be "happy to make fulsome submissions in due course once the format of dealing with Highland's complaint has been

addressed...”. Highland expressed its view that if the NFPC should decide to resolve the issue by way of written submissions, supporting documentary records would need to accompany those submissions.

- On January 20, 2009, the NFPC responded to both parties. The NFPC advised that they were still in the investigative phase of the Complaint. The NFPC also asked the parties to indicate whether they agreed that the principle issues in the Complaint related to variable pricing decisions made by CEMA in the sale of eggs to different processors. The NFPC also sought submissions regarding the relevance of section 11 of the CEMA proclamation to the dispute.
- CEMA and Highland each responded to the NFPC’s request on January 29, 2009 and February 6, 2009 respectively.
- In April and May 2009, a series of communications took place between Highland and the NFPC with respect to the status of the Complaint.
- In July, 2009 the NFPC requested a copy of the arbitration agreement, which Highland then forwarded.

B. *Impugned Decision*

[15] By letter dated August 5, 2009, the NFPC dismissed Highland’s complaint in its entirety. Following a review and analysis of all of the documentation, including the arbitration decision and agreement, as well as the responses of Highland and CEMA to questions seeking additional information, the NFPC concluded that all of the issues raised in the Complaint had already been considered in the arbitration decision. Consequently the NFPC did not consider itself to be in a

position to afford Highland any substantive relief following a complaint under paragraph 7(1)(f) of the FPAA, whether the complaint were to proceed by voluntary alternative dispute resolution or a public hearing.

[16] Highland brought the present application for judicial review on September 3, 2009, claiming that it was denied procedural fairness by the NFPC. Highland seeks an order in the nature of *certiorari* to quash and set aside the NFPC's decision.

II. Issue

[17] The sole issue raised in this application is whether Highland's right to procedural fairness was in anyway breached by the NFPC in its dismissal of the Complaint.

III. Standard of Review

[18] With respect to issues of procedural fairness, post-*Dunsmuir* jurisprudence from this Court has consistently held that such questions are to be reviewed according to a correctness standard.

Accordingly, the decision-maker is owed no deference. As explained in *Skechley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 53:

[...] The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

IV. Argument and Analysis

A. *Highland was Afforded the Requisite Degree of Procedural Fairness*

[19] In this application Highland essentially argues that the NFPC breached the duty of procedural fairness it owed to Highland by not allowing Highland to make submissions, tender evidence, and participate in a hearing. Highland further argues that the NFPC violated the principle of *audi alteram partem*.

[20] CEMA submits that the NFPC gave Highland the degree of procedural fairness to which it was entitled.

[21] It is clear that both parties agree that the NFPC owed Highland some degree of procedural fairness. The dispute is as to what the content of that duty should be, and whether or not the duty was fulfilled. Both parties submit that determining the required level of procedural fairness which a party is owed is a contextual exercise, depending on the circumstances of each particular case.

[22] The framework for analyzing the content of the duty of fairness was set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193. Both parties rely on *Baker*, but in so doing, present a divergent analysis of what *Baker* would require of the NFPC in this matter. While I realize that the mere fact that the principal of Highland, Mr. Ewanishan, is pursuing this application means that the Complaint is of great

importance to him personally, I believe that an analysis of the Baker factors, set out below, shows that Highland was treated fairly and appropriately by the NFPC.

[23] Before moving to the *Baker* factors, I would like to provide my view on certain factual and contextual representations made by Highland and refuted by CEMA. In making the Complaint to the NFPC, Highland claims to have been directed to the statutory complaint structure by the Arbitrator, Mr. Morden. This understanding of the arbitration decision seems, in part, to have provided the impetus to make a Complaint to the NFPC following the lengthy and, most importantly, binding arbitration, and forms the basis of Highland's belief that the arbitration failed to address all of Highland's allegations of misconduct.

[24] CEMA argues in response that this is an "unfair representation" of the arbitration decision and furthermore, neither the Arbitrator nor the Alberta Court of Queen's Bench have any jurisdiction over the NFPC.

[25] Highland's belief, that Mr. Morden held in the arbitration decision that certain issues fell within the jurisdiction of the NFPC, represents, in my opinion, either a deep misunderstanding of the arbitration decision, or a misrepresentation of statements contained therein.

[26] While Mr. Morden did hold that it would have been "sensible and obvious" for Highland to have complained to the NFPC at the outset of its dispute with CEMA in 2000, in the arbitration decision he merely notes the NFPC had jurisdiction to handle such matters but that Highland instead chose to both litigate and arbitrate its complaints. Even reading the decision with an eye for the

referral to the NFPC that Highland claims is there, reveals no such thing. Certainly the practice of advocacy entails casting the facts in a light most favourable to an applicant's legal arguments, but I am unable to disagree with CEMA's description of Highland's representations as being a "sleight of hand".

(1) Content of the Duty of Fairness

[27] In *Baker*, above, at paras 21-28, Justice Claire L'Heureux-Dubé outlined five factors that assist in determining the degree of procedural fairness owed in a particular circumstance. These factors include:

- a) The nature of the decision being made and the process followed in making it;
- b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c) The importance of the decision to the individual or individuals affected;
- d) The legitimate expectations of the person challenging the decision; and
- e) The choices of procedure made by the administrative body itself.

[28] For clarity I will analyze the nature of the statutory scheme first.

b) *Nature of the Statutory Scheme*

[29] The Court stated at para 24 of *Baker*, above:

[...] The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the

content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.

[30] The FPAA sets out the NFPC's duties and powers in sections 6 and 7 as follows:

Duties of Council

6. (1) The duties of the Council are

[...]

b) to review the operations of agencies with a view to ensuring that they carry on their operations in accordance with their objects set out in section 21 or 41, as the case may be; and

[...]

Powers of Council

7. (1) In order to fulfil its duties, the Council

[...]

(f) shall make such inquiries and take such action within its powers as it deems appropriate in relation to any complaints received by it from any person who is directly affected by the operations of an agency and that relate to the operations of the agency;

[...]

Mission du Conseil

6. (1) Le Conseil a pour mission:

[...]

b) de contrôler l'activité des offices afin de s'assurer qu'elle est conforme aux objets énoncés aux articles 21 ou 41, selon le cas;

[...]

Pouvoirs du Conseil

7. (1) Afin de remplir sa mission, le Conseil :

[...]

f) procède aux enquêtes et prend les mesures qu'il estime appropriées relativement aux plaintes qu'il reçoit — en ce qui a trait à l'activité d'un office — des personnes directement touchées par celle-ci;

[...]

(1) may do all such other things as are incidental or conducive to the fulfilment of its duties

1) peut prendre toute autre mesure utile à la réalisation de sa mission.

[31] Subsection 8(1) directs that public hearings are to be held by the NFPC under certain circumstances, whereas subsection 8(2) gives the NFPC discretion to hold public hearings if doing so would be in the public interest:

Where hearing to be held

Audience obligatoire

8. (1) A public hearing shall be held by the Council

8. (1) Le Conseil tient une audience publique :

(a) in connection with an inquiry into the merits of establishing an agency or of broadening the authority of an existing agency to cover any additional farm product or farm products;

a) lorsqu'il enquête sur l'opportunité de la création d'un office ou de l'extension du pouvoir d'un office existant à un ou plusieurs autres produits agricoles;

(b) where the Council has under review a proposed marketing plan or promotion and research plan; or

b) lorsqu'il étudie un projet de plan de commercialisation ou de plan de promotion et de recherche;

(c) in connection with any other matter relating to its objects if the Governor in Council or the Minister directs the Council to hold a public hearing in connection with such matter.

c) lorsque le gouverneur en conseil ou le ministre le lui enjoint, relativement à toute autre question de sa compétence.

Where hearing may be held

Audience facultative

(2) A public hearing may be held by the Council in connection with any matter relating to its objects where the

(2) Le Conseil peut tenir une audience publique au sujet d'une question de sa compétence s'il est convaincu

Council is satisfied that such a hearing would be in the public interest. que cela est dans l'intérêt public.

[32] The NFPC has also created internal guidelines for the consideration of complaints (“Complaint Guidelines”) which, as stated in the guidelines under chapter “IV. General Guidelines”:

Are to be construed liberally to ensure the fairest, least expensive and most expeditious way of resolving complaints. To ensure the flexibility required, or to avoid any unfairness, the NFPC or the Committee may, from time to time, dispense with, or vary any of these Guidelines in order to meet any unusual requirement or unforeseen circumstances.

[33] In chapter “VI. What Happens Next After a Complaint is Filed” the procedure for dismissing a complaint is outlined:

3. If Council considers that the complainant is not directly affected by the Agency order or regulation, proposed order or regulation or other decision; that the matter is beyond the jurisdiction of Council; the complainant is late in filing, or complaint is trivial, frivolous, vexatious or otherwise not substantive; Council may, after discussing the circumstances with the complainant, dismiss the complaint.

[34] CEMA argues that it is clear based on section 8 of the FPAA that the NFPC is not required to hold a public hearing in every case. Indeed, the NFPC is required to hold a public hearing only if there is an inquiry into the merits of establishing an agency or broadening the authority of an existing agency; if the NFPC is reviewing a proposed marketing plan; and if the matter relates to its objects or if directed by the Minister. The present dispute is related to none of these circumstances.

[35] Furthermore, the discretionary authority to hold a public hearing outside of the listed instances is only to be used if the NFPC is satisfied that such a hearing would be in the public interest. Again, it is clear that the NFPC is not required to hold a hearing.

[36] It is true, as Highland argues, that the FPAA does not provide an appeal from a decision of a paragraph 7(1)(f) complaint. As stated in *Baker*, above, that a decision is final and no further requests can be submitted, would usually militate in favour of a higher degree of procedural protections.

[37] However, in the particular circumstances of this case, I am inclined to agree with CEMA that the fact that a statutory appeal does not exist should be afforded less weight than it might otherwise attract. Highland already had a chance to fully argue its allegations in front of a decision-maker in the underlying arbitration. Based on the record, one might characterize the Complaint itself as an attempt to appeal parts of the arbitration decision.

[38] The statutory scheme does not indicate that Highland should have been granted a higher degree of procedural fairness.

a) *Nature of the Decision and Process*

[39] The requirements of procedural fairness vary depending on how closely an administrative body resembles a court. As stated in *Baker*, above, at para 23:

[...] “the closeness of the administrative process to the judicial process should indicate how much of those governing principles

should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.[...]

[40] Determining the content of the duty of fairness, however, is not as simple as classifying a tribunal as judicial, quasi-judicial, administrative or executive based on one of its functions. The Court must consider all the circumstances under which the tribunal operates. The Supreme Court of Canada held in *Bell Canada v Canadian Telephone Employees Assn*, 2003 SCC 36, [2003] 1 SCR 884 at para 22:

[...] In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal -- such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law -- as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.

[Emphasis in original]

[41] Highland relies on sections 8, 9 and 10 of the FPAA to argue that the matters considered by the NFPC may be of a judicial rather than purely administrative nature. These provisions outline when and how public hearings should be held, as discussed above.

[42] Highland admits that a public hearing will not occur in every instance, but that the availability of such a hearing, and the process for public hearings outlined in the Guidelines for Complaints (providing for a pre-hearing conference, written submissions, a hearing and a written decision) point towards the judicial nature of the NFPC's complaint procedure. Highland also submits that the adversarial nature of the Highland-CEMA dispute coupled with the public hearing provisions suggest that a higher duty of fairness is warranted.

[43] CEMA, on the other hand, submits that the function of the NFPC complaints process is not to adjudicate disputes. In making this submission, CEMA relies on the Federal Court of Appeal decision in *Leth Farms Ltd v Canada (Attorney General)*, 2007 FCA 49, [2007] 4 FCR 410.

[44] In *Leth Farms*, the Court considered whether the NFPC erred in dismissing a complaint based on lack of jurisdiction. The Court held that the NFPC's powers must be considered in the context of the duties imposed in section 6 of the FPAA, and that there is an interdependent relationship between the duties of the NFPC, the NFPC's complaint power, and the objects of agencies overseen by the NFPC as stated in the FPAA.

[45] As such, the Court explains that the words in paragraph 7(1)(f) "take such action...as it deems appropriate" needs to be interpreted in light of the duty imposed on the NFPC by paragraph 6(1)(b) "to review the operations of agencies with a view to ensuring that they carry on their operations in accordance with their objects...". Section 21 of the FPAA broadly states the

objects of an agency, such as CEMA, established pursuant to the FPAA:

<u>Objects</u>	<u>Mission</u>
<p>21. The objects of an agency are</p> <p>(a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and</p> <p>(b) to have due regard to the interests of producers and consumers of the regulated product or products.</p>	<p>21. Un office a pour mission :</p> <p>a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité;</p> <p>b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés.</p>

[46] In *Leth Farms*, above, the specific agency in question was the Canadian Turkey Marketing Agency (“CTMA”). The Court stated at para 50:

[...] In my view, the significant latitude that is extended to CTMA in relation to the conduct of its operations is consistent with a broader, rather than a narrower, range of actions that the Council should be able to take in the fulfillment of its mandate to conduct a review of the operations of the CTMA, especially in situations in which a complaint has arisen in relation to such operations. [...]

[47] The Court went on to emphasize that the nature of the “appropriate action” to be taken will depend on the actual circumstances of the complaint.

[48] I agree with CEMA that, based on the above, the primary purpose of the NFPC’s complaint function is not to arbitrate private disputes, but to ensure that agencies are operating in accordance

with their objects. Therefore, the NFPC complaint procedure is not purely judicial and does not require that each complaint be dealt with by a public hearing and that evidence must be tendered and considered.

[49] In fact, subsection 8(1) limits public hearings to situations where an agency is being established or a proposed marketing plan is being reviewed. Neither is happening in the present case. Subsection 8(2) gives the NFPC the discretion to decide to hold a public hearing only if such a hearing would be in the public interest.

[50] Highland suggests that the adversarial nature of the dispute between Highland and CEMA, and the adversarial nature of the arbitration that already took place should trigger a higher degree of procedural fairness. Once again, I must agree with CEMA that the private nature of the dispute cannot displace the public interest requirement in subsection 8(2), and that it would be unreasonable to require the NFPC to conduct a complete adjudicative review of evidence that has already been considered by the Arbitrator based solely on the fact that Highland characterizes the complaint as adversarial.

c) *Importance of the Decision*

[51] Generally, the nature and extent of the procedural duties owed will be more stringent the

greater the impact the decision has on the person affected. In *Baker*, above, the Court held at para 25:

[...] The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. [...]

[52] Highland submits that the NFPC's decision to dismiss the Complaint had and has a direct impact on Highland.

[53] Highland, however, fails to explain how this is possible, since, as CEMA points out, Highland currently does not operate as an egg processor and has not operated as an egg processor since 2003. If the NFPC had decided to further investigate the Complaint, and order the remedy sought by Highland, it would have no effect on Highland's legal rights since Highland is neither a customer of CEMA, nor commercially engaged with CEMA in any way.

[54] Highland again claims that the wrongdoing found by CEMA at the arbitration is directly linked to Highland's decision to cease operating as an egg processor "in light of the unfair competitive environment in which it found itself". This statement, once again, evidences a misunderstanding of the arbitration decision in which CEMA was cleared of any wrong-doing and in which Highland was unable to establish a link between CEMA's actions and its own decision to shut down.

[55] I understand that the declarations sought by Highland might be of great vindicatory importance to Mr. Ewanishan, Highland's principal, but they are of no practical effect. Since the agreed-to arbitration is complete and precludes Highland from re-litigating those issues, it is hard to

see what is at stake for Highland in this Complaint. As CEMA argues, the reality is that the impact of the decision is no impact at all.

d) *Legitimate Expectations*

[56] The doctrine of legitimate expectations essentially provides that if an administrative body makes promises regarding the procedure it follows, it will be unfair if the body does not follow that expected procedure in a given case (*Baker*, above, at para 26).

[57] Highland relies on the Complaint Guidelines to argue that Highland had a legitimate expectation that the NFPC would discuss the Complaint and the basis on which it was advanced prior to dismissing it.

[58] CEMA submits that the Complaint Guidelines did not create a legitimate expectation that Highland would be consulted, or, in the alternative, if the Complaint Guidelines did create a legitimate expectation, the NFPC satisfied its obligation to consult prior to dismissal.

[59] The guideline in question states:

3. If Council considers that the complainant is not directly affected by the Agency order or regulation, proposed order or regulation or other decision; that the matter is beyond the jurisdiction of Council; the complainant is late in filing, or complaint is trivial, frivolous, vexatious or otherwise not substantive; Council may, after discussing the circumstances with the complainant, dismiss the complaint.

[60] This provision requires the NFPC to discuss the circumstances with the complainant, not discuss the complaint itself. Furthermore, this provision needs to be considered in light of the NFPC's qualification of the guidelines, that they:

Are to be construed liberally to ensure the fairest, least expensive and most expeditious way of resolving complaints. To ensure the flexibility required, or to avoid any unfairness, the NFPC or the Committee may, from time to time, dispense with, or vary any of these Guidelines in order to meet any unusual requirement or unforeseen circumstances.

[61] CEMA argues that a representation with respect to a procedure may qualify as a legitimate expectation only where it is "clear, unambiguous and unqualified," (*Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 131). In the present case, any representation with respect to the requirement for a pre-dismissal consultation is clearly qualified.

[62] In my view, I need not determine whether or not the Complaint Guideline constitutes a legitimate expectation because even if we take that as a given, I find that the NFPC met their duty to discuss the circumstances with Highland prior to the dismissal.

[63] I consider the correspondence that took place between the parties prior to the dismissal to be a discussion of the circumstances as required by the Complaint Guidelines. In effect, the arbitration agreement ousted the NFPC's jurisdiction to consider elements of the Complaint that were addressed in the arbitration decision. There would be no point or purpose in discussing the substance of the Complaint itself with Highland subsequent to the NFPC's review of the arbitration

decision; moreover, this is not an expectation that Highland could have reasonably gleaned from the Complaint Guidelines.

[64] In any case, it is clear from the correspondence between the parties that the NFPC required a review of the arbitration decision as a preliminary step in the complaint process. The dismissal of the Complaint based on fact that the arbitration decision had already dealt with the issues in the Complaint should not have been a surprise to Highland. The submissions made by the parties up until this point revolved around the arbitration decision and agreement.

[65] I must agree with CEMA that the NFPC had all of the materials necessary to make the decision to dismiss the Complaint in a fair manner, and that any concerns were sufficiently shared with Highland prior to the dismissal.

e) *The Agency's Choice of Procedure*

[66] The final factor to consider in determining the content of the duty of fairness is the agency's own choice of procedure. Where the statute grants the decision-maker the ability to choose its own procedures it is entitled to deference by the reviewing court. As stated in *Baker*, above, at para 27:

[...] the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances... While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.

[67] Both parties seem to agree that the FPAA grants the NFPC broad powers and considerable discretion in deciding the appropriate procedures to follow on a case-by-case basis.

[68] Highland submits that although the NFPC must be granted deference in how it might have decided to hear Highland's submissions, no deference should be afforded on the issue of whether to hear the submissions at all.

[69] This is a flawed argument. While the Complaint Guidelines do require the NFPC, in most cases, to discuss the circumstances with the complainant before dismissing a complaint, the NFPC is still able, and indeed required in some circumstances, to dismiss a complaint before hearing it. The present Complaint is such a case. Once the NFPC determined that it was unable to hear the Complaint based on the arbitration decision, the NFPC properly and fairly communicated this decision to Highland. As CEMA submits, this is not a case where a complaint was casually dismissed without process. It is proper in these circumstances to defer to the NFPC's decision not to hold a public hearing or review evidence that was before the Arbitrator.

(2) Right to a Hearing

[70] Highland submits additional arguments alleging that the NFPC violated the *audi alteram partem* principle by not providing Highland with the opportunity to make submissions.

[71] CEMA's response to these submissions, with which I agree, is that the right to a hearing is subsumed within the analysis of *Baker* factors and need not be analyzed separately. The purpose of

the analysis described in *Baker*, above, is to determine the content of the duty of fairness owed and that may, or may not, require a hearing. In this case it is clear that Highland did not have a procedural right to a hearing.

[72] I would like to reiterate that the decision of the NFPC to dismiss the Complaint did not have the effect of destroying or altering any rights enjoyed by Highland. Highland had already had ample opportunity in an extensive adjudicative process to put forth its views. The procedure followed in assessing the Complaint by the NFPC was fair and open, appropriate to the statutory context. There is absolutely no perceived unfairness in the process taken by the NFPC. The NFPC clearly considered that Highland was of the opinion that the arbitration had not fully dealt with all of the issues. The NFPC analyzed this position along with the documents alleged to support it, and ultimately rejected it. The procedure that Highland seems to think the NFPC should have followed would have, in fact, been procedurally unfair to CEMA - a party who had every right to believe that it had successfully defended itself in a judicial process that both parties agreed would be conclusive.

[73] At the hearing Highland raised the additional argument that a complaint to the NFPC was not an “action” in the sense of an “independent legal action” which would be precluded by the arbitration agreement between the parties. Highland provided some case law on this point. However, CEMA also provided statutes broadly defining the term action. I am persuaded that in this particular context, the term action should be broadly construed. However, even if I am wrong on this point, the outcome of this case would not differ. The NFPC concluded that all the issues raised in Highland’s complaint had been dealt with by the arbitrator. In coming to this conclusion, as discussed above, the NFPC did not violate the Applicant’s right to procedural fairness.

V. Conclusion

[74] In consideration of the above conclusions, this application for judicial review is dismissed with costs to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs to the Respondent.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1475-09

STYLE OF CAUSE: HIGHLAND PRODUCE LTD. v.
EGG FARMERS OF CANADA
(FORMERLY KNOWN AS THE CANADIAN
EGG MARKETING AGENCY)

PLACE OF HEARING: EDMONTON

DATE OF HEARING: DECEMBER 7, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: FEBRUARY 21, 2011

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