Federal Court  Cour fédérale

Date: 20120621

Docket: T-1931-11

Citation: 2012 FC 799

Ottawa, Ontario, June 21, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ULTIMA FOODS INC.,
DANONE INC. and
AGROPUR COOPÉRATIVE

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF INTERNATIONAL TRADE
and AGRO-FARMA CANADA INC.

Respondents

PUBLIC VERSION OF CONFIDENTIAL
REASONS FOR JUDGMENT AND JUDGMENT

TABLE OF CONTENTS

THE APPLICATION

[1] In two applications which were consolidated by order of Mr. Justice Beaudry dated January 13, 2012 and heard as one [the Application], the applicants seek judicial review of a decision of the Minister of International Trade [the Minister] made on October 17, 2011 wherein he issued supplemental import permits which allowed Agro-Farma Canada Inc. [Agro-Farma] to import up to [omitted] kilograms of its Chobani brand Greek-style yogurt [Chobani]. Of that amount, [omitted] kilograms was to be used for test marketing in the Greater Toronto Area [GTA] during the three-month period from November 7, 2011 to February 6, 2012 [the Test Permit]. Thereafter, up to [omitted] kilograms was authorized for import and sale in the GTA in the twelve-month period from February 7, 2012 to February 6, 2013 [the Bridging Permit] on the condition that Agro-Farma would invest [omitted] in production facilities in Ontario and create [omitted] new jobs. Together, these import permits will be referred to as the "Chobani Permits" and the grant of the Chobani Permits will be described as the "Decision".

THE MOTIONS

[2] Two motions were brought in the context of this Application. One was made by the Attorney General of Canada and the Minister. It asks the Court to strike portions of the applicants' affidavit evidence. The second motion was brought by all the respondents and it asks that the Application be struck out on the basis that the applicants lack standing. These motions will be discussed after the Application has been considered on its merits.

THE PARTIES

[3] The applicant Ultima Foods Inc. [Ultima] is a major dairy processor in Canada. It produces and markets "Yoplait" brand traditional yogurt. Traditional yogurt is all yogurt which is not Greek-style yogurt [Greek Yogurt]. Ultima's subsidiary, Olympic Dairy Products Ltd, produces two brands of Greek Yogurt.

[4] The applicant Agropur coopérative [Agropur] is a dairy cooperative of 3,459 Quebec dairy farmers. It is a part owner of Ultima and is also one of the largest dairy processors in Canada. Agropur manufactures traditional yogurt under the brand name "Island Farms". Agropur was added as an applicant in this proceeding by order of Madam Justice Bédard dated February 2, 2012.

[5] The applicant Danone Inc. [Danone] is the leading traditional yogurt producer in Canada. Since 2010, Danone has also sold Oikos and Oikos Organic Greek Yogurt, which is co-packed in Ontario by Gay Lea Foods Co-Operative Ltd. Danone is currently adding equipment worth $21 million to produce Oikos at its plant in Boucherville, Québec.

[6] Ultima, Agropur and Danone will be referred to collectively as the "Applicants".

[7] The respondent Agro-Farma is the Canadian affiliate of an American dairy processor. The American company began to produce Chobani in 2007 and it took Chobani only four years to become the "top selling" yogurt in the U.S. Agro-Farma has been marketing Chobani in the GTA since November 7, 2011 pursuant to the Chobani Permits. Agro-Farma was added as a respondent

in this proceeding as part of the consolidation order made by Mr. Justice Beaudry on January 13, 2012.

[8] The Minister of Foreign Affairs has discretionary authority to issue supplemental import permits for goods listed on the *Import Control* List, CRC, c 604 pursuant to subsection 8.3(3) of the *Export and Import Permits Act*, RSC 1985, c E-19 [the EIPA] and Order in Council 1983-3832, C Gaz 1983 II. In practice, however, this power is exercised by the Minister on behalf of the Minister of Foreign Affairs.

THE BACKGROUND

Dairy Industry Participants

[9] The Canadian Dairy Commission [CDC] is a Crown corporation which administers the supply management system for milk [Supply Management]. The CDC is responsible for establishing the price for industrial milk and for setting the national milk production quota in consultation with provincial milk marketing boards.

[10] The Dairy Farmers of Ontario [DFO] is the Ontario milk marketing agency. All Ontario dairy farmers are required to sell their milk to the DFO, which in turn markets the milk to the dairy processing industry (including yogurt manufacturers such as the Applicants) on the farmers' behalf: see *DFO Milk General Regulation*, 04/12 (*Milk Act*, RSO 1990), s 3. The DFO is owned, operated and financed by approximately 4,200 Ontario dairy farm families.

[11] Agriculture and Agri-Food Canada [AAFC] is the federal government department which provides information, research and technology and which establishes policies and programs to achieve, among other things, a competitive and innovative sector for agriculture, agri-food and agri-based products.

[12] The Ontario Ministry of Agriculture, Food and Rural Affairs [OMAFRA] is responsible, through the Ontario Farm Products Marketing Commission, for Supply Management in Ontario and has delegated certain powers in this regard to the DFO pursuant to the *Ontario Milk Act*, RSO 1990, c M-12.

Greek Yogurt

[13] Greek Yogurt is a style of yogurt with a thicker consistency, lower carbohydrate content and higher protein content than traditional yogurt. The special attributes of Greek Yogurt are achieved by adjusting the amount of liquid whey, either by removing it or by rebalancing the ingredients. The production of Greek Yogurt requires three times more industrial milk than is used in the production of traditional yogurt.

[14] Five dairy processors currently market Greek Yogurt in Canada. They are Liberté, Parmalat, Danone, Olympic and Skotidakis.

[15] Agro-Farma submits that Chobani is a "premium" Greek Yogurt because it is firmer than other Greek Yogurts, boasts superior whey retention without the use of added stabilizers and has a longer shelf-life than other Greek Yogurts. According to Agro-Farma, Chobani also differs in that it is manufactured using a unique process and because it can be produced using skim milk.

[16] Chobani is more expensive than other Greek Yogurts. It is rarely discounted in the United States and Agro-Farma says that, in Canada, it intends to adopt similar retail pricing.

Milk Prices in the U.S.

[17] The U.S. does not have the Supply Management system used in Canada. Instead, the government pays direct subsidies to dairy farmers to support their incomes. As a result, milk prices in the U.S. are substantially lower than those in Canada. For example, the type of milk used in yogurt production is 79 percent more expensive in Quebec than in New York State.

Supply Management

[18] Canada's dairy industry is subject to Supply Management. Its dual objectives are established by section 8 of the *Canadian Dairy Commission Act*, RSC 1985, c C-15 [the CDC Act]. It reads:

8. The objects of the Commission are to provide efficient producers of milk and cream with the opportunity of obtaining a fair return for their labour and investment and to provide consumers of dairy products with a continuous and adequate supply of dairy products of high quality.	**8.** La Commission a pour mission, d'une part, de permettre aux producteurs de lait et de crème dont l'entreprise est efficace d'obtenir une juste rétribution de leur travail et de leur investissement et, d'autre part, d'assurer aux consommateurs un approvisionnement continu

et suffisant de produits laitiers de qualité.

[19] Supply Management achieves these objectives through control mechanisms: (i) on domestic pricing, (ii) on the volume of milk produced, and (iii) on the volume of imported dairy products. The CDC is responsible for the first two control mechanisms and the third is governed by the EIPA. All three mechanisms must be in place for Supply Management to operate effectively. I will deal with them in turn.

(i) Price Controls

[20] The CDC establishes target prices for industrial milk in consultation with provincial dairy marketing boards. The target prices reflect the cost of production, consumer demand, and competition from other products, amongst other factors. Prices are based on the milk's end-use and are not subject to negotiation with producers or processors.

(ii) Production Controls

[21] The CDC implements its target prices by limiting domestic milk production through its National Milk Marketing Plan, which establishes a national production target or "Market Sharing Quota" [MSQ] for industrial milk. This target is constantly monitored and periodically adjusted to reflect changes in demand. The MSQ is divided among the provinces. They then allocate quota shares to local producers based on provincial priorities. Dairy producers in Ontario, Quebec, New Brunswick, Prince Edward Island and Nova Scotia have agreed to pool milk revenues and to

harmonize certain aspects of milk production [the Pooling Agreement]. Processors, such as the Applicants, purchase industrial milk through provincial marketing boards.

(iii) Import Controls

[22] Section 5 of the EIPA authorizes the creation of the *Import Control List*. The section states, in part:

5. (1) The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which the Governor in Council deems it necessary to control for any of the following purposes:	**5.** (1) Le gouverneur en conseil peut dresser la liste des marchandises d'importation contrôlée comprenant les articles dont, à son avis, il est nécessaire de contrôler l'importation pour l'une des fins suivantes :
...	…
(d) to implement an action taken under the *Agricultural Marketing Programs Act* or the *Canadian Dairy Commission Act*, with the object or effect of supporting the price of the article;	d) mettre à exécution toute mesure d'application de la *Loi sur les programmes de commercialisation agricole* ou de la *Loi sur la Commission canadienne du lait* dont l'objet ou l'effet est de soutenir le prix de l'article;
(e) to implement an intergovernmental arrangement or commitment; or …	e) mettre en oeuvre un accord ou un engagement intergouvernemental; …

[23] Yogurt was first placed on the *Import Control List* in 1988 pursuant to paragraph 5(1)(d) of the EIPA. As well, when the list was amended in December of 1994, yogurt was also listed pursuant to paragraph 5(1)(e) of the EIPA to implement Canada's commitments under the World Trade Organization *Agreement on Agriculture*, Apr 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 UNTS 410 [the WTO Agreement]: see SOR/95-32, s 158.

[24] I now turn to the issue of exemptions from the *Import Control List*. Subsection 8.3(3) of the EIPA gives the Minister the authority to issue supplemental import permits [the Permits] for goods for which the Minister has determined an "import access quantity". This subsection was the basis for the issuance of the Chobani Permits. It reads as follows:

8.3 (3) Notwithstanding subsection 8(1) and subsections (1) and (2) of this section, where goods have been included on the Import Control List and the Minister has determined an import access quantity for the goods pursuant to subsection 6.2(1), the Minister may issue (a) a permit to import those goods in a supplemental quantity to any resident of Canada who applies for the permit, or (b) generally to all residents of Canada a general permit to import those goods in a supplemental quantity, subject to such terms and conditions as are described in the permit or in the regulations.	**8.3** (3) Malgré le paragraphe 8(1) et les paragraphes (1) et (2), en cas d'inscription de marchandises sur la liste des marchandises d'importation contrôlée, s'il a déterminé la quantité de marchandises bénéficiant du régime d'accès en application du paragraphe 6.2(1), le ministre peut délivrer à tout résident du Canada qui en fait la demande une licence pour l'importation des marchandises en quantité additionnelle ou aux résidents du Canada une licence de portée générale autorisant leur importation en quantité additionnelle, sous réserve des conditions prévues dans la licence ou les règlements.

[25] I note in passing that subsection 8.3(3) provides no guidance to the Minister about when Permits should be issued. The same can be said of the *Import Permit Regulations*, SOR/79-5, which only specify the information that is to be included in an application for a Permit.

[26] The "import access quantity" referred to in subsection 8.3(3) is also called the tariff rate quota [the TRQ]. The Minister has set a TRQ for yogurt pursuant to subsection 6.2(1) of the EIPA. This volume can be imported duty free by Canadian residents who receive allocations. While there are no legislative criteria for determining the overall quantity of the TRQ, the Minister is required by subsection 6(b) of the *Import Allocation Regulations*, SOR/95-36 to consider the potential impact on the applicable Canadian agro-industrial sector when he allocates the TRQ to Canadian residents.

[27] Yogurt imported above the TRQ of 332,000 kilograms is described as "over access commitment" yogurt and is subject to a duty of 237.5 percent. This prohibitive duty effectively blocks yogurt imports.

[28] The Applicants base two submissions on the TRQ. First, they object to the volume of yogurt which Agro-Farma is entitled to import under the Chobani Permits ([omitted] kilograms) saying that, although it is described as a supplementary amount in relation to the TRQ, it far exceeds the TRQ of 332,000 kilograms. However, in my view, the TRQ volume has no bearing in the present case because it was established for an entirely different purpose in the context of the WTO Agreement.

[29] The Applicants also say that the TRQ is relevant because, when it is allocated, the Minister must consider the impact on the relevant agro-industrial sector. The Applicants say that, if this is a requirement associated with importing the relatively small TRQ volume of yogurt, it should, by analogy, have been treated as a requirement when the larger volumes under the Chobani Permits were being considered. The Applicants say that the Chobani Permits destroy their ability to compete, impede investment and will cause job losses. They say that if these consequences had been considered, the Chobani Permits would have been refused.

[30] The difficulty with this submission is that the requirement to consider the impact on the agro-industrial sector is only triggered when the Minister is deciding whether to issue an import allocation or whether to consent to a transfer under paragraph 6.2(2)(b) of the EIPA. It does not

apply when he sets the overall TRQ volume under subsection 6.2(1). The reality is that there are no legislative or regulatory requirements associated with establishing volumes for the TRQ or for Permits. For these reasons, there is no basis for the analogy suggested by the Applicants.

The Guidelines

[31] The Minister has published a series of "Notices to Importers" outlining the criteria he will consider in exercising his discretionary power to issue Permits under subsection 8.3(3) of the EIPA. Notice to Importers No. 783 dated November 2, 2010 [the Guidelines] deals with dairy products and is the version which is relevant to this Application.

[32] The Guidelines show that the Minister may issue Permits for products (such as Greek Yogurt) that are already produced in Canada if a "unique" production process is used and if investment is planned. The Guidelines require an applicant to provide information about the minimum capital investment and job creation associated with the development of Canadian production facilities. This means that, as a matter of policy, the Minister has decided that criteria unrelated to Supply Management may be considered when applications for Permits are evaluated.

[33] The relevant portion of the Guidelines reads as follows:

5.4 *To import dairy products for the purpose of test marketing*.	**5.4** *Importation de produits laitiers pour commercialisation à titre expérimental*
An authorization for supplementary imports may be issued to facilitate test marketing in the Canadian market of new products that are, for example, unique or are produced with unique processes and require a substantial capital	Une autorisation d'importation supplémentaire peut être accordée afin de faciliter la commercialisation à titre expérimental de nouveaux produits sur le marché canadien, qui sont, par exemple, uniques en leur genre ou

investment for their production.

[…]

c) Applications made on company letterhead should contain the following information:

i. A description of the product and related production processes, indicating the unique features of same;

ii. A description of a proposed test marketing program, identifying test market areas, market channels, timing, promotion plans and marketing costs, product quantities required for the proposed test marketing program, and an analysis showing the minimum test market results required to decide in favour of the capital investment in Canadian production facilities; and

iii. A detailed outline of the resulting minimum capital investment and job creation; proposed financing required to produce the product (e.g., facilities, equipment, production capacity); and the time required to bring such facilities on line from the time a DFAIT decision to approve a test marketing program is made.

d) Companies are required to commence production in Canada as soon as is feasible after the successful completion of the test marketing program.

[…]

f) Once these quantities or the period have been exhausted, a further authorization for supplementary imports may be issued only for

produits au moyen de procédés uniques et dont la production nécessite un investissement en capital considérable.

[…]

c) Les demandes doivent être présentées sur le papier à en-tête de l'entreprise et comprendre les renseignements suivants :

i. une description du produit et des procédés de production afférents ainsi que les caractéristiques uniques de ces derniers;

ii. une description du programme de commercialisation à titre expérimental proposé qui définit les marchés-tests, les circuits de commercialisation, le calendrier, les plans de promotion, les coûts de commercialisation, les quantités de produits nécessaires pour réaliser le programme proposé et une analyse indiquant les résultats minimums qui doivent être obtenus auprès des marchés-tests pour approuver l'investissement en capital;

iii. un plan détaillé de la création d'emplois et de l'investissement en capital minimums, le financement proposé pour la production du produit, c.-à-d. les installations, l'équipement, la capacité de production et le temps qu'il faut pour rendre ces installations fonctionnelles à partir du moment où le MAECI approuve le programme de commercialisation à titre expérimental.

d) Après avoir réussi le programme de commercialisation à titre expérimental, les entreprises sont tenues de commencer la production au Canada dès que possible.

[…]

f) Une fois que les quantités sont épuisées ou que la période est écoulée, une autre autorisation d'importation supplémentaire peut

the same product, in quantities sufficient to continue serving the test marketing areas during a period reasonably required for the construction of the domestic production facilities. Once such facilities have been established, no further authorization for supplementary imports will be issued for either the test marketed product or for required raw materials. An applicant may submit only one test marketing application for a given product.	être accordée pour le même produit seulement, en quantités suffisantes pour continuer de servir les marchés-tests pour une période raisonnable nécessaire à la construction des installations de production nationales. Une fois ces installations construites, aucune autre autorisation d'importation supplémentaire ne sera accordée pour le produit faisant l'objet d'une commercialisation à titre expérimental ou pour les matières premières requises. Un demandeur ne peut présenter qu'une seule demande de commercialisation à titre expérimental pour un produit en particulier.
[…]	[…]

[34] As discussed below, although the Applicants acknowledge that the Guidelines are not binding on the Minister, they criticize him for granting the Chobani Permits in part because they say Chobani is not produced using a unique process as required by the Guidelines.

Danone's Permits (2009)

[35] "DanActive" is a beverage which Danone produced in the U.S. in 2006. At that time, the Canada Border Services Agency [the CBSA] issued an advance ruling that classified DanActive as a "beverage containing milk" rather than as "yogurt". This meant that Danone could import DanActive into Canada without having to pay prohibitive duties. Given this ruling, importation began.

[36] However, in 2008, after Danone had committed to the construction of a Canadian plant to produce DanActive, the CBSA issued a ruling reclassifying DanActive as "yogurt". As a result of this ruling, imports of DanActive became subject to prohibitive duties.

[37] In response to the reclassification, litigation was commenced but it was discontinued when the Minister issued Permits allowing Danone to import an [omitted] quantity of DanActive over a twenty-month period [the Danone Permits]. The evidence shows that [omitted] kilograms of DanActive were imported under the Danone Permits.

THE CHOBANI APPLICATION

[38] On April 29, 2011, Agro-Farma applied for a Test Permit to import Chobani duty-free and sell it in the GTA for three months for "test marketing" purposes. At the end of the test phase, if successful, Agro-Farma proposed to invest [omitted] million in a manufacturing plant in Ontario and create [omitted] new jobs. It also asked for a Bridging Permit for twelve months so that it could continue to supply the GTA while its manufacturing plant was under construction. Agro-Farma originally asked for permits to import a total of [omitted] kilograms of yogurt, but later increased its request under both permits to [omitted] kilograms. The Permits meant that for fifteen months Agro-Farma could produce Chobani for the GTA using low cost U.S. milk.

[39] Agro-Farma submitted the final revision of its application in June of 2011 [the Chobani Application]. It did not include a description of Chobani's production process because Agro-Farma, in common with the Applicants, treats its production process as a trade secret. However, as will be

discussed below, the alleged uniqueness of the production process was the subject of an oral briefing by Agro-Farma representatives.

LETTERS TO THE MINISTER

[40] Applications for Permits are normally confidential. However, the Applicants and other stakeholders somehow learned about the Chobani Application and wrote to the Minister in May and June of 2011. Below is an overview of that correspondence. It is significant that these letters were all before the Minister when he made the Decision.

Letter to the Minister dated May 26, 2011 from Pierre Nadeau, President of the Conseil des Industriels Laitiers du Québec Inc.

[41] This letter did not refer specifically to the Chobani Application but opposed any request for Permits for Greek Yogurt from the U.S. on the basis that (i) five brands of Greek Yogurt with fat content from 0 to 10 percent and in organic and kosher formats are already produced in Canada and (ii) the Permits would confer an unjustified competitive advantage given much less expensive U.S. milk. The letter concluded by saying that if Greek Yogurt was to be imported, existing businesses and Canadian employment would be jeopardized, and there would be a significant impact on investment in dairy processing.

Letter to the Minister dated May 30, 2011 from Yves Leroux of Government & Industry Relations, Parmalat Canada

[42] Parmalat made it clear that it knew that an application had been made for Permits to import Greek Yogurt from the U.S. but it did not mention Chobani. Parmalat noted that there are five brands of Greek Yogurt in Canada, and that the market is growing and quite competitive. The letter highlighted the competitive advantage that would be enjoyed by the importer and noted that the importer's sales would "cannibalize" Canadian processors' Greek Yogurt sales. The letter also expressed serious concerns about the negative impact on jobs and investment in the Canadian yogurt processing sector.

Letter to the Minister dated May 30, 2011 from Louis Frenette, President and CEO of Danone

[43] At the date of the letter, Danone had not yet started to produce Greek Yogurt. Nevertheless, it wrote the Minister saying that it understood that Agro-Farma "may have" requested a Test Permit. Danone's letter also alleged that the product was not new and listed the Canadian brands of Greek Yogurt. Danone said that there was ample capacity to meet present and future demand. Danone asked the Minister to consult with all stakeholders before reaching a decision.

Letter to the Minister dated May 31, 2011 from Gerry Doutre, President and CEO of Ultima

[44] Ultima said it "understood" that Permits were being sought for Chobani and that it "wish[ed] to express [its] total opposition to such a proposal". Ultima also expressed its view that

there is "nothing new or unique about Greek style yogurt or the way it is made". With this comment, Ultima was the only party to raise with the Minister the question of the uniqueness of Agro-Farma's production process. Ultima listed the Canadian brands of Greek Yogurt and the flavours associated with each brand.

[45] Ultima also said that Permits would allow a U.S. competitor to use the massive price differential between Canadian and U.S. milk to gain market share at the expense of Canadian processors. Ultima ended its letter asking for a meeting with the Minister.

Letter to the Minister dated June 15, 2011 from Don Jarvis, President and CEO of the Dairy Processors Association of Canada

[46] This letter discloses that DPAC thought test marketing had already started. It described Canadian brands of Greek Yogurt and indicated that, in future, "DPAC/ATLC will be requesting a meeting with your officials to review this situation".

A Summary of the Letters

[47] In my view, these letters taken together, informed the Minister that:

(i) Greek Yogurt is not a new product in Canada;

(ii) Greek Yogurt imports under the Chobani Permits would harm:

(a) Processors' competitive positions;

(b) Employment at processing plants;

(c) Investment in processing facilities.

(iii) The market for yogurt in Canada is competitive and growing;

(iv) Sales of Chobani would "cannibalize" Canadian processors' sales of Greek Yogurt; and

(v) Chobani is not made using a unique process.

[48] Since the letters say that Greek Yogurt is not a new product and is not manufactured with a unique process, the Minister would have understood that the authors were saying that the Permits should not issue because the Guidelines did not apply.

Responses from the Minister

[49] The Minister replied to Mr. Doutre of Ultima on July 6, 2011, refusing his request for a meeting but assuring him that "the position of Ultima, as outlined in [its] correspondence, along with the views of other stakeholders will be carefully considered should we receive requests for supplementary import quota for Greek Yogurt for test marketing purposes" [my emphasis]. The Minister replied to Mr. Jarvis of DPAC by letter dated September 21, 2011 repeating the same language. The Applicants submit, and I agree, that these letters [the Minister's Letters] indicate that the Minister had not received the Chobani Application when, in fact, it had been received. Later in these reasons I will consider whether the Minister's Letters breached a duty of fairness owed to the Applicants.

THE UNIQUENESS OF THE CHOBANI PRODUCTION PROCESS

[50] As mentioned above, the Chobani Application said nothing about the uniqueness of the Chobani production process. Accordingly, DFAIT scheduled a meeting with Agro-Farma on June 3, 2011 to discuss the process.

[51] The day before the meeting, Gaëtan Paquette of the CDC wrote an email to Katharine Funtek of DFAIT and others, which objected to the Chobani Permits mainly on the basis that Greek Yogurt was not a new product in Canada. The email said in part:

> The CDC looks forward to hearing from Agro-Farma about the novelness of its product and its manufacturing process at the meeting tomorrow.
>
> As you know, the CDC has expressed its objection to the request for a supplementary permit (either for market development or bridging) by Agro-Farma mainly on the basis that from what we know of their products and those already existing in the market there is not sufficient difference in Chabani's [*sic*] products to justify granting a market advantage to this company.
>
> […]
>
> That being said, the CDC will be interested in hearing what Agro-Farma can provide as information and will review its position in this matter if we feel it is appropriate to do so based on the information provided.

[52] Officials from DFAIT, AAFC, the CDC and Agro-Farma met on June 3, 2011 to discuss the Chobani manufacturing process. Agro-Farma educated those present about its production process but, since the process is a trade secret, no documentation was provided.

[53] At the conclusion of the meeting, the representatives of DFAIT and AAFC were satisfied that the process met the requirement in the Guidelines for a unique process. As well, Mark Lalonde of the CDC said he was "favourably impressed" with Agro-Farma's presentation and with the uniqueness of the Chobani manufacturing process.

[54] Notwithstanding Mark Lalonde's remarks, Gaëtan Paquette sent DFAIT an email on June 23, 2011, which stated that Agro-Farma's products were not "suffisamment innovateurs" (i.e. Greek Yogurt was not sufficiently innovative) and that it was impossible to verify the production process. The CDC acknowledged that, because processors keep their manufacturing processes confidential, it is hard to know whether Chobani's process is unique. However, the CDC said that Skotidakis had advised the CDC that it had been in discussions about co-packing Chobani and therefore knew that Chobani's process was "semblable" (i.e. similar) to the one used by Skotidakis. The CDC also said that it expected that the "cannibalization" rate would be 100 percent. Cannibalization occurs when sales of a new product (i.e. Chobani) are made at the expense of existing products (Canadian traditional and Greek Yogurt).

[55] In spite of these comments, the CDC gave unqualified support for Agro-Farma's Test Permit. Regarding the Bridging Permit, the CDC was of the view that it should not issue until the Minister was sure that Agro-Farma would actually invest in a manufacturing plant. It is noteworthy that the CDC's only concern about the Bridging Permit was timing. It never suggested that it should be denied because it would harm Supply Management.

THE MATERIAL BEFORE THE MINISTER

[56] The documents which were before the Minister when he reached the Decision are in a brief certified under Rule 318 of the *Federal Courts Rules*, SOR/98-106 [the Record]. They include the Guidelines; two Memoranda for Action [the MFAs] dated August 19 and September 1, 2011 from Louis Lévesque, the Deputy Minister of International Trade [the Deputy Minister]; two Memoranda dated August 18 and 26, 2011 from Lise-Ann Jackson, a policy advisor to the Minister [the Memos]; and the correspondence from Canadian dairy processors and industry stakeholders described above.

Memoranda for Action from the Deputy Minister of International Trade

[57] With the exception of the volume of Chobani that Agro-Farma wanted to import under the Permits, the two MFAs are identical. When read together, they show that Agro-Farma initially asked for [omitted] kilograms, then [omitted] kilograms and finally [omitted] kilograms for the Test Permit. For the Bridging Permit, Agro-Farma first asked for [omitted] kilograms and then increased its request to [omitted] kilograms.

[58] The MFA provided the Minister with information about import controls on yogurt, including the TRQ. It also advised him about Agro-Farma's test marketing proposal and the planned [omitted] investment and the creation of [omitted] jobs. The Deputy Minister recommended Permits for the original volumes Agro-Farma requested. He feared that the higher volumes might allow Agro-Farma to improperly expand sales of Chobani into markets outside the GTA.

[59] The Deputy Minister also expressed the view that Chobani "is produced with a unique, customized manufacturing process that does not presently exist in Canada". He noted that DFAIT and AAFC had both agreed that Chobani's manufacturing process met the policy requirements for test marketing. (In other words, it satisfied the requirement in the Guidelines for a unique process.) Further, he advised the Minister that the CDC took the position that the manufacturing process was not "sufficiently unique". However, my review of CDC's email of June 23, 2011 shows that the Deputy Minister misread the email and gave the Minister an incorrect view of the CDC's position. When the CDC spoke of insufficient uniqueness in the email, it was speaking of the product (i.e. Chobani) not the manufacturing process. Finally, the MFA shows the Minister that the CDC supported only the Test Permit. This was also inaccurate because, as noted earlier, CDC's only objection to the Bridging Permit was one of timing.

[60] Turning to AAFC, the Deputy Minister conveyed its opinion that the Canadian yogurt market is growing at 6 percent per year and would bear the introduction of Chobani with "minimal effect on competitors". As well, and importantly, the Minister was advised that AAFC expected Agro-Farma's production of Chobani in Ontario would increase Canadian milk requirements by 80 million litres by the fourth year of the project.

[61] The Deputy Minister also told the Minister that OMAFRA and the DFO had contacted the Minister's office to express their support for the proposal. Significantly, the Minister was also advised that they had assured Agro-Farma that it would have access to the milk it needed to manufacture Chobani in Ontario.

[62] The Deputy Minister also noted that although the Dairy Farmers of Canada, a national organization representing Canadian dairy farmers, was aware of the Application for the Permits, it had not contacted the Minister's office. This fact was presumably included to suggest to the Minister that Dairy Farmers of Canada did not object to the Chobani Permits.

[63] The Deputy Minister's MFA dealt with the possibility of denying the Permits and, in that context, outlined the position of competing dairy processors, including the Applicants, who, as described above, wrote letters opposing Permits for Greek Yogurt. He said:

> [The processors] claim that the market is already well served by other similar Greek-style yogurt products made in Canada. They further argue that, if approved, supplemental import permits would allow Chobani to capture market share and brand recognition in Canada during the test marketing and bridging phases.

Although this was a very brief précis of the processors' views, the brevity is understandable given that their letters were included in the Record.

[64] The Deputy Minister also cautioned the Minister against denying the Permits. He was concerned that such a rejection might "send negative signals to foreign investors" and jeopardize Agro-Farma's proposed investment.

[65] Regarding the Danone Permits, the Deputy Minister explained that the volumes being considered for Agro-Farma were much smaller than the volumes Danone had been allowed for DanActive. Further, the Danone Permits had been granted for a longer period than those proposed for Agro-Farma. Finally, Danone had been given more generous and lengthy Permits even though

its investment and job creation figures were less than those proposed by Agro-Farma. The Deputy Minister was clearly indicating that the Chobani Permits were not out of line with the Danone Permits.

[66] The Guidelines and a summary of yogurt consumption data for the GTA were appended to the MFA.

[67] The Deputy Minister concluded by recommending (i) the issuance of a three month Test Permit for the GTA allowing the importation of [omitted] kilograms of Chobani for that purpose and (ii) the issuance of a Bridging Permit for [omitted] kilograms of Chobani for sale in the GTA for a period not to exceed one year while Agro-Farma constructed its manufacturing facility.

Memoranda from the Minister's Policy Advisor

[68] In contrast to the recommendation of the Deputy Minister, Lise-Ann Jackson recommended the approval of Permits for the largest volumes sought by Agro-Farma. She feared that the lower volumes would not provide Agro-Farma with sufficient incentive to carry through with its proposed investment. However, she suggested that the Minister require Agro-Farma to provide further information about the investment before granting the Bridging Permit. In my view, this suggestion was made to address the CDC's concern that the Bridging Permit not issue until the commitment to invest was better understood.

[69] Ms. Jackson also highlighted the fact that yogurt processing in Canada is "predominately" Quebec-based and observed that Agro-Farma's proposed production facility would be located in Ontario, thereby offering "broader-based economic benefits".

[70] Ms. Jackson reiterated the Deputy Minister's observation that the Danone Permits had involved higher volumes despite a lower level of investment and job creation.

A Summary of the Information before the Minister

[71] In my view, in addition to the information in the letters from processors and stakeholders described above, the MFAs and the Memos taken together, informed the Minister of:

(i) The existence of import controls on yogurt and the TRQ of 332,000 kilograms;

(ii) The Guidelines;

(iii) The fact that AAFC and DFAIT had concluded that Chobani's production process was unique and (wrongly) that the CDC was concerned that the process was not sufficiently unique;

(iv) The fact that the CDC approved the Test Permit;

(v) The level of Agro-Farma's proposed capital investment and resulting job creation;

(vi) The limitations on the volume, duration and geographic scope of the Permits;

(vii) AAFC's projection for growth in the Canadian yogurt market (6 percent) and its opinion that this growth would absorb any impact Chobani might have on competitors;

(viii) The projected increase in the overall consumption of milk as a result of the project at the end of four years (80 million litres);

(ix) OMAFRA and DFO's guarantee that Agro-Farma would have access to the milk it required to manufacture Chobani;

(x) The concentration of yogurt processing in Quebec and the possibility of expanding the sector in Ontario;

(xi) Competitors' opposition to Agro-Farma's application on the basis that the Chobani Permits could allow it to capture market share while benefiting from cheaper milk, and that existing processors were already serving the market well and making new investments;

(xii) A comparison of the Chobani Application and the Danone Permits showing that the latter had involved a longer period and greater volumes with less investment and job creation.

THE MINISTER'S DECISION

[72] By letter dated October 17, 2011, the Minister granted Agro-Farma the Test Permit and Bridging Permit for the largest volumes requested. The Test Permit was to be valid for three months from November 7, 2011 to February 6, 2012, while the Bridging Permit was to be valid for one year from February 7, 2012 to February 6, 2013, or until Agro-Farma's manufacturing plant is operational. The Bridging Permit was conditional on Agro-Farma's commitment to build a manufacturing plant in Ontario by February of 2013.

THE PARTIES' POSITIONS

Ultima and Agropur

[73] Counsel for Ultima and Agropur said in submissions that the Chobani Permits are "dangerous" because they are "bad" for Supply Management. They are said to be "bad" in the sense that they were issued primarily to encourage investment and job creation without adequate regard

for the fact that sales of Chobani would be made at the expense of sales of domestic yogurt. According to Ultima and Agropur, if the Decision serves as a precedent and the Minister is entitled to make decisions based on irrelevant objectives (such as investment and jobs) while ignoring the harmful impact on Canadian competitors, Supply Management will "hang by a thread".

[74] Ultima and Agropur say that processors' sales will be harmed by the Chobani Permits and that there will therefore be a reduced demand for Canadian milk. This, in turn, will reduce farmers' incomes. Ultima and Agropur say that Permits which harm processors operate to the detriment of and undermine the very statutory scheme which gives the Minister the discretion to issue the Permits.

[75] Ultima and Agropur also say in paragraphs 87 and 81 of their Memorandum of Fact and Law that the Minister's discretion to issue Permits should only be exercised in a way that *supports* Supply Management and that the "issuance of a supplemental permit for a purpose *or* effect that runs counter to the supply management system is *ultra vires* [of] the EIPA."

[76] The alleged harm to Canadian processors is of two kinds: lost sales and the inability to benefit from what is effectively a subsidy to a competitor. Regarding lost sales, the evidence was that the CDC estimated that under the Chobani Permits, Agro-Farma's sales of Chobani in the GTA would result in cannibalization at a rate of 100 percent. Agro-Farma, on the other hand, estimated a cannibalization rate of approximately 50 percent.

[77] Regarding the subsidy, Ultima and Agropur say that the Chobani Permits mean that, for 15 months, Agro-Farma will be selling Chobani made with much less expensive U.S. milk. This means that, even allowing for the cost of importing Chobani from the U.S., Agro-Farma's sales of Chobani will be more profitable than sales made by Canadian processors because the latter are required to use more expensive Canadian milk.

Danone

[78] Danone's position is that the Minister must exercise his authority to issue Permits to support Supply Management. Danone says that import restrictions are a fundamental aspect of Supply Management because they protect prices by preventing an oversupply of cheaper U.S. dairy products which would take sales away from products made with higher priced Canadian milk.

[79] Danone also says it is wrong to take a discretionary power granted in the context of Supply Management and use it to achieve completely unrelated objectives – including foreign investment, increased employment and a rebalancing of the processing sector as between Ontario and Quebec.

The Attorney General

[80] The Attorney General takes a different view. In his Memorandum of Fact and Law, he says that the objectives of Supply Management and the impact of Permits on the Canadian dairy industry are factors which the Minister would ordinarily consider but, having done so, he is entitled to

consider other policy objectives including job creation and foreign investment. In other words, the Minister is not limited to granting Permits only when they support Supply Management.

[81] In submissions, counsel indicated that the Attorney General acknowledges that there is no such thing as entirely unfettered discretion and that the Minister needs to consider the objectives of Supply Management. However he noted that the protection of processors from competition is not a stated objective of Supply Management and that, in any event, the Applicants have adduced no evidence of actual financial harm or loss of market share even though Chobani has been sold in the GTA since November 7, 2011. Further, there is no evidence that Supply Management has been injured in any way.

[82] Finally, the Attorney General says that the Minister knew that demand for milk would increase by 80 million litres after four years and that this fact together with the prospect of a significant investment in the manufacturing sector were the primary reasons for the Decision.

Agro-Farma

[83] In paragraph 85 of its Memorandum of Fact and Law, Agro-Farma says that the Minister's discretion should be exercised "in furtherance of" (a) the objects of the CDC and (b) the general objects of the Minister, which include providing policy direction in most areas involving market access and trade policy.

[84] In submissions, Agro-Farma said that all Permits will "upset" Supply Management unless the rate of cannibalization is zero. Agro-Farma also said that Permits are inherently discriminatory, because they may give the Permit holder a cost advantage over Canadian companies with higher input costs. However, since the Permits are authorized by the EIPA they are not problematic simply because they are discriminatory.

[85] Accordingly, Agro-Farma says that neither the upset to Supply Management nor the discriminatory effect of the Chobani Permits mean that the Decision was unreasonable.

THE ISSUES

[86] The issues can be described as follows:

1. Was the Minister's decision reasonable?
2. Was there a duty of procedural fairness and was it breached?
3. Do the Applicants have direct standing and does Danone have public interest standing?
4. Should certain affidavit evidence be struck?
5. What should be the costs award?

Issue 1 Was the Minister's Decision Reasonable?

[87] All the parties agree that there is no such thing as completely unfettered discretion. However, in my view, the power to issue the Permits in this case is a discretionary power that is situated very close to the unfettered end of the spectrum. I say this because Parliament has given the Minister no criteria for the exercise of his discretion to issue Permits.

[88] I am not persuaded by the Applicants' submission that the Minister may only grant Permits which "support" Supply Management. I think it inevitable that, in the short term, Permits for dairy products manufactured with less expensive U.S. milk will cause some disruption to Supply Management. I have reached this conclusion because, if imports are prohibited in order to support Supply Management and if importing is later allowed, the support, which was achieved by the prohibition, will normally be reduced to some degree. Accordingly, the Applicants' submission is not reasonable because if Permits could only issue in Support of Supply Management, they would never issue.

[89] The disruption to processors' businesses as a result of Permits may be, as alleged in this case, both short and long term. In the short term, processors' sales may decline and, as a consequence, their milk purchases from dairy farmers may be reduced. It may also be that processors will be required to lay off employees and reduce or defer their investments in new plants and/or equipment. As well, in the longer term processors may be prejudiced in their attempts to gain future market share.

[90] However, it will not necessarily be the case that disruptions to processors' businesses will have a negative impact on Supply Management. For example, in the circumstances of this case, the market for yogurt is growing. Danone says that if Chobani captures market share as a result of the Permits, Danone will lose the opportunity to gain the future market share it presently anticipates. This, in my view, is a change in the competitive landscape that has no impact on Supply Management.

[91] I am of the view that, in order for the Minister's exercise of discretion to be reasonable, the Minister must consider the impact of a Permit on Supply Management; any decision to issue a Permit that harms Supply Management in the long term will be unreasonable. Such harm would be contrary to the objectives of the statutory scheme within which the Minister must exercise his discretion, as reflected in paragraph 5(1)(d) of the EIPA. It will be for the Minister to determine in each application for a Permit whether Supply Management will be harmed in the long term. This will depend, *inter alia*, on the geographic scope and the duration of the Permits and on the market conditions for the relevant products.

[92] There is no case law which directly addresses the facts of this case in which the Decision was made to support Supply Management in the long term but was also made to support investment in manufacturing and which the Minister's intention to consider such an extraneous matter was mentioned in the Guidelines. However, I have concluded that, as there are significant benefits to Supply Management in the long term, the Minister may consider other government objectives and policies when deciding whether to issue Permits.

[93] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, the Supreme Court of Canada said:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[94] I have concluded that the Decision is reasonable because the evidence before the Minister suggested that the Chobani Permits would not harm Supply Management in the long term: the volumes at issue were below those granted under the Danone Permits, sales were restricted to the GTA and imports were only possible for fifteen months. As well, the evidence before the Minister suggested that, in spite of the disruption to Supply Management caused by the short term cannibalization of domestic yogurt sales and the resulting possibility of reduced demand for milk, the longer term prospects for Supply Management were excellent because the demand for milk would increase by 80 million liters by end of four years.

[95] It is noteworthy that the CDC did not oppose the granting of the Permits. It approved the Test Permit and the only issue it raised in respect of the Bridging Permit was the timing of its approval. Further, the CDC did not suggest that Supply Management would be harmed – it simply noted the inevitable disruption that would be caused when processors faced competition from imported yogurt. Lastly, the CDC did not say that the Minister would fail to respect his Guidelines if the Permits were issued. It simply expressed concern that it could not determine whether Chobani's process was unique. However, the evidence before the Minister showed that officials from DFAIT and AAFC had concluded that Chobani's production process was unique and that the Guidelines were being respected.

[96] For all these reasons, to use the language from *Dunsmuir*, I am satisfied that the Decision falls well within the range of possible acceptable outcomes and that it is defensible on the facts and the law.

Issue 2 Was there a Breach of the Duty of Procedural Fairness?

[97] The Applicants say that if the Minister had confirmed that the Chobani Application had been made, they would have made further submissions dealing with the uniqueness of the process for manufacturing Chobani. They also say that, having heard from supporters of the Chobani Permits, the Minister was bound to hear from those opposed. Finally, they say that their views were not adequately described in the MFAs sent to the Minister.

[98] In my view, the starting point on this issue is the fact that the Permit application process has historically always been private and confidential. For this reason, I have concluded that the Minister's Letters, which were misleading, can be excused by the fact that, although he knew that some information about an application for Permits for Greek Yogurt had been leaked to some processors, he was unsure of the extent of the disclosure and did not want to be responsible for breaching the confidentiality of the Chobani Application by providing further information to the public.

[99] I find there was no duty to hear the Applicants' views for two reasons. First, the Minister's broad discretion to issue Permits that suggests there is, at best, only a minimal duty of fairness.

Second, given the confidential nature of the Chobani Application process, the Applicants would not, in the normal course, have had any opportunity to make submissions to the Minister. This means, in my view, that the minimal duty of fairness would not have included the right to make representations.

Issue 3 Do the Applicants have Direct Standing and does Danone have Public Interest Standing?

[100] The Respondents have moved to strike the consolidated Application alleging that it is plain and obvious that the Applicants cannot succeed because they do not have standing pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[101] Subsection 18.1(1) of the *Federal Courts Act* reads:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. [my emphasis]	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. [je souligne]

[102] An applicant for judicial review will be 'directly affected' by a decision within the meaning of subsection 18.1(1) where the decision affects the applicant's legal rights or obligations, or directly prejudices the applicant: *Rothmans of Pall Mall Canada Ltd v Canada (Minister of National Revenue)*, [1976] 2 FC 500 at para 13 (FCA); *Canwest Mediaworks Inc v Canada (Minister of Health)*, 2007 FC 752, 388 FTR 190 at para 13.

[103] The Applicants have not persuaded me that the Decision to grant the Chobani Permits directly affects their legal rights or obligations in any way. The Applicants are not parties to the

Permits. As well, they are not prevented from marketing Greek Yogurt in Canada, or from applying for Permits. Finally, their existing milk quotas remain unchanged.

[104] Turning to the issue of direct prejudice, even though the Applicants compiled much of their evidence in support of this Application after the completion of the Chobani three-month test marketing period, the Applicants have put forward no evidence attesting to any loss in market share or revenues during that period.

[105] Roland Murray, Vice President, Finance, and Interim President of Danone, stated in his affidavit that the Chobani Permits would adversely affect Danone in four ways:

(i) Danone will experience a "permanent financial loss" in 2012 of $6,687,360;

(ii) Danone's $23 million dollar investment in its Oikos Greek yogurt brand would be put at risk (this amount includes the $21 million being invested in equipment);

(iii) The goodwill associated with the Oikos brand would be put in jeopardy; and

(iv) Danone will be forced to compete with a subsidized competitor in an effort to obtain an adequate allocation of Canadian milk.

[106] Gerry Doutre, President and CEO of Ultima, stated that Ultima will suffer harm because it "will be forced to compete with an imported product that enjoys a massive competitive advantage".

[107] Dominique Benoit, Vice President, Institutional Affairs of Agropur, also anticipated both short and long term harm to its members. In the short term, he argued that increased sales of American-produced yogurt would decrease sales of Canadian yogurt due to cannibalization.

Because 70 percent of yogurt is processed in Quebec, cannibalization would disproportionately affect Quebec processors. Moreover, any decrease in revenues to Ontario farmers is shared with Quebec farmers pursuant to the Pooling Agreement. In the long term, Mr. Benoit speculated that the Chobani project might disrupt the political balance in the allocation of milk. An increased demand for milk in Ontario would mean either that existing Ontario processors would have access to less milk, or that the distribution of milk production quota between provinces would have to be renegotiated.

[108] I am not persuaded that the Applicants will experience direct prejudice as a result of the Chobani Permits. Roland Murray of Danone admitted on cross examination that the $6,687,360 estimated financial loss to Danone is the profit that Danone would, hypothetically, earn if it could also access less expensive U.S. milk to produce its yogurt. In other words, as noted by counsel for the Attorney General, this is the amount that Danone would gain if it had Permits. In my view, this so-called "loss" to Danone is fanciful and does not amount to direct prejudice.

[109] The record also discloses that, contrary to their submissions, the Applicants expected to compete successfully in the growing market for Greek Yogurt in Canada. Roland Murray stated in cross-examination that he expected yogurt consumption in Canada to grow and he agreed that Greek Yogurt is an expanding market segment. Mr. Murray also said that he was "very confident" that Danone's Greek Yogurt would sell well in 2012. He also stated the following in his cross-examination:

> Mr. Armstrong [counsel for Agro-Farma]: You do not believe that you are going to lose market share because Chobani comes here on a test market, do you?

> Mr. Murray: We will not gain the market share that we would like to have.
>
> I am not saying that we will lose, but the fact that you [Chobani] are in, that means you will pick up some market share that we will not get it.

[110] Finally, Mr. Murray admitted in cross-examination that Danone's construction of expanded facilities in Quebec is underway and is projected to be completed by September of 2012. Approximately $21 million of the total investment of $23 million is directed toward the purchase of new equipment to allow Danone to produce and package Oikos Greek Yogurt in its existing facility in Boucherville, Quebec.

[111] It is clear from this evidence that the Applicants were concerned about the competitive disadvantage they would suffer as the result of the Chobani Permits, but nevertheless positive about the prospects for sales of their own brands of Greek Yogurt. As noted by counsel for the Attorney General, if the Applicants were concerned about direct harm to their businesses, one would expect to see internal documents as evidence of projected lost sales, lost market share, harm to their reputation, and/or concerns about the inability to obtain an adequate allocation of Canadian milk. In the absence of such evidence, and given the evidence to the contrary, as discussed above, I conclude that the Chobani Permits will not cause the Applicants direct prejudice. At most, there may be a short period of disruption in which the Applicants must compete to develop market share as the market for Greek Yogurt expands.

[112] I also observe that Mr. Benoit's concerns about the impact of the Chobani Permits on the allocation of milk production quota within Ontario or between the provinces are speculative at this

juncture. The evidence before the Minister was that Agro-Farma had been guaranteed access to an adequate supply of Ontario milk for the production of Chobani. That evidence has not been called into question.

[113] The Applicants have also said that they are directly affected by the Decision because it threatens the Supply Management system in which they are participants, relying on *Friends of the Canadian Wheat Board et al v Canada (Attorney General)*, 2011 FCA 101; and *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144.

[114] However, the evidence is that the production of Chobani in Canada will result in higher incomes for dairy farmers. AAFC advised the Minister that Chobani production would increase Canadian milk consumption by 80 million liters by the fourth year. Increased consumption of milk for yogurt processing translates into higher revenues for Ontario milk farmers. These gains are then shared with farmers from Quebec and the Maritime provinces pursuant to the Pooling Agreement. Any loss in revenues for Canadian farmers resulting from Chobani's use of U.S. milk would therefore be limited to the short term, that is, the fifteen-month period under the Permits.

[115] The prejudice alleged by the Applicants stems from the fact that the Permits allow a new processor into the market. This means that existing processors will have to compete for shares of the expanding market with the newcomer and that their market share gains in future may not be as high as they would have otherwise been if Agro-Farma had not been issued the Permits. There is no evidence that the change in the competitive environment has any bearing on Supply Management.

[116] For all these reasons, I have concluded that none of the Applicants have direct standing.

[117] Danone put forth an alternative argument claiming public interest standing. An applicant for public interest standing must satisfy a conjunctive three-part test, demonstrating that: (i) there is a serious question raised; (ii) the applicant has a genuine or direct interest in the outcome of the litigation; and (iii) there is no other reasonable or effective way to bring the issue before the Court: *Canadian Council of Churches v Canada*, [1992] 1 SCR 236.

[118] In my view, Danone cannot satisfy the third branch of the test. The CDC or groups of dairy farmers are well suited to apply for judicial review.

Issue 4 Should Certain Affidavit Evidence be Struck?

[119] The Attorney General of Canada and the Minister moved to strike (i) portions of affidavit evidence and related exhibits filed by the Applicants on the basis that it included irrelevant opinion evidence and new evidence which was not before the Minister when he made the Decision, and (ii) paragraphs 62 and 86 of the Memorandum of Fact and Law filed by Ultima and Agropur which are alleged to refer to documents which were not properly adduced as exhibits to an affidavit [the Motion].

[120] The Motion was not argued during the hearing because all parties decided that the two days available for the hearing should be spent on the merits of the Application. Accordingly, it was agreed that, if I felt that I needed to refer to portions of the contested evidence, I would give the

parties notice so that argument could be directed to the admissibility of that evidence. I gave such notice in a Direction dated June 6, 2012 and have been advised that there is no opposition to my use of the contested evidence pursuant to the notice. However, the affidavits at issue remain in the Court's record so the Motion will be adjourned *sine die* so that, if so advised, the moving parties may make the Motion returnable before the Court of Appeal.

Issue 5 What should be the Costs Award?

[121] Costs are awarded to the Respondents. However, the scale remains under reserve and, if necessary, the registry may be contacted and I will arrange to hear submissions by teleconference dealing with the scale of costs. Thereafter, I will ask the Respondents to submit bills of cost and, if lump sum amounts cannot be agreed, I will hear submissions by teleconference and fix lump sum awards.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs to the Respondents because the Applicants lack standing and, in the alternative, because the Decision is reasonable. The scale and amount of costs remain under reserve pursuant to paragraph 121 of the Reasons.

"Sandra J. Simpson"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1931-11
STYLE OF CAUSE:	Ultima Foods Inc.. et al v Attorney General of Canada et al
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	April 24, 2012
REASONS FOR JUDGMENT:	SIMPSON J.
DATED:	June 21, 2012

APPEARANCES:

Peter Kirby René Cadieux	FOR THE APPLICANT
Simon Potter Brenda Swick	FOR THE APPLICANT
Alexander Pless Michelle Kellam Geneviève Bourbonnais	FOR THE RESPONDENT
Robert Armstrong Scott Kugler Paul Seaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Montreal, Quebec	FOR THE APPLICANT
McCarthy Tetrault Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy-Attorney General of Canada	FOR THE RESPONDENT
Gowlings Toronto, Ontario	FOR THE RESPONDENT