Federal Court Cour fédérale

Date: 20200422

Docket: T-290-19

Citation: 2020 FC 540

Ottawa, Ontario, April 22, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

FORTUNE DAIRY PRODUCTS LIMITED
AND
VERKA FOOD PRODUCTS LIMITED

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are the producers of, among other products, Desi Ghee [Ghee], which the Applicants describe as a butter oil with a unique texture and flavour. Ghee is commonly used in South Asian cooking and gaining popularity in Canada. The Applicants dispute the approach taken by the Canadian Food Inspection Agency [CFIA] in enforcing a 1mg/100g tolerance level

of beta-sitosterol in their Desi Ghee product. The Applicants argue that there is no regulation or policy establishing this level. The Applicants contend that they relied on industry standards, including US-based standards, and the Canadian Nutrient File to produce their Desi Ghee at a level of 4 mg/100g for over 14 years and that they had a legitimate expectation to continue doing so. The Applicants submit that as a result of the CFIA's enforcement of the 1mg/100g level, they lost revenue because they were required to suspend their operations and to ultimately purchase raw materials at a higher cost from a Canadian supplier. The Applicants argue that the CFIA's actions are not reasonable and are procedurally unfair. The Applicants seek a range of relief including declarations and an injunction to permit them to continue to produce Desi Ghee at higher tolerance levels.

[2] The various statutes and regulations that provide a mandate to the CFIA and that govern food production and sales in Canada are detailed, interwoven and confusing to the lay person. The Respondent's affiants provided information about the role of the CFIA and Health Canada in implementing and enforcing the relevant statutes, regulations and policies. The Applicants provided their account of the production of Ghee and their understanding of industry standards.

[3] The Applicants' arguments are, in some respects, inconsistent. The Applicants submit that they are challenging a "matter" and not a decision, but also argue that the CFIA's "decision" to impose the 1mg/100g level for beta-sitosterol is unreasonable.

[4] The Applicants submit that they are not challenging the reasonableness of the regulations or policy, because there are none. However, they also argue that 1mg/100g tolerance level is not reasonable as it is not justified and does not reflect international standards.

[5] The Applicants repeatedly state that they are not "challenging the science" underlying the 1mg/100g tolerance level for beta-sitosterol. However, the Applicants' affiant, Mr. Gary Matta, does express his views on some scientific matters.

[6] The Applicants argue that the CFIA never directed them to any regulations or policies regarding the beta-sitosterol level. However, the Applicants submit that they followed industry standards, in particular, the United States Department of Agriculture [USDA] tolerance levels, and they relied on the Canadian Nutrient File, which suggests that they are not unable to determine the applicable Canadian regulations. They also point to other regulations (for example, regarding butter) to advocate that a 4mg/100g level should apply.

[7] The Applicants' main argument is that the CFIA breached procedural fairness in their ongoing actions to enforce a "new policy" because the Applicants had a legitimate expectation that their practice over 14 years of producing Ghee with a 4 mg/100g level of beta-sitosterol was acceptable. This argument confuses the legal doctrine of legitimate expectations with the day-to-day notion of expecting to continue to do what they had previously done, either because the CFIA had not routinely tested their products or had not previously detected their non-compliance.

[8] Contrary to the Applicants' submissions, the governing statutes and regulations prohibit the adulteration of food products and, more particularly, the addition of non-milk fats to dairy products. There is a method to test for the existence of beta-sitosterol in dairy products, including Ghee, which demonstrates the presence of a non-milk fat and adulteration. The CFIA did not impose a new regulation or policy and did not act without authority in enforcing the 1mg/100g level. The actions of the CFIA were reasonable and procedurally fair.

[9] For the reasons that follow, the Application is dismissed. These reasons are not intended to provide a treatise on the production of Ghee or to interpret the regulations for products that are not at issue in this application. The Court has focussed on the key issues: the identification of the "matter" that is the subject of this Application; the admissibility of the Applicants' affiant's affidavit; and whether the CFIA's actions were reasonable and procedurally fair.

II. Background

[10] The Applicants, Fortune Dairy Products Limited [Fortune Dairy] and Verka Food Products Limited [Verka], are producers of Ghee. Verka began to manufacture Ghee, in Canada in 2004. More recently, Verka delegated its manufacture of Ghee to Fortune Dairy.

A. *The testing of the Applicants' Ghee in 2018*

[11] In response to a complaint, the CFIA investigated and conducted testing on samples of the Applicants' Ghee. In March 2018, the CFIA informed the Applicants that three of the four samples tested did not comply with the minimum tolerance level of 1mg/100g of beta-sitosterol.

A further four samples were tested with similar results. The test results showed that, overall, 6 of the 8 samples exceeded the 1mg/100g of beta-sitosterol, with levels ranging from 2mg/100g to 8mg/100g.

[12] The Applicants allege that the CFIA enforced a new policy, which departed from the CFIA's previous practice of permitting 4mg/100g of beta-sitosterol in Ghee. The Applicants assert that, until 2018, the CFIA never mentioned a beta-sitosterol tolerance level to them. The Applicants contend that they were not aware, nor could they have been aware, of this level because there are no regulations prescribing this level.

B. *The Response from the CFIA Complaints and Appeals Office, July 2018*

[13] Following the March 2018 test results, the Applicants engaged in extensive correspondence with the CFIA regarding the tolerance level for beta-sitosterol. Mr. Gary Matta, (Mr. Matta) Director and Co-owner of Verka and Plant Manager of Fortune Dairy, made a complaint to the CFIA Complaints and Appeals Office, which disputed the 1mg/100g tolerance level and argued, among other things, that the Canadian Nutrient File permitted a level of 4mg/100g for butter and 5mg/100g for butter oil. Ms. Janine Lowry of the Complaints and Appeals Office provided a comprehensive response on July 23, 2018, which addressed the issues raised by Mr. Matta and noted, among other things, the relevant statutes and regulations, the List of Permitted Food Additives, the CODEX Standards for Fats and Oils from Vegetable Sources and the Canadian Nutrient File.

[14] Ms. Lowry noted that the Complaints and Appeals Office reviewed Mr. Matta's concerns and documentation, as well as those of the CFIA's Operations Branch, Science Branch and Policy and Programs Branch. Ms. Lowry noted the role of the CFIA in regulating dairy products. She noted section B.08.002 of the *Food and Drug Regulations*, CRC, c 870 and section 2 of the former *Dairy Products Regulations*, SOR/79-840, which provide that dairy products shall not contain oils or fats other than milk fat and that dairy products that contain fats other than milk fat are considered adulterated. She also noted section 48 of the *Dairy Products Regulations* which defines butter oil as "the product prepared from butter or cream and resulting from the removal of most of the water and solids – not – fat content, and shall contain not less than 99.3 percent milk fat and not more than 0.5 percent water".

[15] Ms. Lowry explained that beta-sitosterol is a plant sterol which is not found in animal fats, nor in milk, and that the CFIA has protocols to measure beta-sitosterol in order to detect the adulteration of butter, cheese and other dairy products by the presence of vegetable oil. She also explained the method to test for beta-sitosterol. Ms. Lowry noted that "[t]he tolerance of 1mg/100g applied by the CFIA to the level of B-sitosterol as an indicator of adulteration in butter takes into account the maximum use levels for food additives and the limits of detection in the laboratory."

[16] Ms. Lowry's response also addressed Mr. Matta's submission that the Canadian Nutrient File set out a permissible level of 4mg/100g. Ms. Lowry confirmed that this entry referred to "butter and butter-unsalted" and was an error. She also noted that the Canadian Nutrient File includes a disclaimer regarding errors due to data entry and other reasons.

[17] In conclusion, Ms. Lowry stated that dairy products must comply with the regulatory requirements in the *Dairy Products Regulations* and the *Food and Drug Regulations*. She added that the CFIA had confirmed that its assessment of the Applicants' products is consistent with policy and with previous compliance assessments of similar dairy products.

[18] Mr. Matta responded, disputing Ms. Lowry's conclusion. Mr. Matta did acknowledge that the Applicants' Ghee contained added beta-carotene, which is noted on its label, but disputed that this would result in a non-compliant beta-sitosterol level.

III. The Applicants' Submissions

A. *The Applicants' Legal Submissions*

[19] The Applicants submit that the "matter" of the CFIA's actions in enforcing a 1mg/100g level of beta-sitosterol can be judicially reviewed.

[20] The Applicants explain that there is no discrete decision for which they seek judicial review. Rather the Applicants submit that the "matter" which affects them is the ongoing enforcement of the non-regulated standard or non-existent policy regarding beta-sitosterol, which causes an adverse impact.

[21] Despite submitting that this is a judicial review of a "matter", the Applicants also argue that the "decision" of the CFIA was unreasonable and should be quashed and redetermined. The Applicants submit that after 14 years of operation, the CFIA's decision that the tolerance level

for beta-sitosterol in Ghee is 1mg/100g rather than 4mg/100g lacks justification, transparency and intelligibility.

[22] The Applicants submit they had a legitimate expectation that they could continue to produce Ghee as they always had. They also dispute that any regulations prescribe the level of beta-sitosterol for Ghee.

[23] In their Notice of Application, the Applicants seek a wide range of remedies, including an order to quash the decision and the actions of the CFIA which seized the Applicants' products, required them to stop production and required them to meet a 1mg/100g beta-sitosterol level in their production of Ghee.

[24] Based on the Applicants' argument that the CFIA acted unfairly and unreasonably in enforcing a tolerance level without any regulatory authority, they seek redetermination of this "matter" according to applicable legal and scientific principles.

[25] The Applicants also seek declarations that: the CFIA's actions are arbitrary, biased, and contrary to the principles of procedural fairness and natural justice; the existing regulations as administered and enforced by the CFIA permit the operation of the Applicants' long standing process for the production of Ghee at a tolerance level of 4mg/100g of beta-sitosterol; and, there is no policy, regulation, law or practice prohibiting the Applicants from producing their Ghee at the 4 mg/100g level.

[26] As an alternative to declarations, the Applicants seek an injunction: preventing the CFIA from arbitrarily imposing a limit of 1mg/100g of beta-sitosterol on Desi Ghee; prohibiting the CFIA from interfering with their production operations solely on the basis that their Desi Ghee has a tolerance level of 4mg/100g; requiring the CFIA to permit the Applicants to continue production at this level; and requiring the CFIA to return the products seized pending the CFIA's reconsideration of whether the CFIA has regulatory authority and whether the Applicants can work out an arrangement with the CFIA about how they can continue to produce their Ghee.

[27] The Applicants also submit that the Court should direct the CFIA to consider promulgating specific regulations, which would be applicable to Ghee on a go-forward basis.

[28] In their oral submissions, the Applicants argued that one or more of the remedies requested could address the CFIA's breach of procedural fairness in continuing to enforce the 1mg/100g tolerance level for their production of Ghee.

B. *The Applicants' Submissions on the Facts*

[29] The Applicants submit that the CFIA never enforced a tolerance level for beta-sitosterol in the Applicants' 14 years of business, and then suddenly enforced the 1mg/100g level in March 2018 without notice and without advising them of any applicable regulation.

[30] The Applicants allege that as a result of the CFIA's enforcement action, the CFIA seized their Ghee stock from their production facility and from store shelves and that they were forced to shut down production. The Applicants allege that they lost over $5 million in sales revenue.

The Applicants acknowledge that they later resumed production, but only after a more expensive Canadian supplier could be found, resulting in further lost revenue.

[31] The Applicants acknowledge that Ghee is a dairy product, but refer to it as a non-standardized dairy product. The Applicants argue that Ghee is not specifically addressed in the regulations relied on by the CFIA. The Applicants also submit that, unlike other dairy products, there is no standard of identity for Ghee set out in the Canadian Standards of Identity and no prescribed composition for Ghee.

[32] The Applicants submit that the Canadian Nutrient File refers to a tolerance level of 4mg/100g for "butter and butter, unsalted". The Applicants note that Health Canada's affiant attested that the level set out on the online version of the Canadian Nutrient File is an error and would not be corrected until the next version of the Canadian Nutrient File is published. The Applicants submit that in the absence of Canadian regulations, they relied on the Canadian Nutrient File, which is consistent with the US National Nutrient Database Standard Reference and with good manufacturing standards.

[33] The Applicants submit that Mr. Matta repeatedly asked the CFIA for the regulation or policy it was following by enforcing the 1mg/100g limit and that the CFIA provided evasive responses. The Applicants further submit that the CFIA's affiant indicated only that no adulteration was permitted and that this approach had been in place for 20 years.

[34] The Applicants submit that the regulations now relied on by the Respondent speak only to adulteration; i.e., the addition of non-milk fats to a dairy product. The Applicants argue that the Respondent bears the burden of showing that the Applicants' product has been adulterated and has not done so.

[35] The Applicants also submit that the Respondent misread or selectively read the Regulations and failed to consider that the CFIA's enforcement of a 1mg/100g tolerance level for Ghee is in error. The Applicants note that Regulation B.08.002, which provides that a dairy product that contains fat other than milk fat is adulterated, is subject to exceptions. The Applicants question why a 4mg/100g level is permitted for processed cheese, but not for Ghee. The Applicants also note that butter is an ingredient of Ghee and Regulation B.08 056 provides that butter may contain food colour, which the Applicants argue would impact the level of beta-sitosterol.

[36] The Applicants also submit that their product label informs the consumer that beta-carotene, which is plant based, is added for color. The Applicants argue that because they clearly label the ingredients in their Ghee and because Ghee is not specifically listed in any regulations, they are not breaching any regulations.

[37] The Applicants dispute the evidence of the CFIA's affiant, Ms. Fournier, indicating that although butter can contain food colour, additional food colour cannot be added to Ghee and that the food colour in butter would not result in levels of beta-sitosterol above 1mg/100g in Ghee

unless more was added. The Applicants submit that there is no authority for Ms. Fournier's assertion.

[38] The Applicants also point to Mr. Matta's evidence that the tested levels of beta-sitosterol can naturally occur in the Ghee because the raw ingredient is cows' milk and cows have a plant-based diet.

[39] The Applicants also note that section B.08.006, which states that milk fat or butter fat shall be the fat of cow's milk, and sets out other criteria, does not mention beta-sitosterol. The Applicants submit that if beta-sitosterol is not permitted, it should be specifically stated in the regulations.

[40] The Applicants state that they are not challenging the existing regulations or policy nor are they challenging the science underlying the existing regulations. The Applicants submit that they are not asking for an exemption, rather, that a 4mg/100g level should be applied to every producer of Ghee.

IV. The Respondent's Submissions

A. *The Respondent's submissions on the legal issues*

[41] The Respondent submits that the Applicants' arguments are analogous to those of a person who repeatedly speeds on the highway without detection. The person who speeds and gets caught cannot argue that the speed limit does not apply to them or that they had an

expectation that they could speed. The Respondent submits that in the present case, the Applicants appear to argue that because they were not specifically informed of the 1mg/100g tolerance for beta-sitosterol in Ghee and/or enforcement action had not been taken in the past, they should be permitted to continue to produce Ghee with a 4mg/100g level, based on their own view of industry standards.

[42] The Respondent submits that ignorance of the law is not an excuse for non-compliance with the regulations. As manufacturers of dairy products, the Applicants should have informed themselves.

[43] The Respondent also questions what is the "matter" for which the Applicants seek judicial review.

[44] The Respondent submits that despite the Applicants' submissions that they are not challenging the regulations, they are doing just that. The Respondent argues that the reasonableness of the regulations that have been in existence since the Applicants commenced their business is not a justiciable issue.

[45] The Respondent submits that only the legality of a policy may be challenged; the "wisdom or soundness" of the government's policy and regulations cannot. (*Moresby Explorers Ltd. v Canada (Attorney General)*, 2007 FCA 273 at para 24, [2008] 2 FCR 341 [*Moresby*]*;* *Maple Lodge Farms Ltd. v Government of Canada* [1982] 2 SCR 2 at 7-8, 15 ACWS (2d) 215 [*Maple Lodge*]).

[46] The Respondent adds that, in any event, the policy for testing the level of beta- sitosterol is reasonable, as are the regulations, given that there are no allegations or evidence of bad faith, or of irrationality, and that they are within the power of the Government to enact and the CFIA to enforce.

[47] The Respondent argues that this Application should be limited to the Applicants' allegations that the enforcement actions of the CFIA were not procedurally fair.

[48] The Respondent acknowledges that the Applicants may have produced Ghee with higher levels of beta-sitosterol, which was either not known to, or not detected by the CFIA. However, this does not give rise to any legitimate expectation.

[49] The Respondent argues that the Applicants' reliance on the doctrine of legitimate expectations is based on a misunderstanding of that doctrine, which is only one factor in determining the content of the duty of procedural fairness. The doctrine does not give rise to substantive rights, only procedural rights. (*Agraira v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at paras 94-97, [2013] 2 SCR 559 [*Agraira*]).

[50] With respect to the remedies sought by the Applicants, the Respondent submits that the only possible remedies would be procedural because the only "matter" that can be judicially reviewed is the Applicants' allegations of a breach of procedural fairness in the enforcement of the regulations and policy, which the Respondent denies. The Applicants' request for reconsideration is not an option because this judicial review is based on a "matter", not a

decision. Declaratory relief is also not an option; the Court cannot declare a different level of beta-sitosterol than the current regulations permit. Nor can an injunction be granted as no serious issue is raised, the Applicants have not suffered irreparable harm and the balance of convenience favours the CFIA's regulatory structure.

[51] The Respondent adds that the Applicants' request that specific regulations be enacted setting out the beta-sitosterol level has wider implications, including that the beta-sitosterol level is only one element of one product that could be an adulterant. Moreover, it is not the Court's role to establish policy.

[52] As a preliminary issue, the Respondent submits that the affidavit of Mr. Matta, the Applicants' affiant, includes passages that contravene Rule 81 of the *Federal Courts Rules*, SOR/98-106 and should be struck. In addition, the Applicants' submissions based on the inadmissible passages should be rejected.

B. *The Respondent's Submissions on the Facts*

[53] The Respondent recounts that in November 2017, the CFIA received a trade complaint (as distinct from a separate consumer complaint) that the Applicants' Ghee product was adulterated. In March 2018, the CFIA provided the Applicants with the test results and the Applicants undertook to take corrective measures, but also engaged in correspondence with the CFIA disputing the 1mg/100g level.

[54] The Respondent submits that the CFIA never issued a “decision” or ordered that the Applicants cease production. Rather, the CFIA and the Applicants engaged in discussions about the Applicants’ proposed action plan to address the issue. The Applicants voluntarily stopped production temporarily.

[55] The Respondent also submits that there was no “decision” made by the CFIA in 2018 nor was there a new policy imposed with respect to the permissible level of beta-sitosterol in Ghee.

[56] The Respondent explains that the legislation and regulations must be read together. The *Canadian Food Inspection Agency Act*, SC 1997, c 6, s 11, makes it clear that the CFIA has an enforcement role, including for the *Food and Drugs Act*, RSC, 1985, c F-27, as it relates to food.

[57] The *Food and Drugs Act*, at paragraph 4(d), prohibits the sale of food that is adulterated. With respect to dairy products, the *Food and Drugs Regulations* apply. The Respondent highlights section B.08.002, which provides that for a dairy product, inclusion of fat other than milk fat is adulteration.

[58] The Respondent also notes that the *Food and Drug Regulations* refers to butter oil as a milk product in the category of dairy products.

[59] The Respondent notes that there is no dispute that Ghee is a dairy product. The Applicants acknowledge that it is “butter oil”, which is a concentrated milk fat.

[60] The Respondent explains that the *Safe Foods for Canadians Regulations*, SOR/2018-108, section 9, incorporates the Canadian Standards of Identity, which lists Dairy Products in Volume 1. Section 39 of the Canadian Standards of Identity provides the definition for butter oil, which states that it must consist of 99.3% milk fat.

[61] The Respondent explains that beta-sitosterol is plant-based. The presence of beta-sitosterol in a dairy product indicates adulteration.

[62] The Respondent submits that there is no exception in the *Food and Drug Regulations* for Ghee that would permit this dairy product to contain plant based fats. In response to the Applicants' argument that processed cheese can have higher levels, the Respondent notes that there is a specific exception for processed cheese in the *Regulations*.

[63] The Respondent further notes that section B.08.002 of the *Food and Drugs Regulations* sets a "zero tolerance" for adulteration due to foreign fats in dairy products and that the Applicants should have known this. The Respondent explains that the CFIA adopted the higher tolerance level of 1mg/100g because the testing method cannot test for a zero level, only for 0.53mg/100g. To account for some uncertainty in test results, the method tests for 1mg/100g of beta-sitosterol as its means of enforcing zero tolerance. The Respondent notes that this method has been in effect since 1999.

[64] The Respondent submits that the Applicants have misconstrued the Canadian Nutrient File, which does not set regulatory standards. The Respondent adds that the Applicants also relied on the beta-sitosterol level for a different product – butter, rather than butter oil.

[65] The Respondent notes that the July 2018 letter from Ms. Lowry (CFIA, Complaints and Appeals Office) to the Applicants confirmed that they must comply with the 1mg/100g level for beta-sitosterol and referred them to Regulation B.08.002. The Respondent submits that the Applicants were clearly informed of the applicable regulations, but that they simply disagree and continue to dispute that they apply to them.

[66] The Respondent also points to Ms. Fournier's affidavit at para 38, which attests that in 2008 the CFIA conducted testing on the Applicants' products using the same method for testing that was used in 2018. In 2008, all the Applicants' tested samples complied with the 1mg/100g level.

V. The Issues

[67] The Applicants' raise two issues:

1. Whether the CFIA's actions in enforcing a 1mg/100g level of beta-sitosterol in the production of Ghee were reasonable; and,

2. Whether the CFIA breached its duty of procedural fairness in enforcing the 1mg/100g level of beta-sitosterol.

[68] The Respondent raises two preliminary issues:

1. Whether the Applicants have raised a "matter" that is justiciable – in other words, whether the issues raised by the Applicant can be the subject of judicial review; and,

2. Whether the Court should strike parts of the affidavit of Mr. Matta, the Applicants' affiant.

VI. The Standard of Review

[69] The regulations and the policy for testing the level of beta-sitosterol in dairy products and of the CFIA's action in enforcing the regulations and the policy would be reviewed on the standard of reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] SCJ No 65 [*Vavilov*] provides guidance with respect to the assessment of the reasonableness of the matter under review.

[70] In *Vavilov*, the Court focused on the review of a decision, however, the same principles would apply with necessary adaptation to the review of a matter. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible and that it is justified in relation to the relevant factual and legal constraints that bear on it (*Vavilov* at para 99).

[71] Issues of procedural fairness are reviewed on the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). As noted in *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 34, [2018] FCJ No 382 (QL), correctness is not so much a standard of review as a finding that where a

breach of procedural fairness is found, no deference is owed. With respect to the allegation that the CFIA breached procedural fairness in enforcing the *Food and Drug Regulations* and the testing for the 1mg/100g level of beta-sitosterol, the Court must consider the scope of the duty of procedural fairness owed to the Applicants and whether the duty was breached.

VII. Preliminary Issue: Have the Applicants raised a Justiciable Issue – i.e. a matter that can be judicially reviewed?

[72] The Respondent argues that the Applicants have not raised any issue that is subject to judicial review for reasonableness, but acknowledges that the Applicants could challenge the CFIA's application of the 1mg/100g policy to their operations.

[73] The Respondent submits that regardless of the Applicants' attempts to characterize their Application in terms of the "matter" of the enforcement of a policy without a regulatory basis, the Applicants' overall position is that the 1mg/100g tolerance level is not reasonable, which is a challenge of the underlying regulations and policy. The Respondent submits that the Court cannot review the reasonableness of the tolerance level of beta-sitosterol in Ghee, which is a question of policy, and not a "matter" amenable to judicial review under subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7.

[74] The Applicants' Notice of Application, filed on February 11, 2019, states that "[t]his is an Application for judicial review in respect of: a) a "matter" coming within the scope of section 18.1 … which is justiciable, being the manner in which the Canadian Food Inspection Agency

(CFIA) has implemented what it purports to be a 'policy' on food production regulations…". The Notice of Application seeks a range of relief including: a declaration that the CFIA's actions are arbitrary; a declaration that there is no policy; an order "quashing, setting aside, or in the nature of *certiorari* against the actions of the CFIA…"; an order sending the "matter" back to the CFIA for redetermination; and, injunctive relief.

[75] The range of relief set out in the Applicants' Notice of Application and the Applicants' submissions raise the question of what exactly is the subject of this Application.

[76] As noted in the Court's Order dated February 3, 2020, which refused the Applicants' motion to file supplementary evidence and submissions to, among other things, respond to the Respondent's arguments that the matter was not justiciable, the Applicants' Notice of Application is the guidepost.

[77] The Applicants' written arguments add confusion to the identification of the "matter" because the Applicants also argue that "the decision of the CFIA was unreasonable" and "the Respondent's decision after 14 years that the tolerance for beta-sitosterol in Ghee was 1mg/100g rather than 4mg/100g totally lacks justification, transparency and intelligibility". The Applicants also refer to the March 2018 letter from the CFIA in response to their complaint to the CFIA Complaints and Appeals Office as a "decision" to enforce a "new" beta-sitosterol tolerance level.

[78] Despite the Applicants' references to decisions, they argue that they are not challenging a specific decision. The Applicants contend that the CFIA imposed and enforced a new level for beta-sitosterol without any basis in law or science and that this "matter" is judicially reviewable.

[79] The Applicants also repeatedly state that they are not challenging the reasonableness of any regulations or policy, because, in their view, there is no regulation or policy justifying the CFIA's actions. However, the Applicants' submissions do challenge the reasonableness of the regulations and testing method or policy (pursuant to section B.08.002 of the *Food and Drugs Regulations* and to paragraph 4(1)(d) of the *Food and Drugs Act*) that they have been required to comply with.

[80] Subsection 18.1(1) of the *Federal Courts Act* provides:

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.	**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.

[81] In *Air Canada v Toronto Port Authority et al*, 2011 FCA 347, [2013] 3 FCR 605 [*Air Canada*], the Federal Court of Appeal noted, at para 24:

> Subsection 18.1(1) of the *Federal Courts Act* provides that 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". A "matter" that can be subject of judicial review includes not only a "decision or order", but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to

> do an "act or thing", a "decision", an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action", not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.

[82] In *May v CBC/Radio Canada*, 2011 FCA 130 at para 10, [2011] FCJ No 519 (QL) [*May*], the Federal Court of Appeal noted that ongoing policies may be challenged:

> The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, [1999] 2 F.C. 476 at 491 (F.C.A.). Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment: *Sweet v. Canada* (1999), 249 N.R. 17.

[83] The jurisprudence has broadly defined a "matter", pursuant to subsection 18.1(1) of the *Federal Courts Act*, to include "administrative action" and "anything in respect of which relief may be sought." This would include policy decisions and ongoing policies, where the allegation is that the policy or regulation is unlawful. This would also include the application or enforcement of a policy or regulation where the allegation is that procedural fairness has been breached.

[84] The Applicants' claim that the CFIA's application and enforcement of the regulations and policy regarding the tolerance level for beta-sitosterol in the Applicants' dairy food product, Desi Ghee, was procedurally unfair, can be judicially reviewed.

[85] The Applicants also claim that the regulations limiting beta-sitosterol levels in dairy products (section B.08.002 of the *Food and Drugs Regulations*) and the policy for testing are

unreasonable and that the CFIA's actions in enforcing the regulations were unlawful. This "matter" would also fall within section 18.1 (*May* at paras 10-11; *Krause v Canada*, [1999] FCJ No 179 (CA) at paras 11, 21, 86 ACWS (3d) 4). However, as the Respondent notes, the bases for judicial review of a policy or regulation are limited.

VIII. Preliminary Issue: Should parts of Mr. Matta's affidavit be struck?

[86] The Respondent submits that several full paragraphs (paragraphs 9, 21, 25, 28, 30, 31 and 32) and other specific sentences of the Affidavit of the Applicants' affiant, Mr. Matta, should be struck because these passages contain opinion, argument and speculation contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106. Alternatively, the Respondent submits that this evidence be given no weight.

[87] The Respondent submits that Mr. Matta is not an expert witness and is not qualified to offer opinions or conclusions on chemistry, nutritional science or government resources and practices.

[88] The Respondent further submits that the Applicants' arguments that rely on the inadmissible evidence should be rejected including the argument that the diet of cows is responsible for higher levels of beta-sitosterol in the Applicants' Ghee.

[89] The Applicants respond that the Court should attribute the appropriate weight to Mr. Matta's evidence. The Applicants submit that Mr. Matta was not held out as an expert and his evidence is based on his experience and to his interaction with the CFIA.

[90] The Court finds that in the context of the key issues to be determined in this Application, although specific statements in Mr. Matta's affidavit cross the line of impermissible opinion and speculation, the problematic parts of the affidavit need not be struck but will be given low weight.

[91] In *Quadrini v Canada Revenue Agency*, 2010 FCA 47 at para 18, 185 ACWS (3d) 196 [*Quadrini*], the Federal Court of Appeal noted the general rules regarding the content of affidavits, including that an affidavit should contain relevant information to assist the Court in determining the application, and that the "purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation". The Court added that affidavits may be struck if "abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions".

[92] In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116 at para 37, 280 ACWS (3d) 229, the Court commented on the admonition to present facts without gloss or explanation, noting that "*Quadrini* warns against controversial argumentation that steps over the line of permissibility" and that an affidavit is not a memorandum of fact and law.

[93] The passages at issue, although cast as Mr. Matta's "belief", are either statements of Mr. Matta's opinion, including about the scientific basis for higher beta sitosterol levels than

1mg/100g, arguments about the regulations and policy or lack thereof, or are speculation about why the higher levels of beta-sitosterol were detected in the Applicants' Ghee. Some of the Applicants' arguments rely on these assertions by Mr. Matta.

[94] For example, Mr. Matta attests that beta-sitosterol can occur naturally in cow's milk, the ingredient in Ghee, and, therefore, the presence of beta-sitosterol in Ghee is not an indicator of adulteration. The Applicants rely on this assertion in their argument. Mr. Matta is not a scientist and his opinion cannot support the argument.

[95] More generally, the Court has considered Mr. Matta's evidence to the extent that he attests to his own experience in producing Ghee and to matters within his personal knowledge in his capacity as co-owner and Plant Manager.

IX. Are the CFIA's actions in enforcing a 1mg/100g level of beta-sitosterol in the production of Ghee reasonable?

A. *The Applicants' Submissions*

[96] The Applicants argue that there are no regulations with respect to Ghee. However, once the CFIA pointed to the regulations and testing method, the Applicants clearly challenged them. In this Application, the Applicants argue that both the 1mg/100g level for beta-sitosterol and the enforcement of this level are unreasonable. The Applicants argue that the regulations and testing method are arbitrary and without legislative basis, based on considerations extraneous to the

legislative purpose, and founded on erroneous findings of fact (i.e., unsupported by scientific research).

B. *The Respondent's Submissions*

[97] The Respondent submits that it is not open to the Court to review the reasonableness of the tolerance level of beta-sitosterol in Ghee, which is a question of policy and not a "matter" amenable to judicial review under subsection 18.1(1) of the *Federal Courts Act*. The Respondent points to *Moresby* at para 24 where the Federal Court of Appeal held that courts cannot review the "wisdom or soundness of a government policy".

[98] The Respondent further submits that a high degree of deference is owed to lawful policy; a policy decision is only unreasonable if it is made in bad faith or is irrational, incomprehensible, or an abuse of discretion (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA at para 35, [2014] FCJ No 499 (QL) [*Malcolm*]; see also *Vavilov* at paras 88-90).

[99] The Respondent submits that the regulations were lawfully enacted and have been reasonably enforced in accordance with the *Canadian Food Inspection Agency Act*.

[100] The Respondent disputes the Applicants' allegations of bias (although this was not pursued by the Applicants), noting that the current policy for testing for beta-sitosterol has been in place since 1999 and applies to all producers. The Respondent also disputes that the policy for testing is arbitrary, noting that it has a legislative basis in subsection 4(1) of the *Food and Drugs*

Act and section B.08.002 of the *Food and Drugs Regulations*, which prohibits adulteration and the sale of dairy products containing non-milk fat.

[101] The Respondent notes that the CFIA is responsible for the enforcement of the *Food and Drugs Act* as it relates to food and, as such, it is lawful for the CFIA to establish the testing method to determine the levels of beta-sitosterol. The CFIA policy of testing at the 1mg/100g level is justified as the means of enforcing the *Food and Drugs Act* and *Food and Drugs Regulations*; in particular, section B.08.002.

[102] The Respondent adds that the 1mg/100g level has support in the international scientific community, including the Association of Official Analytical Chemists International and the Food Safety and Standards Authority of India.

[103] The Respondent submits that the Applicants' argument that section B.08.006 (which provides that milk fat or butter fat shall be the fat of cow's milk and shall have specified properties) does not mention beta-sitosterol, does not assist the Applicants. The Respondent notes that beta-sitosterol is not a milk fat or butter fat, but a plant-based matter. Section B.08.006 applies to milk fat and butter fat, and as such, beta-sitosterol would not be mentioned.

C. *The enforcement of the 1mg/100g level of beta-sitosterol is reasonable*

[104] The Applicants' submissions reflecting their clear preference for a 4mg/100g level of beta-sitosterol based on their interpretations of foreign and international regulatory standards,

their past operations, and the impact of the CFIA's enforcement actions on their revenues are not relevant to the determination whether the CFIA's actions were reasonable.

[105] The jurisprudence establishes that a policy decision is owed a high degree of deference and will only be found unreasonable if made in bad faith, for considerations extraneous to the legislative purpose, or if it is irrational, incomprehensible or an abuse of discretion, (*Malcolm* at para 35). In *Vavilov*, the Supreme Court of Canada described a reasonable decision as one that is both internally coherent and justified in light of the legal and factual constraints, including the legislative scheme and purpose (at para 85).

[106] As the Respondent notes, courts cannot review the "wisdom or soundness of a government policy".

[107] The relevant statutory provisions and regulations are set out in ANNEX A.

[108] The CFIA's enforcement of validly enacted regulations and the policy of testing for beta-sitosterol to enforce zero tolerance for adulteration of dairy products is justified. The *Food and Drugs Act* and the *Food and Drugs Regulations* prohibit adulteration of dairy products. Section B.08.002 prohibits non-milk fats (which include plant-based fats) in a diary product. When beta-sitosterol is found in a dairy product, this demonstrates that the dairy product has been adulterated.

[109] The CFIA's actions in enforcing the regulations were neither biased nor arbitrary. The role of the CFIA with respect to the *Food and Drugs Act* and the *Food and Drug Regulations*, in the present circumstances, was to ensure that Canadian consumers were not misled by the adulteration of a dairy product.

X. Did the CFIA breach its duty of procedural fairness in enforcing the 1mg/100g level of beta-sitosterol in the production of Ghee

A. *The Applicants' Submissions*

[110] The Applicants submit that, based on their 14 years of production of Ghee relying on the Canadian Nutrient File, the US National Nutrient Database and good manufacturing practice, they had a legitimate expectation that the permissible level of beta-sitosterol in Ghee was 4mg/100g. As noted above, the Applicants submit that the CFIA breached procedural fairness by "suddenly" enforcing the 1mg/100g standard in March 2018, seizing their Ghee and requiring them to stop production.

B. *The Respondent's Submissions*

[111] The Respondent submits that the CFIA acted lawfully and fairly pursuant to its mandate to enforce the *Food and Drug Act* and *Regulations* in investigating the complaint in accordance with the powers set out in the *Safe Foods for Canadians Act*, SC 2012, c 24, in testing samples of the Applicants' Ghee for adulteration, and in informing the Applicants that their samples exceeded the 1mg/100g level for beta-sitosterol.

[112] The Respondent submits that the Applicants misunderstand the doctrine of legitimate expectations, which arises only in the context of procedural rights. The Respondent notes that ignorance of the applicable regulations does not create a legitimate expectation. The Respondent further submits that the Applicants have also misconstrued the purpose of the Canadian Nutrient File and the USDA standards, neither of which can be relied on to override the *Food and Drug Regulations*.

[113] The Respondent explains that the Canadian Nutrient File is a reference tool for menu planning, not for food production, and that it includes a disclaimer that it may contain errors. The Respondent also explains that the Applicants' claimed reliance on erroneous information in the Canadian Nutrient File does not assist them, because the erroneous information pertains to "butter-unsalted" and not to butter oil. Ghee is butter oil.

[114] The Respondent disputes that the Applicants' had a legitimate expectation to continue to produce Ghee at a 4mg/100g beta-sitosterol level because they had done so for 14 years. The Respondent submits that even if the Applicants could rely on the doctrine of legitimate expectations, there is no evidence that the CFIA ever indicated that the 4mg/100g level was acceptable or condoned.

C. *The CFIA did not breach Procedural Fairness*

[115] Although the Applicants acknowledge that the doctrine of legitimate expectations cannot be relied on to claim a substantive right, they do seek a substantive right based on their past

practice: to be permitted to continue to produce Ghee at a level of 4mg/100g of beta-sitosterol. The Applicants' legitimate expectation appears to reflect the more common use of the term rather than the legal doctrine.

[116] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22, 89 ACWS (3d) 777 [*Baker*], the Supreme Court of Canada emphasized that the duty of procedural fairness is flexible and variable, and depends on the context of the particular statute and the rights affected.

[117] The legitimate expectations of those challenging a decision are only one of several factors noted by the Court in *Baker* that inform the scope of the duty of procedural fairness. The other factors include: the nature of the decision being made and process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the person(s) affected; and, the choices of procedure made by the decision-maker (*Baker* at paras 23-28).

[118] In *Baker*, the Court explained that where a legitimate expectation is found to exist, it may determine what procedures the duty of fairness requires in given circumstances; if the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness (at para 26).

[119] In *Agraira*, at paras 94-95, the Supreme Court of Canada elaborated on the doctrine of legitimate expectations as a factor to determine what is required by the duty of procedural fairness and the conditions for it to apply. The Court noted at para 95:

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled Judicial Review of Administrative Action in Canada:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
> >
> > [Emphasis added.]
>
> (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[120] In *Agraira*, at para 97, the Supreme Court of Canada cited *Baker*, noting that "an important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights". The Court explained that where the conditions for legitimate expectations are satisfied, the Court can only grant procedural remedies to address the legitimate expectation.

[121] In the present case, the Applicants do not argue that they had a legitimate expectation that the CFIA would follow a particular procedure. Rather, the Applicants assert that they had a legitimate expectation that the permissible level of beta-sitosterol for Ghee was 4mg/100g. The CFIA did not hold out or convey to the Applicants in a "clear, unambiguous and unqualified" manner, or in any manner, that the permissible level of beta-sitosterol in Ghee is 4mg/100g. Nor did the CFIA convey to the Applicants in a clear, unambiguous and unqualified manner that they would not enforce the applicable regulations and policy for testing.

[122] Section B.08.002 of the *Food and Drug Regulations* has remained continually in force since the Applicants began manufacturing. The evidence of the CFIA is that the 1mg/100g standard has been used to test for adulteration of dairy products since 1999 and was used to test the Applicants' product in 2008.

[123] The Applicants submit that they were guided by the Canadian Nutrient File, because "it appears to be the only public statement by the Government of Canada of the standard", and by the USDA and good manufacturing standards. However, the Canadian Nutrient File is a reference for food composition and sets out the amount of nutrients in foods commonly consumed in Canada. As explained by the Respondent, the Canadian Nutrient File is not a regulatory standard to guide manufacturers of food products and it sets out caveats and disclaimers. In addition, the reference in the Canadian Nutrient File relied on by the Applicants is for "butter and butter-unsalted", not for butter oil.

[124] Regardless of whether or not the Applicants misunderstood the purpose of the Canadian Nutrient File, or whether they relied on the wrong product reference or the equivalent database in the US, these publications do not support the Applicants' expectation that Ghee can be produced with higher levels of beta-sitosterol.

[125] As a manufacturer of Ghee – a dairy product – the Applicants were required to adhere to the applicable statutes and regulations and should have informed themselves of the *Food and Drugs Act* prohibition on adulteration of food products and the *Food and Drug Regulations* governing dairy products, including the prohibition on non-milk fats in section B.08.002.

[126] The Applicants have not established that they had a legitimate expectation that certain procedures would be followed before the CFIA enforced the regulations or that 4mg/100g was the permissible level for beta-sitosterol in their Ghee.

[127] The Respondent's analogy to the speeder who is ultimately caught is apt.

[128] Even if the Applicants had established a legitimate expectation, this would only give rise to procedural rights. The issue would be how the legitimate expectation of the Applicants, considered along with the other relevant factors, informs the content of the duty of procedural fairness owed by the CFIA to the Applicants. The Court would look to procedural remedies; for example, whether a procedure expected in the past should be followed. The only procedure the Applicants expected in this context appears to be that no enforcement action would be pursued.

[129] In the present case, the CFIA did not breach its duty of procedural fairness in enforcing the regulations, responding to the complaint, testing the Applicants' product using the long standing method, informing the Applicants of the results and requiring the Applicants to take corrective action. The Applicants were aware of the "case to be met" – which was the report of the test results indicating that samples of their Ghee exceeded the 1mg/100g level of beta-sitosterol, and which demonstrates adulteration of the product. They had ample opportunity to make submissions to the CFIA before further enforcement action was taken.

[130] The record establishes, among other things, that: upon receipt of the complaint, the CFIA notified the Applicants; the CFIA contacted the Applicants to arrange for a convenient date for inspection of the Applicants facilities and provided a link to information about the CFIA's inspection model; the Inspection Report was completed in December 2017, indicating that three of four samples tested detected beta-sitosterol above the 1mg/100g level; a further four samples were tested with similar results; the Applicants signed the Report acknowledging that they would take corrective action for their non-compliance on March 1, 2018; correspondence ensued between the Applicants (primarily Mr. Matta) and the CFIA in which Mr. Matta challenged the tolerance level and provided articles about beta-sitosterol; the CFIA advised Mr. Matta in early March 2018 that until test results for additional samples collected were available and further advice from the CFIA's technical specialists group was provided, the Applicants could continue normal production activities; further correspondence continued in April; on April 17, 2018, Ms. Pam Glennie, CFIA, wrote to Mr. Matta reporting on the guidance provided by the CFIA's technical experts and clearly indicating the tolerance level of 1mg/100g and the testing method, with several supporting references; Mr. Matta continued to dispute the level, asking that Ghee be

considered as a processed food, noting the higher levels for “butter-unsalted” and sending additional articles to the CFIA; and, the CFIA responded to Mr. Matta’s correspondence.

[131] On April 29, 2018, Mr. Matta submitted a complaint to the CFIA, Complaints and Appeals Office with several attachments. The Applicants alleged that the maximum limit for beta-sitosterol for butter is 4mg/100g, as indicated in the Canadian Nutrient File and the USDA, and that the CFIA’s inspectors refused to accept this “fact” and had detained raw material for testing. The Applicants indicated that they could not obtain other suppliers and were on the “verge of closure”. The Applicants further alleged that they could not control the source of their butter and that plant sterols naturally creep into cow’s milk due to the cow’s grass diet. The Applicants’ desired outcome was for the CFIA to accept that the tolerance level for beta-sitosterol was 4mg/100g and to release their raw material.

[132] Following the Applicants’ complaint, further correspondence ensued. On July 23, 2018, Ms. Lowry responded to Mr. Matta and confirmed that the CFIA’s assessment of the Applicants’ Ghee as non-compliant was consistent with policy and with previous assessments of similar dairy products. Mr. Matta disputed some of the information, sent other articles, and posed additional questions. Ms. Lowry responded.

[133] In November 2018, the CFIA corresponded with the Applicants about the test results and asked for a concrete action plan to address the products in retail outlets and at their warehouse. Further correspondence ensued about the action plan. Mr. Matta continued to suggest that the addition of food colour contributed to the higher levels of beta-sitosterol in the Ghee that was

tested. The CFIA noted that this had been addressed, explained, and rejected as noted in the letter of July 23, 2018.

[134] . In addition, Ms. Fournier, the Acting Section Head of Food Chemistry, with 31 years of experience at the CFIA, attested that the addition of food colour (beta-carotene) at the levels noted by the Applicants would not result in beta-sitosterol levels over the 1mg/100g level. Ms. Fournier's supplemental affidavit reiterated that the food colour in butter would not bring the level of beta-sitosterol above 1mg/100g. She explained that if higher levels of beta-sitosterol are found in Ghee, it signals that something else was added; e.g., a plant-based fat.

[135] Moreover, the Applicants had previously been clearly advised that beta-carotene could not be added to the Ghee. On January 6, 2012, the CFIA (Ms. Gruppe) responded to email sent by Mr. Matta on December 27, 2011. Ms. Gruppe indicated that Ghee is butter oil as defined and described in the Standardized Products Section, noting sections 48-49 of the former *Dairy Products Regulations*. She noted that under this standard, there is no provision for the addition of colour. She explained that although the butter used may contain beta-carotene, "you are not permitted to add more carotene as indicated in your process flow charts and your ingredients list on the label". She requested that the Applicants provide an action plan to address "this issue".

[136] The evidence demonstrates that the Applicants had many opportunities to make representations to the CFIA and the Applicants did so. The CFIA engaged with the Applicants and responded to their correspondence and arguments, including that the CFIA had erred in enforcing the regulations, that different regulations applied and that the level of 4mg/100g should

be permitted. The CFIA did not demand that the Applicants shut down their operation in March 2018, following the testing, rather permitted them to continue until further analysis was completed, the technical experts were consulted and a corrective action plan was provided. The CFIA did not impose a new regulation or policy on the Applicants arbitrarily or retroactively; the regulation and testing policy had been in effect for the duration of the Applicants' production in Canada. The Applicants' product had been previously tested in 2008 applying the same regulation and testing method.

[137] The duty of procedural fairness owed to the Applicants by the CFIA in its enforcement of the regulations and policy was fully met.

XI. Conclusion

[138] The Application for Judicial Review is dismissed. The Applicants have not established that the CFIA's actions in enforcing the regulations governing dairy products are unreasonable or procedurally unfair. In addition, the Applicants have not established that the applicable regulations and the testing method to ensure compliance are unreasonable. As noted at the outset of these reasons, the Applicants' characterization of the issues and their arguments have been, to some extent, inconsistent. The Court has attempted to address all the arguments. Although the Applicants are adamant that they should be permitted to produce their Ghee with higher levels of beta-sitosterol than permitted by the regulations and have disputed the information provided by the CFIA, the Respondent has clearly established the existence of the governing regulations that

apply to the Applicants' product. The Respondent has also demonstrated that the conduct of the CFIA in enforcing the applicable regulations has been reasonable and procedurally fair.

XII. Costs

[139] Both parties requested costs if successful on this Application. The Respondent submitted a Bill of Costs, calculated at Column III of Tariff B, totalling $5443.21, which includes disbursements of $1093.21.

[140] The Respondent's costs also include the costs for a second counsel, and costs for successfully defending the Applicants' motion to file supplementary submissions and two pieces of correspondence as new evidence (one of which was already on the Application Record).

[141] The Applicants proposed that a lump sum of $2500 be awarded to the successful party for the costs of this Application. The Applicants agreed that if the Respondent were successful, an additional $750 should be added for the costs of the motion. The Applicants suggested that the Respondent's costs for a second counsel were surprising and opined that cost awards in this Court are customarily modest.

[142] Having considered the parties' submissions and the factors set out in Rule 400 to guide the exercise of the Court's discretion in awarding costs, the Court finds that a lump sum of $4000 shall be paid by the Applicants to the Respondent.

JUDGMENT in file T-290-19

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The Applicants shall pay costs to the Respondent in the amount of $4000.

"Catherine M. Kane"

Judge

ANNEX A

The Relevant Statutory Provisions

[1] *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6:

11 (1) The Agency is responsible for the administration and enforcement of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, *Feeds Act*, *Fertilizers Act*, *Health of Animals Act*, *Plant Breeders' Rights Act*, *Plant Protection Act*, *Safe Food for Canadians Act* and *Seeds Act*.	**11 (1)** L'Agence est chargée d'assurer et de contrôler l'application des lois suivantes : la Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire, la *Loi relative aux aliments du bétail*, la *Loi sur les engrais*, la *Loi sur la santé des animaux*, la *Loi sur la protection des obtentions végétales*, la *Loi sur la protection des végétaux*, la *Loi sur la salubrité des aliments au Canada* et la *Loi sur les semences*.
(2) [Repealed, 2012, c. 24, s. 103]	(2) [Abrogé, 2012, ch. 24, art. 103]
(3) The Agency is responsible for	(3) L'Agence est chargée :
(a) the enforcement of the Food and Drugs Act as it relates to food, as defined in section 2 of that Act; and	a) de contrôler l'application de la Loi sur les aliments et drogues en ce qui a trait aux aliments, au sens de l'article 2 de cette loi;
(b) the administration of the provisions of the Food and Drugs Act as they relate to food, as defined in section 2 of that Act, except those provisions that relate to public health, safety or nutrition.	b) d'assurer l'application des dispositions de cette loi en ce qui a trait aux aliments, sauf si celles-ci portent sur la santé publique, la salubrité ou la nutrition.

[2] *Food and Drugs Act*, R.S.C., 1985, c. F-27:

Prohibited sales of food	**Vente interdite**
4 (1) No person shall sell an article of food that	**4 (1)** Il est interdit de vendre un aliment qui, selon le cas :
[…]	[…]
(d) is adulterated; or […]	d) est falsifié; […]

[3] *Food and Drug Regulations, C.R.C.*, c. 870

B.08.001.1 The following definitions apply in this Division.	**B.08.001.1** Les définitions qui suivent s'appliquent au présent titre.
milk product means […]	produit du lait […]
(b) with respect to cheese, any of the following products, namely, […]	b) dans le cas du fromage, l'un ou l'autre des produits suivants : […]
(iii) butter, butter oil and whey butter, […]	(iii) le beurre, l'huile de beurre et le beurre de petit-lait, […]
B.08.002 Except as provided in these Regulations, a dairy product that contains a fat other than milk fat is adulterated.	**B.08.002** Sauf l'exception prévue dans le présent règlement, tout produit laitier qui contient du gras autre que du gras de lait est falsifié.
[…]	[…]
B.08.006 [S]. Milk Fat or Butter Fat shall be the fat of cow's milk, and shall have	**B.08.006 [N]**. Le gras de lait ou gras de beurre doit être la matière grasse du lait de vache et doit avoir
(a) a specific gravity of not less than 0.905 at a temperature of 40°,	a) une densité d'au moins 0,905 à la température de 40 °C,
(b) a tocopherol content not greater than 50 micrograms per gram, as determined by official	b) une teneur en tocophérols d'au plus 50 microgrammes par gramme, déterminée selon

method FO-16, Determination of Tocopherol in Milk Fat or Butter Fat, October 15, 1981,

la méthode officielle FO-16, Détermination de la teneur en tocophérols du gras de lait ou du gras de beurre, 15 octobre 1981,

(c) a Reichert-Meissl number not less than 24, and

c) un indice de Reichert-Meissl d'au moins 24, et

(d) a Polenske number not exceeding 10 per cent of the Reichert-Meissl number and in no case shall the Polenske number exceed 3.5, and

d) un indice de Polenske ne dépassant pas 10 pour cent de l'indice de Reichert-Meissl et ne dépassant 3,5 en aucun cas, et

where the tocopherol content is greater than 50 micrograms per gram or the Polenske number exceeds 10 per cent of the Reichert-Meissl number, there shall be deemed to have been an addition to the milk fat of fat other than that of cow's milk.

si la teneur en tocophérols dépasse 50 microgrammes par gramme ou si l'indice de Polenske dépasse 10 pour cent de l'indice de Reichert-Meissl, le gras de lait sera censé avoir été additionné d'une matière grasse autre que celle du lait de vache.

[…]

[…]

B.08.041 (1) [S]. Processed (naming the variety) Cheese with (naming the added ingredients)

B.08.041 (1) [N]. Le fromage fondu (indication de la variété) (avec indication des ingrédients ajoutés)

[…]

[…]

(b) may contain […]

b) peut contenir […]

(iv) one or more of the following colouring agents:

(iv) les colorants suivants :

(A) in an amount consistent with good manufacturing practice, annatto, beta-carotene, chlorophyll, paprika, riboflavin, turmeric, and

(A) en quantité conforme aux bonnes pratiques industrielles, le rocou, le ß-carotène, la chlorophylle, le paprika, la riboflavine, le curcuma, et

(B) in an amount not exceeding 35 parts per million, either singly or in combination

(B) en quantité n'excédant pas 35 parties par million, le ß-apo-8′-caroténal, l'ester

thereof, beta-apo-8′-carotenal, ethyl beta-apo-8′-carotenoate,	éthylique de l’acide ß-apo-8′-caroténoïque ou un mélange de ces produits,

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-290-19
STYLE OF CAUSE:	FORTUNE DAIRY PRODUCTS LIMITED AND, VERKA FOOD PRODUCTS LIMITED v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 5, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	APRIL 22, 2020

APPEARANCES:

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Mr. Kirk Shannon Ms. Sarah Jiwan	FOR THE RESPONDENT

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