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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
GROUP WESTCO INC., applicant,	Ross McFadyen for the applicant
- and -	Curtis Unfried, John Martens and Jennifer Sokal for the respondent, Manitoba Chicken Producers
MANITOBA CHICKEN PRODUCERS AND THE MANITOBA FARM PRODUCTS MARKETING COUNCIL, respondents.	David Gisser, Q.C. and Tamara Edkins for the respondent, The Manitoba Farm Products Marketing Council
	Judgment delivered: June 4, 2021

TOEWS J.

Introduction

[1] This matter involves two substantially similar preliminary motions filed by each of the respondents, Manitoba Chicken Producers (the "Board") and the Manitoba Farm Products Marketing Council (the "Council") to dismiss, stay or strike an application for judicial review brought by the applicant Group Westco Inc. ("Westco").

The Facts

[2] Westco is a registered producer of chicken broiler in Manitoba since 2006 and is required to conduct its business in accordance with Chicken Broiler Quota Order, M.R. 228/2006 as amended (the "Quota Order"). Pursuant to the Quota Order, Westco has been assigned a "basic allotment" and a "market allotment" for the production of chicken broiler from the Board. These allotments govern the amount of chicken broiler Westco is entitled to market.

[3] It is Westco's position that these allotments have prevented it and one other larger Manitoba producer, Friendly Farms, from participating in the growth in the chicken broiler industry in Canada. Both Westco and Friendly Farms had made requests of the Board seeking permission to effectively increase the basic allotment and the maximum allotment set out in the Quota Order. When the request by Friendly Farms was denied, Friendly Farms appealed the denial to the Council pursuant to s. 19 of ***The Farm Products Marketing Act***, C.C.S.M. c. F47 (the "***FPMA***").

[4] Sections 19 (1) and (2) of the ***FPMA*** provide:

> **Appeal to Manitoba council**
> 19(1) Any person affected by a regulation, order or decision made by a board or commission may appeal to the Manitoba council, but only if the person has first asked the board or commission to review the matter and the board or commission has refused to grant the relief requested.
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> **Notice of appeal**
> 19(2) An appeal must be commenced by a written notice given to the Manitoba council within 60 days after the regulation, order or decision is made, or within any longer period that the council considers appropriate.

[5] Since Westco's proceeding in respect of essentially the same issues was still pending before the Board, Friendly Farms made a request of the Council that its appeal

be adjourned so that any appeal by Westco could be heard at the same time. Westco's proceeding involved a request that the Board review a decision it made in respect of Westco's allotments on January 31, 2018.

[6] The Board opposed the application by Friendly Farms for the adjournment and in a decision dated May 11, 2018, the Council determined that the Friendly Farms appeal should proceed as scheduled.

[7] On July 27, 2018, the Board ruled that Westco's request for the Board to review its decision was denied. On August 31, 2018, Westco filed a notice of appeal with the Council relating to the Board's decision of January 31, 2018. Following the filing of Westco's appeal to the Council, the Council issued written reasons for decision on September 21, 2018 in connection with the Friendly Farms appeal.

[8] At the conclusion of the Family Farms decision, the Council directed the Board to take certain steps in respect of the Family Farms allotment. The Council then wrote to Westco and the Board in connection with Westco's appeal, setting the appeal date for November 21, 2018 and setting a case management call for October 24, 2018. Although the case management call was subsequently adjourned by agreement, the communication with Westco and the Board stated that the purpose of the case management call was to confirm the nature and scope of the appeal in light of the Council's decision in the Friendly Farms appeal.

[9] The amendment to the allotments as a result of the Family Farms decision of the Council on September 21, 2021, was adopted by the Board on November 15, 2018 and

approved by the Council on December 12, 2018. The amendment was registered on or about December 14, 2018.

[10] It is Westco's position that the amendment was contrary and inconsistent with the order of the Council as set out in the Friendly Farms decision. In a letter dated January 14, 2019, Westco wrote to the Council advising it of that position. By copy of the same letter, Westco asked the Board to review and reconsider the amendment in light of the Friendly Farms decision.

[11] Over the objections of Westco, the Board proceeded to hold consultations with other registered chicken broiler producers seeking their comments on the amendment. Westco was not invited to these meetings and when its legal counsel attended one such meeting where these consultations with producers were to be held, he was asked to leave the meeting.

[12] On July 22, 2019, the Board advised Westco by letter that it was not prepared to reconsider the amendment, noting that since the Council had approved the amendment it was reasonable to conclude the amendment was in keeping with the Council's decision.

[13] On September 20, 2019, Westco's pending appeal to the Council proceeded to a hearing. At the hearing Westco advised the Council that it was not pursuing one of the grounds raised in its notice of appeal relating to the elimination of the "maximum allotment" cap based on a fixed quantity of kilograms and replacement with a cap based on an overall percentage of quota within Manitoba. It is Westco's position that as a result of the Council's previous findings in the Friendly Farms decision, it was not necessary to pursue that ground of appeal.

[14] However, as a result of a concern over the nature of possible communication between members of the Board and the Council concerning the amendment that had been registered on December 14, 2018, Westco sought to obtain a copy of correspondence dated October 5, 2018 from the Executive Director of the Board to the Council. It commenced its efforts to obtain that correspondence through the process established by Manitoba's access to information legislation in April of 2019.

[15] Westco was finally able to obtain an unredacted copy of the letter on February 4, 2020. This correspondence discloses that the Board had requested a meeting with the Council to discuss the Amendment flowing from the Friendly Farms decision prior to the registration of the amendment.

[16] Westco subsequently filed the application for judicial review of the Council's decision on March 5, 2020. The substantive relief applied for including, inter alia:

- An order of certiorari quashing the approval of the amendment by the Council dated December 12, 2018;
- An order of mandamus requiring that the Board render the quota order compliant with the direction and order set out in the decision of the Council dated September 21, 2018, given in connection in the Friendly Farms matter.

The Position of the Board and the Council

[17] The position of the Board, which is substantially the same position advanced by the Council, is that Westco has failed to pursue the statutorily available appeal route and therefore the court should refuse to exercise its jurisdiction to hear the judicial review application. In this respect the Board relies on the recent decision of the Manitoba Court

of Appeal in ***Thielmann v. Association of Professional Engineers and Geoscientists of the Province of Manitoba***, 2020 MBCA 8, [2020] M.J. No. 8 (QL), where it held at paras. 24 and 25:

> **24** In the past decade, there has been a significant shift away from early judicial intervention in the work of a tribunal. The general rule with respect to prematurity is that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 31). Moreover, the exceptional circumstances exception is exceptionally narrow and the threshold for intervention is exceptionally high (*ibid* at para 33).
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> **25** The Supreme Court of Canada's decision in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 expressed approval of *CB Powell Limited* and explained that there were sound reasons for restraint with respect to judicial intervention. The Court stated (at para 36):
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> > Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: . . .. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971) [*Bell v Ontario Human Rights Commission*, [1971] SCR 756].

[18] Furthermore, it is the Council's position that there are no "exceptional circumstances" here to derogate from the general rule of no judicial intervention. In the result, the Council submits that the court should decline to hear the application for judicial review and "strike, stay, or dismiss it in favour of the carefully crafted legislative process under the ***FPMA***".

The Position of Westco

[19] Westco takes no issue with the description of the statutory scheme under the ***FPMA*** and the roles and responsibilities of the Board and the Council set out in the briefs

of the Board and the Council. However, it disagrees with the manner in which the underlying dispute has been characterized in the briefs of the Board and the Council.

[20] Westco states that the application for judicial review is in respect of a direction and order already made by Council following the full statutory appeal process as set out under the ***FPMA***. It states that its application for judicial review is not premature in view of the fact that the Council has already provided Westco with an adequate remedy in the form of its direction and order which the Board and the Council have refused to implement. It is therefore seeking certiorari and an order of mandamus to require the Board and the Council to implement the amendment, by having the Quota order amended in the form ordered and directed by Council in its Friendly Farms decision.

Analysis and Decision

[21] It is instructive to consider the comments of Rempel J. in ***Ackron Egg Farms Ltd. v. Manitoba Egg Farmers***, 2020 MBQB 187, [2020] M.J. No. 296 (QL), in which he characterizes the concept of supply management in the context of another board, also under the statutory purview of the Council and the ***FPMA***. He states:

> **5** The decisions and the appeal in dispute cannot be analyzed without an understanding of the key concepts that underlie the supply management plan for farm products established through legislation across Canada. A quota system lies at the heart of any supply management plan.
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> **6** In very broad terms, food producers acquire a quota from a regulatory board or commission that is created by statute. That quota permits them to produce a certain volume or quantity of food products that are then sold to the board at a set price. Producers who do not hold quota of regulated food products are not permitted to sell what they produce to consumers. Only sales to the regulatory board are permitted and a series of rules governs any surplus created by a producer above the set quota amount and the payment, if any, for that surplus to the producer. The regulatory board, which operates on a non-profit basis, then markets the product and offers it for sale to the public.

> **7** The quotas themselves do not belong to the producers. The property rights to the quota or the "ownership" of quota always remains with the regulatory board. In practical terms, this means that there is a finite supply of quota of any regulated farm product that is available for allocation by the regulatory board to individual producers. To be clear, a quota is not a commodity that is sold by a regulatory board to individual producers. A quota represents an acquired right to produce a food product under a legislative plan.
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> **8** The supply management plan for agricultural products in Manitoba cannot exist without the acquisition of a quota by producers and the limitation of production in accordance with those quotas. Without adherence to quotas, prices for agricultural products cannot be regulated and this in turn would make it impossible for producers to realize a set price for what they produce.
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> **9** The public policy rationale underlying the supply management scheme for agricultural products in Canada is the benefit created to consumers by a reliable supply of agricultural or food products at stable prices that offer a fair return to producers. This kind of system protects both consumers and producers from wild price fluctuations caused by the vagaries of the market.

[22] That characterization is equally applicable to the Board and the issues under consideration here.

[23] Furthermore, as Rempel J. noted in the ***Ackron*** case, the court should be careful to avoid considering matters on judicial review "… that were not raised before the Council and are not reflected in any of its submissions in the Record before the Council." (at para. 61). He continues as follows:

> **62** It is a fundamental principle of administrative law that a court conducting a judicial review may decline to deal with issues that were never raised before the administrative body if it is inappropriate to do so. (See ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61 (CanLII), [2011] 3 SCR 654, at para 22; ***Town of Russell v. Her Majesty the Queen in Right of the Province of Manitoba***, 2011 MBCA 56 (CanLII), at paras. 38-39; ***Houston Recruiting Services Ltd. v. Green***, 2011 MBCA 16 (CanLII), at paras. 15-17.)
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> **62** The discretion to permit parties to raise fresh issues on judicial review should not be exercised where the issue could have been raised but was not raised before the administrative body (***Alberta (Information and Privacy Commissioner)***, at para. 23).

> **63** The main rationales for this general principle are set out by the Supreme Court of Canada in ***Alberta (Information and Privacy Commissioner)***, at paras. 24-26, and include:
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> a) That on an application for judicial review, if the decision-maker has not been asked to address a particular issue in its original decision, it is difficult conceptually to conclude that the decision-maker erred;
> b) Where the legislature has entrusted the determination of the issue to the administrative tribunal, the courts should respect the legislative choice of the tribunal as the first instance decision-maker by giving the tribunal the opportunity to deal with the issue first and to make its views known;
> c) The courts should be especially careful not to overlook the loss of the benefit of the tribunal's findings of fact and analysis inherent in allowing the issue to be raised, especially if the issues related to the tribunal's specialized functions or expertise; and
> d) Raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record to consider the issue.
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> **65** The Supreme Court of Canada further cautioned courts in admitting new issues on judicial review in ***Alberta (Information and Privacy Commissioner)***, at paras.54 and 55:
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> [54] … The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
> [55] … Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

[24] In my opinion the same care and deference should be exercised here especially in view of the fact that the Council is the same tribunal and it is the same statutory appeal process under consideration here as in the ***Ackron*** case.

[25] Without expressing any opinion as to the expiration of any appeal period under the relevant legislation, it is clear to me that the matter which Westco is seeking certiorari and mandamus has not been considered by the Council. While the Board refused to reconsider its decision as set out in the amendment, the appeal by Westco to the Council of that refusal dated July 22, 2019 and the underlying issue has not been considered by the Council.

[26] As stated at paragraph 36 of the Westco brief in response to the motions of the respondents:

> 36. On September 20, 2019, Westco's pending appeal to Council – resulting from its notice of appeal dated August 23, 2018 – proceeded to a hearing. In connection with that process, Westco specifically advised Council that it was not pursuing one of the original grounds raised in the notice of appeal, namely the elimination of the "maximum allotment" cap based on a fixed quantity of kilograms, and replacement with a cap based on an overall quota within Manitoba. Rather, Westco determined that as a result of Council's previous findings and directions in the [Friendly Farms] Decision, it was not necessary to pursue that ground of appeal.

[27] Furthermore, as Westco states at paragraph 62 of the same brief:

> 62. … It is of note that at no point in the last two years has the Board or Council even attempted to explain the patent inconsistency between the [Friendly Farms] Decision and the form of the Amendment.

[28] This assertion exemplifies why the matter in fact should first be dealt with by the Council. It is this issue that is central to Westco's appeal and in my opinion supports the position of the Board and Council that this issue should be raised and considered by the Council before an application for judicial review in this court should proceed. Contrary to the position of Westco, the issues raised in this application for judicial review have not been raised before the Council. Judicial review should not proceed here until the Council has had an opportunity to deal with the issue first and to make its views known.

[29] Westco is also advancing the argument here that the court should assume improper conduct by the Board or the Council on the basis of the correspondence from the Executive Director of the Board to Council requesting a meeting with the Council to discuss the amendment flowing from the Friendly Farms decision prior to the registration of the amendment. In my opinion, any allegations of procedural unfairness or breaches

of natural justice should first be raised at an appeal to the Council. As noted in Sara Blake, *Administrative Law in Canada*, 6th ed (LexisNexis Canada Incorporated, 2017), at 9.55:

> Review by another tribunal is generally considered adequate even where bias is alleged against the first tribunal or the reviewing tribunal. Courts dismiss speculation that the reviewing tribunal will fail to provide a fair process.

[30] I will not engage in speculation about procedural unfairness or breaches of natural justice in the context of this motion on the basis of the material before me. In this case it would be preferable to have the Board and the Council, to extent that they properly may do so, explain in the context of an appeal provided by the ***FPMA*** their respective decisions and the process they adopted in this matter. In that way should the matter be the subject of a judicial review the record returned to the court would be more fulsome. As the court noted in ***Thielmann*** at para. 25, citing from the decision of ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)***, 2012 SCC 10: "… early judicial intervention risks depriving the reviewing court of a full record bearing on the issue."

[31] Finally, I find no merit in the argument advanced by Westco that the Board's motion should be dismissed because the court should not entertain preliminary motions but rather deal with the matters raised in the motion within the context of the substantive judicial review. As discussed, the law requires that statutory appeals be exhausted before a matter is brought to the court for judicial review.However, it does not follow that where a matter is brought to the court on a preliminary motion to dismiss a judicial review because it is not ripe for review that the court should dismiss the preliminary motion.

[32] It is appropriate for the court to exercise its discretion to dismiss an application for judicial review where in the interests of judicial economy and proportionality, argument can and should be heard on a preliminary motion without the expense of hearing the whole of the application. The authority for this sound proposition can be found in ***Nadler v. College of Medicine University of Saskatchewan***, 2017 SKCA 89, 2017 CarswellSask 531 (QL), where the court held at paras. 44 and 45:

> **44** Dr. Nadler asserted further that the proper procedure would have been for the Chambers judge to have heard his originating application and the application to strike at the same time. For this proposition, he relied upon *Eidsvik v Canada (Fisheries and Oceans*), 2011 FC 940 at para 20. ***Clearly, there may be circumstances where it is useful and indeed, necessary, to hear the whole of the judicial review application before it can be determined that the application should be dismissed because it is premature. On the other hand, as the Federal Court jurisprudence indicates, circumstances will arise where, in the interests of judicial economy and proportionality, argument can and should be heard on a preliminary motion without the expense of hearing the whole of the application.***
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> **45** Here, Dr. Nadler sought orders for certiorari, mandamus and prohibition entirely on the ground that the Investigation Committee had lost jurisdiction – thereby rendering its decision null and void because it was missing a seventh member of the panel, Dr. Marciniuk. While ancillary relief was also sought, granting that relief depended on the success or failure of the College's application. Given the straightforward nature of Dr. Nadler's claim, it was appropriate for the Chambers judge to consider the College's application without hearing full argument on the amended originating application. To do so was entirely in keeping with the purpose and intention of *The Queen's Bench Rules*, which are "to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way" (Rule 1-3(1)) and "to facilitate the quickest means of resolving a claim at the least expense" (Rule 1-3(2)(b)).
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> [emphasis added]

[33] In my opinion, the interests of judicial economy and proportionality require that the motions of the Board and the Council be heard and determined on a preliminary basis because of the failure of Westco to pursue the statutory appeal provided by the ***FPMA***. In my opinion, the remedy provided by the statutory appeal is adequate in all the

circumstances to address Westco's concerns. Furthermore, the exercise of the appeal in this matter will result in the establishment of an appropriate record should Westco decide to seek judicial review at the conclusion of the statutory appeal process.

[34] Again, I make no comment about the availability of an appeal but as Sara Blake on *Administrative Law in Canada*, 6th ed (LexisNexis Canada Incorporated, 2007) states at 9.56:

> 9.56 Judicial review is not available to an applicant who missed the time limit to appeal, who abandoned an appeal, or who did not apply for or was denied leave to appeal. **(citations in the original omitted)**

[35] In this case, pursuant to s. 19(2) the ***FPMA*** the Council has the jurisdiction to allow an appeal to proceed within any period that the Council "considers appropriate". Clearly, the decision to allow the appeal to proceed is in the discretion of the Council if the appeal made by Westco has been abandoned or is otherwise barred.

Conclusion

[36] Accordingly, for the reasons provided, the motions of the Council and the Board, to have Westco's application for judicial review dismissed, is granted. Costs may be spoken to although the usual practice is that an administrative tribunal neither receives costs or has costs awarded against it where it is making submissions to the court related to the scope of its statutory responsibilities.

_____ J.