



File: 44200-50/CMB 00-14
44200-50/CMB 00-16
44200-50/CMB 00-18

February 16, 2001

DELIVERED BY FAX

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Attention: Ms. Wendy A. Baker

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Vancouver, BC V7X 1L3
Attention: Ms. Maria Morellato

Dear Sirs/Mesdames:

**RE: AN APPEAL BY HALLMARK POULTRY PROCESSORS LTD. ET AL
FROM THE AUGUST 15, 2000 REGULATIONS OF THE BRITISH COLUMBIA
CHICKEN MARKETING BOARD**

**AN APPEAL BY SUNRISE POULTRY PROCESSORS LTD. ET AL
FROM THE AUGUST 15, 2000 REGULATIONS OF THE BC CHICKEN
MARKETING BOARD**

British Columbia
Marketing Board

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Mr. Christopher Harvey, Q.C.
Mr. John J.L. Hunter, Q.C.
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February 16, 2001
Page 2

**AN APPEAL BY K & R POULTRY LTD. (FARM FED) FROM THE
AUGUST 15, 2000 REGULATIONS OF THE BC CHICKEN MARKETING BOARD**

**AN APPEAL BY THE BC EGG HATCHERY ASSOCIATION FROM THE
AUGUST 15, 2000 REGULATIONS OF THE BC CHICKEN MARKETING BOARD**

Introduction

This is a supplementary decision about the production of documents in these appeals.

On October 23, 2000, we issued reasons for decision concerning the obligation of the British Columbia Chicken Marketing Board (Chicken Board) to produce documents on appeal. On October 30, 2000, the Chicken Board produced additional documents to the parties. On November 7, 2000, Mr. Harvey, on behalf of Hallmark Poultry Processors Ltd. et al, requested further documents from the Chicken Board. On December 7, 2000, Mr. Hunter provided some of the requested further documents, and refused to produce others. On December 12, 2000, Mr. Harvey made application to the British Columbia Marketing Board (BCMB) to compel production of the requested documents that were not produced and where issues remain outstanding between the parties.

Decision

We find it convenient to structure our decision in accordance with the headings utilized by Mr. Harvey to seek production of further documents.

The redraft FPA (Federal-Provincial Agreement) and operating agreements referred to in page 9 of the e-mail package; and current drafts and other correspondence relating to the FPA

CFC (Chicken Farmers of Canada) Memorandum dated May 19, 2000 and documentation provided therewith, as noted on page 12 of the e-mail package

Mr. Harvey argues that the BCMB cannot fairly adjudicate on the grounds of appeal without a full documentary record of FPA discussions, and in particular would be unable to determine whether the FPA and the new BC Regulations were being developed “in tandem as part of an overall political objective or whether they evolved along purely independent paths.”

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Ms. Maria Morellato
February 16, 2001
Page 3

Mr. Hunter argues that the documentation is not relevant because the FPA was proposed a long time before the present Chicken Board was appointed and the FPA is not concluded. Further, the documents do not relate to the questions of policy identified in the written submissions by Sunrise Poultry Processors Ltd. et al on the production of documents.

Given the grounds of appeal, it is our view that FPA documents that passed between the Chicken Board and other agencies such as the CFC, during the period when the Regulation Review was under way by the new Chicken Board and up until the time the new Regulations under appeal were passed, are matters touching on the appeal. Whether those documents support the grounds the Appellants allege is, of course, another question entirely. Mr. Hunter has conveniently listed the relevant documents at Schedule "A" of his December 7, 2000 letter. While we expect that the Processors, as members of CPEPC (Canadian Poultry and Egg Processors Council), would have access to many or most of these documents through the CFC, we order them produced, along with the May 19, 2000 CFC memo and enclosures.

The letter from [then Minister of Agriculture] Evans to federal and provincial Ministers referred to on page 9 of the email package

We direct that this document be produced. It does touch on the matters under appeal, and in particular the climate within which the Chicken Board was drafting the new Regulations. Whether or to what extent it has probative value for or against the Appellants' case is an issue for the Panel in due course.

The CFC letter of July 27, 2000 referred to at pages 21 and 22 of the e-mail package

The Chicken Board disclosed this document on December 7, 2000. On December 12, 2000, Mr. Harvey requested additional documentation referred to in the July 27, 2000 letter. In particular, Mr. Harvey requested the "report from external auditors in BC" and all follow-up correspondence regarding LDA (Liquidated Damage Assessment) penalties and the subject of whether "these factors will have to be taken into account when establishing BC's production base when entering the new FPA".

These documents need not be disclosed. The CFC's July 27, 2000 letter is now disclosed. As of the date that letter was written, the draft new Regulations had already been circulated. We are unable to see how material referred to in the July 27, 2000 letter could meaningfully further the inquiry into the Chicken Board's purposes in creating the new Regulations.

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February 16, 2001
Page 4

All general correspondence between the CFC and the Chicken Board [this being relevant to the issue as to the alleged motive of bringing BC into the national program]

The Appellants say that disclosure of general correspondence is essential to determine whether the Chicken Board is trying to implement a CFC-type scheme and will also show whether the Chicken Board is proceeding for “philosophical/political” considerations.

We refuse to order disclosure of this nebulous category of documents. We have already ruled on the Chicken Board’s duty to provide documents. Inclusion of this “basket clause” category would in our view amount to a fishing expedition, and might appear predicated on the view that the Chicken Board could not be trusted to comply with our earlier directions. We are not prepared to issue an order based on such an assumption.

All relevant deleted e-mail

Mr. Harvey and Mr. Hunter disagree on the “likelihood of retrieving deleted e-mail from a hard drive many months after it has been deleted”. Neither cited any technical authority in support of their position. In any event, there is in our view a serious question whether a deleted e-mail – a series of electronic impulses that have been eliminated – constitutes a “document” we could order produced under s. 8(4) or 8(5) of the *Natural Products Marketing (BC) Act*. On that basis we are not prepared to order the Chicken Board to attempt to recover and then examine such e-mails.

Data relating to the level of exports by Lilydale Co-operative Ltd. and allocation amongst Lilydale growers

The Chicken Board says this data is not relevant to the appeal. Further, it is confidential information about the Appellants’ competitor that could prejudice Lilydale. The Appellants reply that one of the issues on appeal is whether the allocation of export credits has been fair under the former regime, and that the only way to determine this is have disclosure of the proportion of credits that went to Lilydale growers. Mr. Harvey says he does not seek the identity of particular growers, but only the basic facts relevant to the issue.

The BCMB is not prepared to rule on this request unless and until the Appellants give proper notice to Lilydale, and Lilydale receives an opportunity to reply. We therefore leave this item with the Appellants. If they still wish a ruling on this matter, the BCMB will require proof that proper and reasonable notice has been given to Lilydale.

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February 16, 2001
Page 5

Copies of drafts of the new Regulations, but “only those drafts with Board or staff comments hand-written on them”

These drafts need not be produced, for the reasons given at paras. 26, 27 and 31-36 of our October 23, 2000 decision.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

cc: Mr. Jim Beattie, General Manager
British Columbia Chicken Marketing Board