



August 21, 2014

File: 44200-50/File:#14-05

DELIVERED BY E-MAIL

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Dear Sirs/Mesdames:

RE: Oranya Farms II Holdings Inc. and Thomas Reid Farms (the Appellants) v British Columbia Chicken Marketing Board (the Chicken Board); Appellants' Stay Application regarding a decision of the Chicken Board made April 8, 2014.

BACKGROUND:

1. On September 1, 2005, the British Columbia Farm Industry Review Board (BCFIRB) issued its decision on its Review of the Specialty Chicken sector in British Columbia which decision included a policy direction to the British Columbia Chicken Marketing Board (Chicken Board) to designate Certified Organic and Asian chicken as specialty classes.¹ A further Specialty Review was proposed for 2009 but did not occur.
2. On April 8, 2014, the Chicken Board held a meeting during which it made its decision to amend its General Order with respect to specialty chicken production. This decision was issued by way of a Notice to B.C. Chicken industry stakeholders on April 11, 2014² which provides as follows:

¹ Draft Orders were approved by BCFIRB on January 23, 2006 which contained (among other things) the Specialty Regulations. See "Organic Chicken in B.C." at page 28 of the Affidavit of Melissa Horton sworn July 10, 2014.

² See p.p. 69 – 71 to the Affidavit of Melissa Horton sworn July 10, 2014.

**British Columbia
Farm Industry Review Board**

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- a. Effective September 7, 2014 (the start of quota period A-126), growers of Certified Organic and Redbro chicken will be reclassified from Specialty to Mainstream production. Growers holding specialty quota that are producing Certified Organic as of April 11, 2014, will have the option of producing Certified Organic or Taiwanese chicken under their specialty quota until July 1, 2016 at which time they are required to provide the Chicken Board with their written election as to whether they will convert their specialty quota to mainstream and produce organic or regular chicken or to keep their specialty quota and produce only Taiwanese or Silkie chicken. Other growers may also produce organic chicken under their mainstream quota upon demonstrating that they have achieved certification recognized by the industry and the Chicken Board.
 - b. Effective September 7, 2014, the Chicken Board will no longer set a live price for Certified Organic chicken. The Chicken Board will continue to set a minimum price for mainstream chicken each production period and producers and processors will have to negotiate a differential price for Certified Organic.
 - c. Effective January 1, 2015, the option to annualize quota and allotment is rescinded. All growers are required to adhere to the principle of period to period compliance (subject to exemptions) in order to provide processors with a consistent supply of specialty product.
 - d. Effective July 1, 2016, growers will not be permitted to access market development allotments or to lease in or out in excess of 100% of their total quota holdings. (the Decision)
 - e. As of July 1, 2016, assurance of supply to any processors who are still under the program will be eliminated.
3. The appellant, Oranya Farms II Holdings Inc. (Oranya), owns and operates three chicken farms in B.C., two of which produce an Asian breed known as Silkie chickens and one which produces Certified Organic chickens.³ The appellant, Thomas Reid Farms Ltd., is also a grower of Certified Organic chickens.
 4. On May 9, 2014, BCFIRB received a Notice of Appeal from the appellants⁴ of the Chicken Board's Decision and included a request for a stay of the Decision pending the hearing of the appeal or the conclusion of a supervisory review (which the appellants requested as part of their appeal).
 5. The parties participated in a pre-hearing conference on June 25, 2014 during which the appellants clarified that they did not oppose the re-classification of organic chicken from

³ See paragraph 5 to the Affidavit of Cornelis Spitters sworn July 23, 2014.

⁴ The appellants filed a joint Notice of Appeal which is not permitted under the Rules to the *NPMA*. By way of a letter dated July 22, 2014, BCFIRB advised the parties of this irregularity and requested them to file separate Notices of Appeal. On July 23, 2014 BCFIRB received a separate Notice of Appeal from Thomas Reid Farms Ltd. thereby correcting the irregularity.

specialty to mainstream given that there was a limited amount of specialty quota to service what they believe is a growing organic market. However the appellants submitted that there should be an organic designation within the mainstream production. The appellants also submitted that the Chicken Board's decision will eliminate price assurances and production controls for organic chicken growers with the results that chicken growers will have to compete with each other and that this will reduce the price for organic chicken. Consequently, the appellants seek a stay of the Chicken Board's decision to remove price and production controls and a full supervisory review of specialty production by BCFIRB.

6. On June 16, 2014, following a written submission process, the Certified Organic Associations of British Columbia (COABC) and the British Columbia Chicken Growers' Association (BCCGA) were granted full intervener status. On June 25, 2014, BCFIRB advised the parties of a schedule for providing their written submissions on the stay application which process was completed on July 30, 2014⁵.
7. On July 21, 2014, the appellants applied for an adjournment of the hearing of the appeal which was scheduled for August 28 and 29, 2014. That application was granted for the reasons set out in a decision dated August 5, 2014 and the hearing is currently scheduled for October 6, 7 and 8, 2014.

EVIDENCE AND SUBMISSIONS:

Appellants' Position:

8. The appellants rely on written submissions dated July 4, 23, and 31, 2014 and the affidavit of Oranya's director, Cornelis Spitters, sworn July 23, 2014. The appellant, Thomas Reid Farms Ltd., did not provide any evidence in support of the stay application. In the July 4th letter, the appellant, Oranya Farms, submits that the anticipated termination of a minimum price is already placing a downward pressure on prices for organic chicken and creating "predatory pricing conditions." In particular, Oranya claims that for the production period, A-124, another organic chicken grower lowered its prices below the minimum price set by the Chicken Board with the result that Oranya's product "was displaced from the market." Oranya submits that it is now facing pressure from processors to lower its prices for the production period, A-125 (which commenced July 9, 2014) even though a minimum live price was also in effect for that period. Oranya states that processors were initially seeking a 20% or greater reduction from the current minimum live prices (which are based on a cost of production (COP) formula) for the production period, A-126, however it was able to negotiate a price that is 7% lower⁶ than the current minimum price. The appellants submit that removal of price controls will result in "predatory pricing" that will not provide a fair return to growers and that is not sustainable.

⁵ Although BCFIRB received a late responding submission from the appellants on July 31, 2014 to the Chicken Board's sur-reply dated July 28, 2014.

⁶ However in their submission dated July 23, 2014 and affidavit of Cornelis Spitters sworn July 23, 2014, the appellants claim this amount is 5% which represents a loss of approximately \$500,000.00 annually.

9. The appellants also submit that in anticipation of the elimination of price and production controls, an oversupply situation has resulted. In particular, the appellants state that by relying on Market Development Allotments, another grower was able to produce 10,000 to 12,000 Certified Organic chickens per week thereby displacing the appellants' chicken (based on their quota ownership and leased quota) and forcing them to freeze chicken that would otherwise have been sold as fresh. The result is that they have an "unprecedented" increase in inventories of frozen chicken which will be sold at a loss. Consequently, the appellants submit that the Chicken Board's decision is already creating challenges and having a negative financial impact on them and will destabilize the market if a stay is not granted.
10. The appellants further submit that a lack of pricing and production controls will unduly increase financial and market risks for them. The appellants submit that lenders are already reluctant to finance them because they are uncertain if the growers will be able to continue to grow organic chicken under the new conditions.
11. In his July 23rd letter, counsel for the appellants clarified that the appellants are seeking a stay until two months following the determination of the appeal (or supervisory review). He also clarified that while the appellants are challenging price and production controls and "the grandfathering order"⁷ in the Decision" being appealed they are only seeking a stay in relation to the price and production control part of the Decision and not the grandfathering order as it is not scheduled to take effect until July 1, 2016. Counsel also clarified that the appellants are not challenging those parts of the Decision that relate to the reclassification of specialty to mainstream quota or to the rescission of annualization.
12. The appellants submit that there is no urgency to remove pricing and production controls in the organic chicken market as it represents only 1% of the chicken market in British Columbia. Conversely the appellants submit that the removal of pricing and production controls will have "a disproportionate impact on a small number of existing organic growers who built the organic chicken market." The appellants submit that the removal of pricing controls will give processors greater bargaining leverage to set prices every 8 weeks to the disadvantage of growers.
13. The appellants submit that there would be no harm to the public by delaying the decision to remove production and minimum price controls as demand would continue to be met by existing or new growers. The appellants also submit that the organic minimum price (based on a COP formula) could be updated to reflect any cost reductions due to improved efficiencies thereby reducing costs to the consumer but still maintaining market stability and predictability of supply.

⁷ The "grandfathering provision" refers to that part of the decision that permits current holders of specialty quota producing organic chicken to switch to producing Asian chicken but effective July 1, 2016, they must elect whether to convert their quota to mainstream and produce organic or regular chicken or elect to keep specialty quota and produce only Asian chicken. See p. 30 to the Affidavit of Melissa Horton sworn July 10, 2014.

14. The appellants submit that the appeal raises a serious issue as to whether the Chicken Board's decision to remove production and minimum price controls for organic chicken accords with sound marketing policy. The appellants submit that a further issue is whether the Chicken Board discharged its duty to consult with stakeholders (i.e. the Specialty Markets Advisory Committee) prior to removing minimum price controls.
15. The appellants submit that the harm to existing organic growers will be significant and irreparable if the Decision to remove minimum price controls is not stayed. The appellants submit that the investments and costs of production of organic growers are higher than those of conventional growers. The appellants also submit that if the Decision to remove price and production controls is not stayed, it will create uncertainty for organic chicken growers who will not know from cycle to cycle if they will be able to contract with processors. The appellants submit that should the appellants "miss out on a contract for a growing cycle, it would be catastrophic."
16. On the other hand, the appellants submit that maintaining the status quo would preserve the bargaining power as between processors and organic chicken growers pending a decision on the appeal.
17. The appellants further submit that it is not realistic to suggest that they convert to conventional chicken if market conditions are not conducive to growing organic chicken (as the Chicken Board suggests) given that there are unique growing requirements⁸ for organic chicken which increase their production costs and limits their ability to switch to conventional production. The appellants also submit that switching from organic to conventional chicken production would not allow them to recover their investments in space, facilities and land management systems required to grow Certified Organic chicken.
18. The appellants further submit that organic feed suppliers could be harmed if organic chicken growers were forced to switch to conventional chicken production because they need 2 – 3 months advance notice to secure feed delivery contracts and therefore cannot operate "with the possibility of shutting down every 8 weeks or switching to conventional feed."
19. The appellants submit that the harm to them if a stay is refused outweighs the harm to others if a stay of the decision is granted pending the appeal. The appellants also submit that a fundamental change of this nature will have a large impact on a small number of existing organic growers and that this is one reason that militates in favour of granting a stay. The appellants also submit that the short duration of the stay proposed (i.e. 2 months pending the determination of the appeal) militates in favour of a stay as any potential harm to others would be short-lived.

⁸ Including mandatory outdoor access, density requirements, land management requirements, labour and record keeping requirements.

20. The appellants do not “dispute” the Chicken Board’s goal of allowing more growers to produce organic chicken in order to meet consumer demand in B.C., however, they submit that maintaining minimum price and production controls would not interfere with this goal.
21. In their July 31st written submission (in reply to the Chicken Board’s July 28th sur-reply), the appellants disagree with the Chicken Board’s characterization that a stay of the production and pricing controls would amount to a mandatory injunction and instead characterize it as preserving the status quo. The appellants also submit that the Chicken Board already sets different minimum live prices for Silkies, Taiwanese and Organic within the specialty quota and they want that process to continue. The appellants further submit that a number of matters set out in an affidavit in support of the Chicken Board’s submissions are in the nature of hearsay (and double hearsay) and should be assessed weight accordingly.

Chicken Board’s Position:

22. The Chicken Board relies on written submissions dated July 10, 11 and 28, 2014. In its July 10 letter, the Chicken Board submits that the Decision is consistent with the Specialty Program created by Chicken Farmers of Canada.⁹
23. The Chicken Board submits that the appellants have mischaracterized the Decision insofar as they suggest that it will eliminate price controls for organic chicken. Instead, the Chicken Board submits that the Decision provides for the price of organic chicken to be consistent with that for mainstream chicken which is governed by Schedule 3 to the Chicken Board’s General Orders (which sets out a formula to determine the minimum prices to be paid by processors to growers). Any increase (or differential) from the minimum live price to be paid for organic chicken would be a matter of negotiation between the grower and processor. The Chicken Board submits that the practice of negotiating higher prices above the minimum live price already occurs for other categories within mainstream such as antibiotic free, certified humane and veggie fed birds.
24. The Chicken Board further submits that if after converting to mainstream quota, market conditions are such that the price paid for organic chicken is not sufficient for a grower to continue growing organic chicken then the grower may switch to growing ordinary mainstream chicken.
25. The Chicken Board also submits that the appellants have mischaracterized the Decision as eliminating production controls. Organic chicken growers will continue to be subject to the national allocation and will be required to grow within the tolerances for over- and under marketing set out in Part 26 and 27 of the Chicken Board’s General Orders.

⁹ Chicken Farmers of Canada recently introduced a Specialty Program under which specialty chicken was removed from the base allocation and a separate allocation was provided for B.C. specialty chicken which includes only Silkie and Taiwanese breeds – not Certified Organic or Redbro chicken. According to the BCCGA, BC is the only province where organic chicken production is classified as specialty and is not part of the mainstream allocation. According to the Chicken Board, there are 4 organic chicken growers in B.C. and no Redbro chicken growers (see p. 61 and p. 69 respectively, to the Affidavit of Melissa Horton sworn July 10, 2014).

However, the effect of the Decision will be that organic production will not be limited only to those growers who currently hold specialty quota but will be opened up to all mainstream growers who are independently certified to produce it.

26. Consequently, the Chicken Board submits that it is not possible to “sensibly disaggregate” these consequences of reclassification.
27. The Chicken Board submits that pressure exerted by processors to lower prices in the current production cycle or competition from another grower who is undermining prices in the current production cycle (as alleged by the appellants), would be in breach of the General Orders which set the prescribed minimum live price for organic chicken and that those activities should have been reported to the Chicken Board. The Chicken Board submits that these issues cannot be considered an effect of the implementation of the Decision given that the transition to mainstream minimum live prices had not yet occurred in those production periods.
28. The Chicken Board submits that downward pressure on pricing does not constitute irreparable harm because any losses can be quantified; and in particular, any losses sustained to the appellants from receiving a lower price than the current minimum organic cost of production could be compensated in money if BCFIRB made such an order on appeal.
29. The Chicken Board submits that the appellants have made contradictory arguments by asserting, on the one hand that the implementation of the decision will result in an oversupply situation (that they currently experience) but on the other hand, asserting that there is a limited volume of specialty quota available to service a growing organic market as evidenced through research and market realities.
30. The Chicken Board disputes that any oversupply issue experienced by the appellants is the result of another grower’s use of market development allotments and submits instead at page 5 of its July 10, 2014 submission that:

...any oversupply issue that may have occurred in the organic market is due at least in part to a recent, significant overproduction by the appellant, Oranya. As set out in the April 25, 2014 BCCMB minutes Oranya recently sought relief from overproduction penalties for 403,000 kg of overmarketing “caused by the circumstances surrounding the growing of organic chicken to meet market demand for Sunrise and Rosstown.” The minutes reflect that the Board offered Oranya a domestic lease to manage its current overproduction and asked them to present a plan “to ensure that the current overproduction issue is not repeated.”¹⁰
31. In any event, the Chicken Board submits that it is unclear how the increase in the appellants’ frozen inventory is related to the implementation of the Decision or how any

¹⁰ See excerpt of Chicken Board minutes at p. 73 to the Affidavit of Melissa Horton sworn July 10, 2014.

harm occasioned by it would be alleviated by a stay of the implementation of the Decision. The Chicken Board also submits that an oversupply of organic chicken in the market place does not constitute irreparable harm.

32. The Chicken Board further submits that the appellants' argument that they would not be fairly compensated by the Chicken Board for the 30% loss of quota value (due to the price differential between specialty and mainstream quota) does not constitute irreparable harm because it is quantifiable and could be compensated. The Chicken Board also relies on *Kuszyk v BCCMB* (BCFIRB, Dec. 24, 2010 as authority for the proposition that "quota is not property [but] rather a licence to produce, which may be issued on prescribed terms and conditions (and) may be cancelled, that is annulled or abolished, also on prescribed terms and conditions." The Chicken Board submits that it has no role in setting prices that are paid between growers upon quota transfer.
33. The Chicken Board relies on *Skye Hi Farms et al v BC Broiler Hatching Egg Commission* (BCFIRB, March 6, 2014) as authority for the proposition that on a stay application in the regulated marketing context,

there is a presumption that the legislation promotes the public interest and that a stay of that legislation would harm the public interest. Accordingly, the onus would be on the applicant for a stay to demonstrate that there would be a benefit to the public interest in staying the legislation."

The Chicken Board submits that the appellants have not met the burden on them to displace this presumption.

34. The Chicken Board submits that its Decision was made after extensive consultation with industry stakeholders, including the appellants and that it considered the interests of those stakeholders and the public. The Chicken Board also submits that industry stakeholders were overwhelmingly in support of the reclassification of quota from organic to mainstream.
35. The Chicken Board submits that if British Columbia does not adapt to changing consumer needs, these needs will be met by Ontario products (for one), some of which are already present in B.C. stores. The Chicken Board submits that its Decision is intended to allow a greater number of growers to produce organic chicken to meet the growing needs of B.C. consumers. Consequently, the Chicken Board submits that "a stay of the Decision has the potential to harm the organic chicken industry."
36. The Chicken Board also submits that if the implementation of the Decision is stayed, other producers who plan to start growing organic chicken and processors who plan to process and market organic chicken commencing in September will be delayed. The Chicken Board submits that the implementation of the Decision in September 2014 as planned is necessary in order to ensure that B.C.'s chicken industry is able to effectively meet the needs of a growing organic market.

37. In its July 11th submission (in response to the BCCGA's submissions set out below), the Chicken Board takes issue with the BCCGA's characterization of the issues submitting that the appellants have not alleged that they will lose market share and that they do not stand to lose market share because market share is based on quota holdings and the Decision to reclassify organic quota will not affect the amount of quota held by the applicants or any other grower. The only effect will be whether growers currently growing organic elect to convert their quota from specialty to mainstream and that election need not be exercised until 2016.
38. In its July 28th submission (in reply to the appellants' July 23 submission), the Chicken Board submits that the appellants have mischaracterized the effect of a stay as "preserving the status quo" when a stay would instead compel the Chicken Board to set a differentiated minimum live price for organic chicken within mainstream. The Chicken Board submits that if it was required to set a minimum live price for the production period, A-126 (of \$4.16/kg) and future periods, it could not set it based on the COP used for the period A-125 because it believes that price is "inaccurate and artificially high"¹¹ and therefore it would have to retain a third party to determine a more accurate COP at an estimated cost to it of \$15,000 to \$20,000.¹²
39. The Chicken Board also submits that the minimum live price would likely be significantly lower than the price for A-125 and could also be lower than the COP and the \$3.96/kg that Oranya has negotiated for A-126. The Chicken Board therefore concludes that if it is required to set a minimum live price for Certified Organic chicken, the appellants would likely be in the same position as they are in the absence of a stay.
40. In the alternative, the Chicken Board submits that if a minimum live price was set that was higher than the price negotiated between growers and processors, the cost of any increase would be borne either by processors (who have already entered into agreements with their customers for the lower price) or by consumers themselves. The Chicken Board submits that Ontario does not have a differentiated minimum live price for organic chicken so that it is unlikely that the goal to supply the B.C. organic chicken market by the B.C. chicken industry would be achieved if a higher minimum live price was passed on to consumers. Consequently, the Chicken Board submits that the Decision to implement organic chicken as mainstream must be implemented fully in order to permit more growers to meet market needs at a price that is competitive with Ontario.

¹¹ Based on the information of Rob Donaldson, a long-time chicken grower from whom Oranya purchased one of its farms, Serecon Consulting, the company that provided the cost of production analysis apparently based on 2 growers who self market, and Peter Shoore of Sunrise Farms (a processor). See paragraph 8 of the Affidavit of Christine Rickson sworn July 25, 2014.

¹² According to p. 7 to the Affidavit of Melissa Horton sworn July 10, 2014, the minimum live price for organic chicken is set by the Chicken Board every 16 weeks following an update by Serecon Consulting which looks at 2 growers in B.C. and a recommendation to the Board from the Special Markets Advisory Committee (SMAC). According to paragraph 23 to the affidavit of Cornelis Spitters sworn July 23, 2014, the appellants were appointed as members of SMAC for a 6 month term on November 13, 2013.

COABC's Position:

41. By way of two emails dated July 8 and 24, 2014, the COABC states that it supports the submissions of the appellants and a stay of the Decision.

BCCGA's Position:

42. In its submission dated July 11, 2014, counsel for the BCCGA states that it supports a stay pending the hearing of the within appeal.
43. The BCCGA submits that it presumes there is a serious issue to be tried between the parties. The BCCGA also submits that if the proposed pricing scheme is implemented, the potential damages incurred by the appellants and other growers would not be "readily quantifiable" especially as they relate to a potential loss of market share.
44. With respect to the balance of convenience, the BCCGA submits that "the potential damage to the stability of the industry should the new directives be implemented and then be reversed on appeal outweigh[s] the inconvenience of a modest delay to the implementation of the Board's directives should the appeal not succeed."

ANALYSIS AND DECISION:

45. In *RJR-MacDonald*, *supra* at pp. 347-8, the Supreme Court of Canada held that the following "three part *American Cyanamid* test should be applied to applications for interlocutory injunctions and stays in both private law and Charter cases."
- a. At the first stage, an applicant demonstrate a serious question to be tried;
 - b. At the second stage, the applicant must convince the court that it will suffer irreparable harm if the relief is not granted;
 - c. The third branch of the test requires an assessment of the balance of inconvenience. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision of the application will have upon the public interest may be relied upon by either party. When the nature and declared purpose of the legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. The applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
46. The test in *RJR-MacDonald* is incorporated into Rule 7(1)(b) of the *Rules of Practice and Procedure for Appeals under the Natural Products Marketing Act (NPMA)* and provides that an appellant who applies to BCFIRB for a stay of a decision under appeal must specify
- (i) Whether the appeal raises a serious issue(s) to be considered;

- (ii) What harm to the applicant, that cannot be remedied, would occur if a stay is not granted;
- (iii) Why the harm to the applicant outweighs the harm that would occur to others, or to the public interest, if BCFIRB grants the stay.

Serious Issue to be Tried:

- 47. While the appellants are appealing the entirety of the Decision, they seek a stay of only those parts of the Decision that deal with the removal of existing price and production controls for Certified Organic chicken that are scheduled to take effect in the next production cycle that commences on September 7, 2014.
- 48. In *RJR-MacDonald, supra* at p. 348, the Supreme Court of Canada in referring to the first branch of the test held that “whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits.” It also noted that this stage will be satisfied “unless the case on the merits is frivolous or vexatious...”
- 49. None of the parties dispute that there was a serious issue to be tried; ie. whether or not the Decision accords with sound marketing policy. The appellants also allege that there is a serious issue to be tried with respect to the sufficiency of the Chicken Board’s consultative process in making the Decision. I am satisfied that the appeal raises serious issues to be tried.

Irreparable Harm:

- 50. Under the second branch of the test, the appellants must satisfy the burden of proving that they would suffer irreparable harm if the Chicken Board’s Decision is not stayed pending appeal. In *RJR-MacDonald, supra* at p. 341, the Court defined ‘irreparable harm’ as “harm which either cannot be quantified in monetary terms or which cannot be cured” and an example of that includes circumstances where “a party will be put out of business by the court’s decision or where one party will suffer permanent market loss or irrevocable damage to its business reputation.”
- 51. The appellants submit that the Chicken Board’s Decision to remove price and production controls for organic chicken is unnecessary and would not interfere with the Chicken Board’s goal of allowing more growers to produce organic chicken to meet consumer demand in B.C.. The appellants submit that the Decision is already having a negative financial effect on them and the organic chicken market and that they will experience irreparable harm if the decision is not stayed.
- 52. In particular, the appellants claim that in anticipation of implementation of the Decision in the next production period (A-126), the price of organic chicken they produce has been subject to downward pressure due to processors trying to negotiate a lower price and other producers who are overproducing and trying to undercut them. The appellants claim that

this has resulted in an oversupply of organic chicken that they are currently unable to sell and to the lowering of prices below the current COP. The appellants also submit that these indicators are precursors of what will result in the marketplace should the Decision be implemented. In particular, the appellants submit that the removal of price controls will give rise to predatory pricing and give processors greater bargaining leverage to set prices every production period to the disadvantage of growers. On the other hand, they submit that by maintaining the status quo pending appeal, the bargaining power between processors and growers would be preserved.

53. The appellants submit that the removal of price and production controls will create uncertainty and financial risks for them as they will not know from cycle to cycle if they can contract with processors under the new conditions. The appellants also state that given the unique growing requirements for organic chicken their ability to switch to the production of conventional chicken is limited and they would not be able to recover their significant investment in facilities, etc.. The appellants also submit that if they are successful on appeal, any damages they incur from the implementation of the Decision would be irreparable in the sense that even if they could be quantified, they are not recoverable as damages from the Chicken Board given the immunity protection for commodity boards found in s. 19 of the *NPMA*.
54. The Chicken Board submits that it is not removing price and production controls for organic chicken but rather is making them consistent with mainstream chicken. The Chicken Board submits that organic chicken will be subject to the same minimum live price as mainstream chicken and growers of organic chicken can negotiate with processors for a higher price consistent with the practice already in place for growers of other categories of chicken within mainstream. The Chicken Board submits that price and production are necessary parts of the process of reclassification under the Decision and it would make no sense to remove them from the process.
55. The Chicken Board submits that there is no clear relationship between the appellants' increase in inventory and the implementation of the Decision. The Chicken Board submits for example, that Oranya's increase in frozen chicken inventories was the result of it over-producing its authorized allocation in an attempt to meet the growing demand of processors. In any event, the Chicken Board submits that an oversupply of organic chicken in the market place does not constitute irreparable harm.
56. The Chicken Board also submits that it has been aware for some time that the current COP formula for setting minimum live price for organic chicken is inflated. The Chicken Board submits that if a stay was granted and it had to set a minimum live price for organic chicken within mainstream quota framework, it would have to determine a more accurate COP. It believes this would be significantly lower than the current COP and possibly lower than that negotiated by Oranya for the next production period. Consequently, the Chicken Board submits that the appellants would be in the same position with respect to pricing of organic chicken whether or not a stay was granted.

57. On this issue, I find that the appellants have not met the onus on them to demonstrate irreparable harm. In particular, I am not satisfied that the appellants' current frozen chicken inventory is due solely to the over-production of another grower as alleged given the evidence from the Chicken Board that Oranya's oversupply situation was largely the result of its own over-production (403,000 kgs.) in the same growing cycle which they claimed was done to meet processor demands.
58. The appellants also submitted that an oversupply of organic chicken in the marketplace or predatory pricing would drive down prices and could create financial risks for them to continue growing organic. They further submit that while they could convert to conventional chicken production, they would lose some of the financial investment they made in their organic facilities and management systems. Without addressing the merits of the appellants' arguments on this appeal, the Chicken Board has made a policy decision that the development and expansion of the organic chicken industry in B.C. requires a reclassification of Certified Organic chicken from specialty quota to mainstream quota. The appellants argument that the potential exists for there to be an oversupply of organic chicken in the market place as a result of this policy is not sufficient to demonstrate irreparable harm especially given the appellants' own acknowledgment of the growing demand for organic chicken in B.C. that is not currently being met. The Chicken Board, as the first instance regulator needs to be able to act as needed to balance the interests of growers and processors to ensure stability in the market place and it has attempted to do so. Whether or not the Chicken Board has struck the right balance here remains to be determined.
59. The appellants have also alleged that it is unnecessary to remove production and minimum pricing controls for organic chicken within the mainstream quota and that this will have a significant financial impact on them as predatory practices drive prices below their COP. The Chicken Board submits that pricing and production are integral to the Decision, the objective of which is to supply more B.C. produced organic chicken to the market place and to be price competitive with imported organic chicken from Ontario. The Chicken Board also submits that the current COP (which is used to set the minimum live price for organic chicken) is inflated and that the appellants would be in no better position if the Board made adjustments to it in order to set a minimum live price for organic chicken for the next growing cycle because it would likely be lower than that for the current growing cycle.
60. Whether or not production and price controls are a necessary part of the Decision is an issue to be determined on the merits at the hearing of the appeal. For the purposes of this stay application, I conclude it likely that during the A-126 growing cycle and subsequent cycles, prices negotiated with processors may be reduced from those received in previous cycles so that the appellants may receive less for their chicken. However, I do not equate receiving less for their chicken with irreparable harm. Even as a supply managed sector, the chicken industry is faced with the basic principle of supply and demand and where there is a short market, product generally trades at higher price. When supply increases, price pressure is generally downward.

61. Further, I note the Chicken Board's argument that any losses sustained by the appellants receiving a lower price than the current minimum organic cost of production could be "compensated in money" if BCFIRB so ordered. To be clear, BCFIRB does not have authority to award damages and any remedy flowing from this appeal would need to fall within the regulatory authority of the *NPMA*. However, I am satisfied that if the Decision is not stayed and the appeal is successful, there are regulatory mechanisms within the *NPMA* which could allow for a meaningful remedy.
62. I wish to note that even if I had found that the appellants had demonstrated irreparable harm (and I reiterate that I do not), I would have found for the reasons that follow that they did not satisfy the third branch of the *RJR-MacDonald* test.

Balance of Convenience:

63. The appellants submit that the harm to them if a stay is refused outweighs the harm to others if a stay of the Decision is granted pending appeal for the following reasons:
- There is no urgency to remove price and production controls in organic chicken because it represents only 1% of the chicken market in B.C. but that it would have a significant impact on the small number of existing organic growers who would not receive a fair return.
 - There would be no harm to the public by delaying the Decision to remove production and price controls as demand would continue to be met by existing or new growers.
 - A stay would only be of a short duration of approximately 2 months (or pending determination of the appeal) and any potential harm to others would therefore be short-lived.
64. The Chicken Board submits that the balance of convenience does not favour a stay for the following reasons:
- The organic chicken industry in B.C. could potentially be harmed if a stay is granted because the pricing and production aspects of the Decision are integral to the scheme of the legislation. New growers are needed to meet growing market demands. If a stay is granted, new growers who plan to start growing and processors who planned on marketing organic chicken in September will be delayed. A higher live price for organic chicken if passed onto customers would not be competitive with imported chicken from Ontario which does not have a differentiated minimum live price for organic chicken.
 - If a stay was granted, the appellants would be in no better position than if a stay was not granted because the Chicken Board would then have to set a new minimum live

price for organic chicken within mainstream with the result that it would likely be lower than that for the current growing cycle and possibly lower than that negotiated by the appellants for the next growing cycle.

65. *RJR-MacDonald supra* is authority for the proposition that under the third branch of the test there is a presumption that the public interest will be irreparably harmed if legislation is stayed and that an applicant for a stay must show that there would be a benefit to the public interest by granting a stay. The Court found as follows at page 346:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

66. *RJR-MacDonald* recognizes that there is a presumption that the legislation promotes the public interest and that a stay of that legislation would harm the public interest. In this case, the appellants deny that there would be any harm to the public interest and submit that any potential harm would be of a short duration. I find, however, that that this is not the correct application of the test. Under *RJR*, ***the onus is on the applicant for a stay to demonstrate that there would be a benefit to the public interest in staying the legislation*** (emphasis added).
67. The appellants have submitted that a failure to grant a stay could result in an oversupply of organic chicken in the market and instability, and by extension, that price and production controls will prevent this. However, and as stated above, I find that this is speculative and falls well short of the requisite evidence needed to establish that there is a benefit to the public interest in granting a stay.
68. Having regard to the excerpt set out in *RJR MacDonald* in paragraph 64 above, I find that the very reason for a Chicken Board is to make policy judgments regarding sound marketing policy. The Chicken Board has the authority to control the amount of chicken grown in B.C. and the price paid for that chicken. Chicken growers hold quota, which gives them the privilege of producing the allocated volume of chicken at a price set by the Chicken Board. The processors, in turn, obtain that volume of chicken when during the production cycle they require it, at the price fixed by the Chicken Board. The supply-managed system ensures that growers are paid for the chicken they produce and processors receive the chicken when they require it to meet their market demands. The Chicken Board's task is to balance the needs of the growers with those of the processors, as and when necessary, in order to ensure stability in the marketplace. In my view, the Chicken Board's ability to regulate its industry in accordance with its best judgment regarding

orderly marketing principles should not be lightly interfered with. As I said above whether or not the Chicken Board has struck the right balance as a matter of sound marketing policy is something that must be determined on the full hearing of this appeal.

Accordingly, and in the absence of evidence to the contrary, I find the balance of convenience favours the Chicken Board and I would dismiss the application for a stay on this basis as well.

CONCLUSIONS:

69. The application for a stay of the Decision is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Carrie H. Manarin, Presiding Member