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DELIVERED BY E-MAIL

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Dear Sirs:

RE: Flamingo Foods Ltd. v. BC Milk Marketing Board

Overview

Flamingo Foods Ltd. (the appellant), a milk processor, applies to the British Columbia Farm Industry Review Board (BCFIRB) to stay a decision of the British Columbia Milk Marketing Board (Milk Board or BCMMB) pending appeal.

The underlying appeal is about a Milk Board decision to confirm an auditor's report. The report concluded that based on the audit and the Milk Board's pricing orders setting out what processors must pay to the Milk Board for milk, the appellant owes the Milk Board $424,321.98, plus interest at the annual rate of 24%.

The original appeal, filed December 1, 2015, focused primarily on the charging of interest, which interest rate had long been established in Milk Board Orders 38(2) and 39(5). The appellant later clarified, based on a Milk Board email communicated the next day (December 2, 2015) that it takes issue with "not only the fact of, and the rate of, interest charged on the account, but the correctness of the account itself". The appellant states that "[t]he decision challenged is the decision that $424,321.98 is "past due" and that interest is running on that amount from a certain commencement date (which date has never been clearly articulated by the Respondent)".
In this context, the appellant describes its stay application as follows:

> The effect of the Board's decision communicated on December 2nd is that the Appellant is obligated to pay – immediately – both the amount alleged to be "past due" and the interest thereon. It is that decision that the Appellant seeks to stay pending appeal.

For the reasons that follow, the stay application is dismissed.

Background

In setting out the background, I make three preliminary points.

First, the background discussion that follows is obviously taken from the materials the parties submitted to BCFIRB in writing in connection with the stay application. None of what follows is intended to bind the panel following a full hearing of the evidence.

Second, while certain facts were contested on this application, I have not had to resolve those conflicts in order to address this application.

Third, because of my conclusion on the point just made, I have not found it necessary to defer deciding this application until a deponent could be made available to swear an affidavit for the Milk Board.

The appellant processes milk into cheese. It operates out of premises at 7865 Venture Street, Burnaby, British Columbia. It produces standard and specialty cheeses from milk supplied by the Milk Board.

It is not contested on this application that during 2012 and 2013 the appellant made specialty cheese products from enriched milk obtained through the Milk Board. The cheese that was produced was made pursuant to the national Domestic Dairy Product Innovation Program and as such there were financial incentives arising from involvement in that program. Under the program the milk was supplied with a western milk pool discount for processors of 15%. To offset higher production costs to the farmer, the appellant paid a premium for the enriched milk it received.

Milk received by processors is classified and priced on the basis of how it is utilized. The Milk Board engaged the services of KPMG to provide audits of cheese processors including the appellant. In conducting those audits, auditors from KPMG visited the appellant's facilities and reviewed records in order to ascertain whether the appropriate fees were paid to the Milk Board with respect to the milk that was being used under the program.

In the audit conducted for the appellant's operation for a period during 2012 and 2013, the auditor had to make determinations with respect to the types and amounts of enriched milk that was used for the specialty products that were developed and ultimately marketed and sold by the appellant. The end result of the audit process was a determination that the appellant owes $424,321.98 to the Milk Board for the 2012 and 2013 years. As noted above, the Milk Board's orders provide that interest on outstanding amounts accrues at 24% per annum.

The appeal challenges the process used by the auditor in determining the nature and quantity of the milk used by the appellant during the period in question. The appellant says that the process deviated significantly from previous audits and in particular did not include the type of

consultation and feedback that had occurred with previous audits. The appellant says that numerous errors arose as a result and that the resulting reports are incorrect insofar as they indicate that any amount remains owing to the Milk Board for the period in question. The appellant argues that the Milk Board, "whilst apparently acknowledging problems with the audit and the need to have it redone, has in the meantime imposed interest charges that are oppressive and exorbitant. Finally, on December 2, 2015, the BCMMB indicated that it was unwilling to instruct the auditors to reassess the account based on the correct facts". The appellant also intends to argue that the delay between the delivery of its account by the appellant and the subsequent review of the account is "highly unfair procedurally and prejudicial to the Appellant, given that the Appellant has closed its accounts for the year in question and has made numerous financial decisions on the basis that the account was accepted by the BCMMB as submitted".

Prior to the pre-hearing conference call the Respondent provided its response to the appeal in an email dated December 11, 2015 and its position on the stay application in a letter of the same date.

A pre-hearing conference call was held on December 14, 2015. At that time, counsel for the appellant agreed to provide reply submissions by December 16, 2015 and those submissions were in fact provided by letter on that date.

I have had an opportunity to review these submissions, as well as the affidavit evidence submitted by the appellant in support of its application. I wish to be clear that I have considered the material submitted by the parties in its entirety although it is not my intention to refer to all of the submissions in the course of my decision.

The test

With regard to the test for granting a stay, both counsel referred to the test as set out in *RJR – MacDonald Inc. v Canada (A.G.)*, [1994] 1 S.C.R. 311. This test is also set out in Rule 7(1)(b) of the Rules of Practice and Procedure for Appeals under the *Natural Products Marketing (BC) Act* which 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.

Submissions of parties

The appellant argues that the grounds of appeal (described above) raise serious issues.

The appellant further alleges that the failure to grant a stay will result in irreparable harm. It submits that payment of the amount now charged is "inherently disruptive", and that its bank "would likely cut off" its line of credit if the bank were "now told that the financials for 2012

and 2013 are significantly erroneous". It argues that the dislocation caused to the business "by enforcement of the revised account for 2012-2013 could not be remedied by any order later in the appeal process...." The appellant's office manager has deposed:

> The charge that the Board is now claiming would put us out of business. We are only a private family company; we don't have any extra money for something like this. Our line of credit with the bank is based on financial statements which we provide to them as they are prepared. If we were to go back to them now and say that the financials for 2012 and 2013 are all wrong, they would pull our line of credit right away.

The same affidavit also refers to the emotional stress of these events on the office manager.

As for the balance of convenience, the appellant submits in chief that this balance favours a return to the *status quo* that existed prior to the audit, that it is not in the public interest to suddenly impose a huge and unexpected charge with punitive interest long after accounts have been closed thereby creating chaos in the processor's business and potentially removing it from the market. While the amount in question is a huge amount for the appellant, it is merely a "drop in the bucket" for the Milk Board which is in any event merely a conduit for the funds.

The Milk Board has noted that in addition to the basic three part test set out in *RJR – MacDonald Inc.* noted above, that case also stands for the proposition that it should be presumed that a stay of a public body's decision will cause harm to the public interest and that as such it is incumbent on the appellant to demonstrate that the stay would itself provide a public benefit.

On the issue of irreparable harm, the Milk Board submits as follows:

> The Milk Board respectfully submits no "irreparable" harm would befall the Appellant if the obligation to pay interest on past due payments is not "stayed" pending the appeal. The Appellant has put in issue the findings of the auditor which uncovered the amounts due from the Appellant. If the Appellant is successful in its appeal, then to the extent that the BCFIRB finds that payments are <u>not</u> past due from the Appellant, then no is payable (sic). On the other hand, if the BCFIRB finds no reason to displace the findings of the auditor, then interest is properly payable. <u>In the meantime, the Appellant enjoys the time-value of money at the expense of the pool. If the Appellant wishes to mitigate its exposure, then it can (at its option) pay the amounts found due now, pending the appeal</u>. There is simply no reason to "stay" or otherwise "suspend" the obligation to pay interest on the payments that are past due. [emphasis added]

In reply, the appellant reiterates its original submission. It comments as follows on the Milk Board's reference to the appellant enjoying "the time-value of money at the expense of the pool":

> This correctly identifies the opposing interests to be balanced. On the one side are the pool participants – an unknown multitude of players who can have no expectation of any redistribution of funds relating to the accounts of 2012-2013 long settled and forgotten. On the other side is the Appellant, not enjoying the time-value of money but struggling to stay in business in the face of a new claim that would seriously undermine its financial arrangements and its business. The "balance" is a stark imbalance with the weight of inconvenience being exponentially greater on the Appellant's side.

With regard to the balance of convenience, the Appellant emphasizes among other points that this is an "exemption case" and it would not be in the public interest for there to be even fewer independent cheese producers in BC.

Decision

On the face of the appellant's notice of appeal there are serious issues to be dealt with on this appeal and it is in everyone's best interest to have this matter heard as soon as possible. Hearing dates and other procedural matters were addressed at the pre-hearing phone conference for that purpose.

However, under the second branch of the test in *RJR – MacDonald Inc.*, the appellant must satisfy the burden of proving that it would suffer irreparable harm if the Milk Board's decision is not stayed pending appeal.

While the evidence currently before this panel suggests that there may be irreparable harm done to the appellant's business if the impugned decision of the Milk Board is upheld by BCFIRB, I am not satisfied that irreparable harm will befall the appellant's business if the decision is not stayed pending appeal.

At this point, the amount owing and the interest accruing as assessed by the Milk Board are amounts assessed as due and owing. The amounts may in due course be modified, cancelled or endorsed by BCFIRB after the appeal is heard. Importantly, the Milk Board's submissions on this point – and in particular its reference to the appellant's use of the money in the interim and that the appellant may choose to pay now "at its option" – make it clear that the Milk Board is not demanding that the outstanding amount claimed or the putative interest accruing will be paid or be enforced until a final determination is made on this appeal. The Milk Board says that it is the appellant's option whether to pay in the interim. In other words, while the Milk Board asserts that the monies are due and owing and must be paid, it is not in this case going to take steps to execute or enforce on the amount until the appeal is disposed of. It follows, in my view, that there is no impending act of execution or enforcement to "stay".

This being so, it is in my view speculative to assert that the mere existence of this contested claim, including the ongoing running of interest, is likely to undermine the appellant's line of credit and its business. In this regard, I note the evidence of the office manager that "[i]f we were to go back to them now and say that the financials for 2012 and 2013 are all wrong, they would pull our line of credit right away." It is difficult for me to understand on what basis the appellant would, as matters stand today, advise its lender that the financials are "all wrong". The very point of its appeal is, as I understand it, to assert the very opposite.

As such, the appellant has not shown irreparable harm accruing to its business, other than the obvious emotional stress noted in the affidavit materials. That stress to the appellant's office manager, while regrettable, is inherent in all litigation. It is not a basis for a stay. While this panel has some sympathy for the appellant's concerns for the long term viability of its operation

if the decision of the Milk Board is upheld, there is no evidence of irreparable harm in the interim and as such the appellant's stay application is denied.

Given the panel's decision above with respect to the second branch of the test in *RJR – MacDonald Inc.*, it is not necessary to comment on the third branch of that test (balance of convenience).

The appellant's stay application is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Chris Wendell, Presiding Member