September 22, 2016 File: 44200-50 – File #16-08

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Dear Sirs:

RE: Vancouver Island Produce Ltd. v BC Vegetable Marketing Commission

Vancouver Island Produce Ltd. (VIP) filed a Notice of Appeal with the British Columbia Farm Industry Review Board (BCFIRB) on Friday, August 5, 2016. The Notice of Appeal sought to challenge a July 7, 2016 Vegetable Marketing Commission (Commission) "decision" described as "Supervisory Review of Regulated Vegetable Production on Vancouver Island – Agency Application Process 2017 Crop Year".

In this decision, the matter under appeal will be described as the *Agency Application Process*.

The Notice of Appeal lists numerous objections, summarized below:

(a) The *Agency Application Process* lacks legal authority because the Commission has no statutory power under the *Natural Products Marketing (BC) Act* to review agency licences without cause.

(b) The *Agency Application Process* is, applying the *Baker* criteria, a "decision" that was itself subject to a duty of procedural fairness. On this basis, VIP alleges that the September 2, 2016 deadline for applications was too short, that there was an incorrect reference to which portions of the Commission's orders were operative and that the Appellant "should be given the statutory 30 day right of appeal". VIP alleges that the Appellant "had a legitimate expectation that such a decision to implement this agency review process would not be made" and alleges that the impacts on VIP are such that it should have been given the opportunity to make submissions about whether the *Agency Application Process* should even have been embarked upon.

(c) The *Agency Application Process* has no policy justification. VIP alleges that there is no empirical support to justify the process, that producers and agencies were not involved in any discussions that led to the review, that any decision to remove an existing agency would remove a grower's "freedom to choose" its marketing agent, that the Commission has a "predisposition" for only one agency and that one of the agencies is a "sub-agency" of a mainland agency, which does not fit that "vision". VIP also takes issue with the agencies being unable to view the applications of other agencies during the *Agency Application Process*.

(d) The *Agency Application Process* was subject to "reasonable apprehension of bias in the decision-making because the Commission has members who are in a direct pecuniary relationship with competing agencies could use this opportunity to revoke the licences of Vancouver Island agencies without cause. The composition of the Commission creates a conflict of interest".

In a letter dated August 11, 2016, VIP clarified that, by way of remedy, it wants BCFIRB to:

(a) "terminate" the *Agency Application Process*,
(b) require the Commission to notify all growers of the authority to allows it to revoke agency licences without cause; and
(c) direct the Commission to apply procedural fairness and BCFIRB's "SAFETI" principles "with respect to any future process, including any agency application process, and to publish these directions to give proper notice to all growers and agencies affected".

On August 26, 2016, VIP applied for a stay of the *Agency Application Process*.

A pre-hearing conference was conducted on August 30, 2016 at which time I indicated that I was not prepared to address the stay application until the parties addressed the preliminary issue of whether BCFIRB has jurisdiction to consider the grounds for appeal raised in the Appellant's Notice of Appeal given that BCFIRB prior approved the Commission's process in decisions dated June 15, 2016 and July 8, 2016. I referred the parties to the Provincial board's decision *Salmon Arm Poultry Ltd. v. BC Egg Marketing Board* (May 16, 2001), discussed below.

A submission schedule was established and I have received and reviewed the following:

1. Submission of Appellant dated September 6, 2016.
2. Submission of Respondent dated September 14, 2016.

Submissions of the Parties

VIP says that there is a preliminary issue whether BCFIRB's ratification of *Agency Application Process* would properly be characterized as a specific supervisory decision of the Commission's prior ratification. It agrees that if the Commission did not act independently and the agency application process resulted from BCFIRB's supervisory directions, then the matter cannot be appealed and the remedy to challenge such a decision would be judicial review.

VIP says that "the issues are clouded somewhat by the fact that BCFIRB's decision to almost immediately ratify the VMC decision would effectively take away effected [sic] parties' rights to receive proper notice (30 days) to consider whether to file an appeal of the VMC's decision." VIP says it is arguable whether BCFIRB properly exercised a supervisory role in simply ratifying the Commission's decision and whether it acted improperly by "squashing parties' rights" but acknowledges that these arguments focus on BCFIRB's decisions and should be addressed in a judicial review.

The Commission's position is that BCFIRB has prior approved the process being undertaken and therefore does not have jurisdiction to consider the grounds for appeal raised in VIP's Notice of Appeal. It submits that on June 15, 2016, BCFIRB accepted the Commission's recommendation that regulation of the Vancouver Island vegetable industry be continued, and in its supervisory capacity directed the Commission to address the matter of agency structure on Vancouver Island by conducting a transparent, inclusive, and fair application and review process to be ratified by BCFIRB.

The Commission submits that as instructed, it worked with BCFIRB to develop an agency review process that was SAFETI based. The criteria and process were ratified by BCFIRB and the agency application process document was approved on July 8, 2016.

The Commission agrees with VIP's suggestion that BCFIRB's decisions are subjects to be addressed in a judicial review. In light of the foregoing, the Commission seeks summary dismissal of this appeal under Rule 6 of the Rules of Practice and Procedure for Appeals under the *Natural Products Marketing (BC) Act* and section 31(1)(a) of the *Administrative Tribunals Act* (*ATA*) on the ground that the application is not within the jurisdiction of the tribunal.

Decision

The narrow question before me at this stage is whether VIP's appeal should be summarily dismissed based on lack of appellate jurisdiction based on the principle in *Salmon Arm Poultry Ltd. v. BC Egg Marketing Board* (May 16, 2001). In *Salmon Arm Poultry*, BCFIRB held as follows:

> Appeals to the BCMB are governed by the *Natural Products Marketing (BC) Act* which gives the BCMB (now BCFIRB) general supervision over all marketing boards and commissions. Decisions under its supervisory role are subject to review under the *Judicial Review Procedure Act* and therefore cannot be appealed and are only subject to judicial review by the Supreme Court of BC. The BCMB issued a supervisory decision the Egg Quota Allocation Review in August 2000 which led to the Egg Board decisions under appeal. In order for a matter to be the proper subject of an appeal, it is necessary under the Act for there to be "an order, determination or decision of a marketing board...." <u>The panel examined each issue under appeal to determine whether the Egg Board had exercised any discretion in making its orders. It determined that in each case, it did not act independently and the decisions being appealed were all a result of the Egg Board carrying out the specific supervisory directions of the BCMB and therefore not appealable to the BCMB</u>. [emphasis added]

In *Salmon Arm Poultry*, a commodity board issued a "decision" that made after a series of specific Provincial board directions which left no room for the independent exercise of discretion by the commodity board. BCFIRB held, and I agree, that taking into account BCFIRB's concurrent supervisory and appellate mandates, the legislature in s. 8 of the *NPMA* did not intend BCFIRB to hear an appeal where it has previously issued a specific direction to a commodity board or commission that leaves no meaningful independent discretion by that board or commission. This reflects the purpose of the appeal provision in s. 8, which is to hold commodity boards and commissions accountable for their exercises of judgment. Where, as in *Salmon Arm*, the commodity board or commission was acting on specific instruction from BCFIRB in our capacity as supervisory board, an appeal to be BCFIRB would essentially be an appeal from BCFIRB's own decision. That would be an abuse of process. In such a case, the appropriate remedy in such cases is obviously judicial review from BCFIRB's direction.

The facts here are more complex than they were in *Salmon Arm Poultry* because the Commission "decision" under review is an interim procedural step within a larger regulatory process designed to give rise to further exercises of regulatory judgment by both BCFIRB and the Commission before final regulatory policy decisions affecting the industry are made. That process is still underway and is not yet concluded. VIP's request for a BCFIRB appellate order "terminating" the *Agency Application Process* seeks to put a halt to the larger regulatory process before it is concluded.

The question before me is whether such an appeal properly lies - whether, based on the principle in *Salmon Arm Poultry*, the *Agency Application Process* is properly characterized as an "independent" exercise of the Commission's discretion or whether it is more properly seen as the implementation of a specific supervisory direction of BCFIRB.

The following chronology is of assistance in answering this question:

(a) October 10, 2014: BCFIRB initiated the review of Vancouver Island regulated Vegetable Marketing. As noted in BCFIRB's June 15, 2016 letter (p. 2):

> Given the lack of resolution to ongoing Vancouver Island conflicts and significant issues already facing BC's vegetable industry (e.g., declining number of producers, increasing production costs, loss of processors), the Commission requested that BCFIRB initiate a final supervisory review of Vancouver Island's regulated vegetable industry.
>
> In considering the request, BCFIRB determined it was not sound marketing policy to allow continued Vancouver Island disputes to negatively impact operation of the regulated sector. BCFIRB initiated the review of Vancouver Island regulated vegetable marketing on October 10, 2014. [emphasis in original]

BCFIRB's October 10, 2014 supervisory letter stated: "The supervisory review will be led by the Commission. BCFIRB will provide guidance to the Commission in conducting a transparent, consultative process to evaluate whether or not vegetable

production on Vancouver Island should continue to be regulated and, if continued, what that looks like...."

(b) June 8, 2016: The regulatory process culminated in a "Decision and Recommendations" document issued by the Commission. That document, which set out procedures and consultations that were followed before it was issued, sought BCFIRB supervisory approval of its recommendation that the Vancouver Island vegetable industry continue to be regulated. It also sought BCFIRB supervisory approval "of the process for confirming Vancouver Island agency structure going forward". VIP has not challenged the Commission's June 8, 2016 *Decision and Recommendations* document.

(c) June 15, 2016: BCFIRB (a) "accepts the Commission's recommendation that regulation of the Vancouver Island vegetable industry continues to represent sound marketing policy", and (b) "directs the Commission to conduct a transparent, inclusive and fair application and review process, to determine in the first instance as a matter of sound marketing policy:

1) the appropriate number of Vancouver Island agencies;
2) the identity of the Vancouver Island agency or agencies; and,
3) whether any existing Vancouver Island agency licences should be revoked.

The June 15, 2016 letter made clear that BCFIRB "will work with the Commission to develop a SAFETI-based review process to evaluate the Vancouver Island agency structure". The referenced schedule contemplated that in June 2016, "BCFIRB ratifies, with the Commission, forward looking criteria that will be used in reaching these determinations". [emphasis added]

(d) July 8, 2016: BCFIRB issues a supervisory letter with regard to the forward looking criteria:

> BCFIRB stated in the [June 15, 2016 supervisory decision] it would work with the Commission to develop a SAFETI-based review process to evaluate the Vancouver Island agency structure. BCFIRB and the Commission would than [sic] ratify the forward looking criteria that would be used in reaching these determinations....
>
> BCFIRB approves the agency review process, including the evaluation criteria set out in the attached "Supervisory Review of Regulated Vegetable Production on Vancouver Island – Agency Application Process 2017 Crop Year".

The procedural history set out above makes clear to me that BCFIRB not only initiated the current regulatory review as supervisor, but announced from the outset that it would be exercising its supervisory authority to provide direct guidance to the Commission in respect of several aspects of its process, including the process that would be set out in the *Agency Application Process*.

It is of course true that BCFIRB only formally ratified the *Agency Application Process* after the Commission had itself ratified the process, but it is clear the Commission's recommendation was not created in a vacuum. The *Agency Application Process* was a requirement that flowed directly BCFIRB's June 15, 2016 supervisory direction, which direction included a clear statement that the *Agency Application Process* would be the product of BCFIRB "working with" the Commission to develop that document. Thus, what VIP has characterized somewhat critically as BCFIRB's decision "to almost immediately ratify the decision" was in fact contemplated by the supervisory process that was set out in BCFIRB's June 15, 2016 letter.

Based on a proper contextual understanding of how it came to be developed, I have come to the conclusion that it would be an error to characterize the Commission's *Agency Application Process* as an independent exercise of discretion subject to appeal under s. 8 of the *NPMA*. As a document which was the product of a BCFIRB supervisory direction and which reflected input from BCFIRB, it is my opinion that this was not the kind of decision that the legislature intended should be subject to appeal under s. 8 of the *NPMA*. The legislature cannot have intended an abuse of BCFIRB's process by allowing an appeal from a Commission decision that BCFIRB had a supervisory hand in developing prior to formal ratification.

Having arrived at this conclusion, I wish to add two final points.

First, I have considered whether I should reach a different conclusion based on an analysis of the particular grounds VIP has sought to raise on the appeal. In my view, the answer is no. For one thing, some of those appeal grounds advance arguments that BCFIRB has already explicitly rejected as a matter of policy (e.g. that the process has no policy justification). Clearly, no purpose would be served by hearing an appeal on those very same issues on appeal. And to the extent that other proposed appeal grounds seek to advance new legal arguments (e.g., the argument that the *NPMA* does not authorize the Commission to revoke an agency licence without cause and various procedural fairness arguments) those arguments can still be advanced in those parts of the regulatory process to come for consideration by the regulators. None of the proposed grounds of appeal changes the reality that the *Agency Application Process* was developed through the joint work of the Commission and BCFIRB as set out above such that it is not the kind of independent decision subject to appeal under s. 8 of the *NPMA*.

Second, I want to make it clear that had I decided that this appeal is not covered by the principle in *Salmon Arm Poultry*, I would have invited submissions from the parties on the following additional questions:

(a) Does an appeal lie under s. 8 of the *NPMA* from a commodity board's interim procedural decision which does not itself actually impact – but only has the potential to impact – an agency's licence? In other words, does an appeal lie based on the allegation that the process itself has produced "uncertainty" for agencies and the producers who market through them?

(b) If the answer to question (a) is "yes", should this appeal be adjourned pending the outcome of the supervisory process, or alternatively should it be referred to the supervisory process pursuant to s. 8(8) of the *NPMA*?

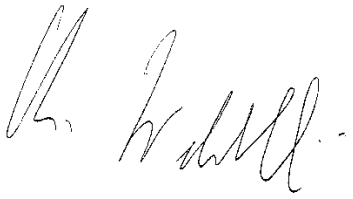
> 8(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.

In view of my decision, I do not find it necessary to invite submissions from the parties on those questions.

Order

For the reasons set out above, I therefore order that this appeal be summarily dismissed pursuant to section 31(1)(a) of the *ATA* on the ground that the application is not within the jurisdiction of the tribunal.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:



Chris K. Wendell, Presiding Member