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File: #17-14

DELIVERED BY E-MAIL

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RE: 0802881 BC Ltd (Stasis Farms) v BC Chicken Marketing Board

On June 12, 2017, Garrett Broatch on behalf of 0802881 BC Ltd. dba Stasis Farm (the appellant) filed a Notice of Appeal with the British Columbia Farm Industry Review Board (BCFIRB) with respect to a June 7, 2017 decision of the British Columbia Chicken Marketing Board (Chicken Board) directing Stasis to use its specialty quota for quota period A-145 to place and ship specialty product under contract for Wingtat Game Bird Packers Ltd. (Wingtat) of the type specified by Wingtat. As the appellant indicated an intention to file a stay of this decision, a submission schedule was established to deal with the application in an expedited fashion.

The appellant's stay application and supporting materials were received on June 12, 2017. The Chicken Board's response materials including the affidavit of William Vanderspek were received June 14, 2017. The appellant's reply was received June 15, 2017.

BACKGROUND

The appellant holds specialty quota in the BC chicken industry. There are two quota categories in the BC chicken industry: specialty and mainstream.

Prior to 2014, certified organic chicken was produced under specialty quota. To take advantage of the new Chicken Farmers of Canada specialty allocation, the Chicken Board made changes to its provincial specialty program in 2014 (in consultation with growers and processors). The Chicken Board now divides chicken production into two classes of quota. Mainstream quota includes conventional, certified organic chicken and Redbro chicken, while the specialty class comprises Taiwanese (TC) and Silkie chicken (collectively known as Asian chicken).

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The Chicken Board gave growers holding specialty quota until 2020 in which to either transition their quota to mainstream quota (which allows for production of organic chicken) or to retain specialty quota and produce Asian chicken.

The appellant has historically grown TC's, and on occasion, organic chicken, with its specialty quota. In period A-144, the appellant was growing organic chicken for Sunrise Farms, a processor which supplied organic chicken to Thrifty Foods. On May 2, 2017, Sunrise notified the appellant that it was not in a position to purchase Stasis Farms' organic chicken in A-145 (August – September 2017). The Chicken Board made efforts to find another processor to voluntarily take the appellant's organic chicken for A-145 but was unable to do so.

Subsequently, in a letter dated June 2, 2017, the Chicken Board directed the appellant's production to Wingtat for period A-145 and until further notice. In a follow-up letter on June 7, 2017, the Chicken Board ordered the appellant to use its specialty quota for A-145 to place and ship specialty product -- the type of product to be specified by Wingtat. According to the contract prepared by Wingtat (Exhibit 'A' to the affidavit of Mr. Vanderspek) chicks needed to be ordered June 7, 2017 for a placement of June 30 – July 13, 2017.

STAY APPLICATION

In coming to this decision, I reviewed the written submissions from the parties as well as the affidavit evidence from the Chicken Board's witness, Mr. Vanderspek. Much of the appellant's "evidence" came in the form of unsworn email communications and letters the appellant received or sent to the Chicken Board and its processor, which largely related to the merits of the appeal and events which have transpired over the past year and not the specific request for a stay. While the materials were instructive, at this stage the time constraints involved in this application have meant that my decision below has focused on the key issues and associated evidence presented.

The test for whether it is appropriate to grant a stay is set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. This test has been incorporated into Rule 7(1)(b) of the *Rules of Practice and Procedure for Appeals under the Natural Products Marketing Act* 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 (serious issue to be tried);
- (ii) What harm to the applicant, that cannot be remedied, would occur if a stay is not granted (irreparable harm);
- (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 (balance of convenience).

Serious Issue to be Tried

The appellant does not specifically address the test for a stay in his initial submission, despite being referred to Rule 7 by BCFIRB staff prior to bringing this application. It appears that the appellant, in its appeal, is arguing that the Chicken Board erred in directing it to produce TC chicken in A-145. The appellant alleges that none of the other four organic growers were directed to produce Asian chicken, the total organic production volumes have not been reduced

in A-145 and the distribution is being disrupted by another producer who seeks to supply the Thrifty's account himself in an effort to grab more market share. The consequence of the Chicken Board's decision is that the appellant will earn less in A-145 and his financing arrangements will be placed in jeopardy.

The Chicken Board argues that any merit in the appeal is not obvious. While it reserves the right at a later date to argue that the appeal is frivolous, for the purpose of this application, it is not arguing that the stay application fails on this branch of the test.

I am satisfied that the appeal meets the test of raising a serious issue to be tried.

Irreparable Harm

This second branch of the *RJR-MacDonald* test requires me to consider whether the appellant has satisfied the burden of proving that it would suffer "irreparable harm" if the decision to grow TC product is not stayed pending appeal.

Submissions

The appellant's application does not focus on the second branch of the test for the stay specifically but from his submission, it appears that the appellant's argument is that producing TC chicken in A-145 will not be as profitable as producing organic chicken. The appellant has advised its bank that it has been removed from the organic market, telling them while the market is still very strong "a small farmer like ourselves cannot compete". The appellant argues that its bank financing was based on organic production, a grace period for paying back the loans due to previous difficulties has already been given, and it cannot go to back to the bank again asking for another chance. The appellant says staying in specialty production will cause Stasis Farms to short its loans and risks foreclosure.

In response, the Chicken Board argues, based on *RJR-MacDonald*, that the Supreme Court of Canada defined "irreparable" as referring to the nature of the harm rather than its magnitude, and defined it as "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other". Examples included instances where "one party will be put out of business by the court's decision"; "where one party will suffer permanent market loss or irrevocable damage to its business reputation".

The Chicken Board relies on *Oranya Farms II Holdings Inc. et al v. British Columbia Chicken Marketing Board* (BCFIRB, August 21, 2014) at para. 61 where BCFIRB accepted that any losses sustained by the appellants in that case receiving a lower price than the current minimum organic cost of production could be "compensated in money" if BCFIRB so ordered. While BCFIRB does not have the authority to award damages, there are regulatory mechanisms within the *NPMA* which could allow for a meaningful remedy.

While the appellant does not clearly set out the nature of the harm it will suffer if a stay is not granted, the Chicken Board argues that the suggestion seems to be that there will be lost profits if the appellant is not permitted to produce organic chicken in A-145. The Chicken Board says it is

not clear that the appellant would suffer any harm if a stay was not granted and the Chicken Board's decision was overturned on appeal. The Chicken Board's evidence suggests that there is not a market for the appellant's organic chicken in A-145. Accordingly, it is not the Chicken Board's decision not to place organic chicken with the appellant that has the potential to cause harm but rather it is the fact that there is no purchaser for any organic chicken that the appellant would produce.

With respect to whether there is any harm at all, the Chicken Board says the appellant's submission is silent on the effect of the offer from Wingtat to produce TC's for the A-145 period, nor does it explain what if any difference in profitability it would expect between organic and TC production for that period. (I note here that the appellant did address this point on reply and I have considered that submission below.)

Assuming that the appellant would suffer some loss in profits from its inability to produce organic chicken in A-145, the Chicken Board argues that this is clearly, on the reasoning in the *Oranya* stay decision, insufficient to meet the test for "irreparable harm". Further, if the Chicken Board were ultimately unsuccessful on appeal, there are regulatory mechanisms available to it that could compensate 0802281 B.C. Ltd. for any lost profits as a result of the decision not to permit it to grow organic chicken in A-145.

The appellant's submission in reply focuses in large part on the appellant's difficulties in producing organic chicken which are attributed to what can best be described as bullying tactics by other larger organic producers which have placed Stasis Farms in a precarious financial position even before the most recent events related to A-145. It also details the Chicken Board's efforts to assist the appellant in finding a processor for its product and what it sees as unfair treatment at the hands of the processors, other producers and the Chicken Board. While this history may be relevant on the hearing of the appeal on its merits, it does not assist me in determining irreparable harm for the purposes of the stay application.

The appellant has attached excerpts from spreadsheets for organic and specialty returns in reply which it says clearly demonstrates serious harm to its farm. The appellant argues that his numbers show he would earn considerably more money producing organic chicken as opposed to TC chicken presumably, although not specified, for A-145. It is difficult to assess the veracity of the appellant's numbers or what weight can be placed on them in the absence of any knowledge of the underlying assumptions or facts. Further, I do not have the benefit of the Chicken Board's position on these numbers as this submission was received in reply and not as part of the initial stay application.

The appellant disagrees that there is no market for its organic chicken and suggests that what has happened here is that another producer has interfered with its contractual arrangements. The appellant argues that its contractual arrangement should be protected and the organic market does not belong to any one producer. The appellant further says that its irreparable harm is not lost profit but is rather the inability to pay the full mortgage amount per month and the fact that any regulatory relief that BCFIRB may order following an appeal on the merits will be too late if the bank decides to call the loan.

Decision

I cannot resolve the differing views of the appellant and Chicken Board here. It will suffice to say that in my view, having considered the submissions of the parties and based on the evidence reviewed, I am not convinced that the appellant has demonstrated through clear evidence that it will suffer irreparable harm if the decision directing the appellant to use its specialty quota for A -145 to place and ship specialty product for Wingtat is not stayed in advance of the hearing of the appeal. I agree that any losses sustained by the appellants resulting from a lower price for its production are compensable as there are regulatory mechanisms within the *NPMA* which would allow for a meaningful remedy.

While I am very cognizant of the appellant's submissions regarding its precarious financial circumstances, a decision to stay the Chicken Board's order requiring the appellant to produce Asian chicken would not return the appellant to the *status quo* in A-144. The evidence before me is that contracts have been signed with other growers and if the appellant grows organic chicken in A-145, no processor is prepared to take that chicken. The effect of a stay would be to put the appellant in an even worse financial position than it currently finds itself.

Balance of Convenience

The third branch of the test for a stay involves a determination of who will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits. For the reasons that follow, I conclude that the balance of convenience would favour the Chicken Board even if the appellant had shown irreparable harm.

Submissions

The appellant argues that the balance of convenience favours the status quo (allowing the appellant to grow organic chicken). Its argument seems to focus on the right to grow organic chicken generally and not just in A-145. The appellant points to its location in southwest Langley, outside of areas that have been restricted as a result of Avian Influenza and away from other poultry farms, as being in the public interest. The appellant also says that having just five organic poultry farms is not in the public interest as the supply could be disrupted by any unknown factor.

The Chicken Board relies on the *Oranya Farms* decision at paragraphs 65-66 which held:

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 in BCFIRB decision).

Further, it points to paragraph 68, where BCFIRB concluded that “... 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. ...”

The Chicken Board argues that its authority to ensure that chicken is produced to meet market demands in a particular period is at the core of its regulatory authority. If its decision here was stayed, and the appellant permitted to produce organic chicken, the Chicken Board would have to direct a processor to purchase the product, displacing contracts already in place (including those for chicks that have already been ordered for placement) with another grower or hatchery. This type of direction has the potential to cause serious disruption to relationships between growers and processors and to orderly marketing, and as a general matter is not in the public interest.

Finally, the Chicken Board argues that the appellant has provided no basis from which BCFIRB could conclude that there would be any benefit to the public interest in staying the Chicken Board’s order and certainly has not discharged its burden to demonstrate such a benefit so as to be entitled to a stay of this decision.

Decision

As first instance regulator, the Chicken Board must make policy judgments regarding sound marketing policy. Without addressing the merits of the appellant’s arguments on this appeal, here the Chicken Board has made a decision to direct a grower to produce a particular regulated product for the marketplace, a matter within its core regulatory authority. Whether or not the Chicken Board has acted in accordance with sound marketing policy in considering the interests of other growers and processors will await a full hearing on the merits. In the interim, however I agree that the appellant has not overcome the presumption set out in *RJR – MacDonald* above that a stay would harm the public interest.

For the above reasons, the application for a stay is dismissed.

Given the concerns outlined by the appellant in his submissions, BCFIRB will, with the parties’ cooperation, move to have the appeal heard as soon as reasonably possible.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



John Les
Chair