



July 22, 2002

File: 44200-50/CMB 02-08

**DELIVERED BY FAX**

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Attention: Mr. John J.L. Hunter, Q.C.

Dear Sirs/Mesdames:

**AN APPEAL BY MJ FARM LTD. FROM A FEBRUARY 21, 2002 ORDER OF THE  
BRITISH COLUMBIA CHICKEN MARKETING BOARD TO CEASE PRODUCTION  
AND MARKETING**

On July 5, 2002, the British Columbia Marketing Board (the "BCMB") received a request by the Appellant, MJ Farm Ltd. to adjourn the hearing of its appeal currently scheduled for July 26, 2002, until the British Columbia Court of Appeal makes its decision in the appeal of Mr. Justice Metzger's decisions in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, (unreported) April 24, 2002, L012392, Vancouver Registry (BCSC). On June 12, 2002, the Court of Appeal granted the BCMB leave to appeal the decision of Metzger J., and agreed to an expedited hearing, scheduled for August 16, 2002.

The decision of Mr. Justice Metzger articulates a significantly narrower appellate role for the BCMB than had previously been recognised. Mr. Justice Metzger held that the BCMB is required to "defer" to the discretion of the Chicken Board unless the outcome of that discretion was "unreasonable". Under this narrower standard of review, there is less chance of an Appellant overturning a commodity board's decision.

The Appellant argues that if it is unsuccessful on appeal, its remedy will be judicial review. In the event the appeal of Mr. Justice Metzger's decision is successful, the Appellant argues that it will be faced with the costly and time consuming task of arguing its case again under a broader standard of review. The Appellant further argues that there is no prejudice to the Chicken Board by delaying the appeal. The Appellant is licensed and is paying its levies in the interim.

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**British Columbia  
Marketing Board**

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The Chicken Board opposes the granting of an adjournment of this appeal. It argues that although the British Columbia Court of Appeal has granted an expedited hearing, there is no assurance when its decision will be delivered. The delay could be many months. The Chicken Board argues that it is important for the chicken industry in British Columbia that appeals be heard expeditiously and in accordance with the time requirements in the *Natural Products Marketing (BC) Act*.

## DECISION

In an earlier application by the Chicken Board to have the Appellant's appeal dismissed as being out-of-time, a Panel of the BCMB directed that this appeal proceed as the Panel was unable to come to a definitive decision based on the written and oral submissions of the parties. The Panel felt it would be cumbersome and potentially duplicative to proceed by way of further preliminary argument, particularly since the appeal itself did not require a lengthy hearing. The Panel further directed the parties to come prepared to address the implications of Mr. Justice Metzger's decision recognising that as it alters the standard of review that the BCMB has historically applied on appeals, it will likely affect the merits of the appeal.

Since the preliminary decision was issued, an expedited hearing before the Court of Appeal has been scheduled for August 16, 2002.

The Panel's obligation to hear appeals within 60 days is subject to its power to "adjourn a hearing for the period it considers appropriate on the request of the person bringing the appeal or of the marketing board or commission from which the appeal is being made or on its own initiative": s. 8(7) of the *Act*.

On one interpretation, the decision under appeal is an exercise of discretion whereby the Chicken Board determined that the Appellant would not be exempted from the new Regulations. Based on the Metzger decision, the BCMB's ability to review such an exercise of discretion is restricted to whether the outcome of that discretion was "unreasonable".

Should this appeal proceed on a narrower standard of review and should the Appellant be unsuccessful, the Appellant would then have to decide whether to accept the decision or incur the cost of appealing the BCMB's decision to the Supreme Court. It is very possible that by the time any judicial appeal is heard, the Court of Appeal would have issued its decision. If the Court of Appeal overturns Mr. Justice Metzger's decision, the Appellant may very well find this appeal remitted back to the BCMB for determination according to the broader appellate role the BCMB has traditionally exercised. This, in turn, would result in further delay and expense in the final resolution of this matter.

There is no question on this application that the decision of Metzger J. is the law unless and until set aside by a higher court. At the same time, this is the Appellant's appeal. The Appellant has applied for an adjournment because it has considered its position, including the potential costs of any delay, and concludes that an adjournment is clearly in its interests. The Appellant understands

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that the Chicken Board's decision stands in the interim. The Appellant advises that it has a license and is continuing to pay levies. The Appellant has not applied for any interim relief pending appeal.

The Panel finds that there is prejudice involved in forcing the Appellant to proceed with this appeal amid the uncertainty of appeal proceedings from a Supreme Court decision that has effected a dramatic change in the operation of the appeal system as it has functioned for two decades.

The Appellant's wishes and interests are not conclusive, but on the other side, the Chicken Board has not satisfied us that it is prejudiced by the adjournment of this appeal. Its decision remains in place. Beyond the broad statement that "it is important for the chicken industry in this province to have appeals heard expeditiously", the Chicken Board has not pointed to any prejudice that a delay would occasion to its ability to defend the appeal either by way of lost evidence or by way of prejudice to its procedural fairness interests.

The July 26, 2002 appeal hearing is adjourned. The period for the adjournment is until such time as the Court of Appeal renders a final determination of Mr. Justice Metzger's decision in the *Hong/Mundhenk* appeal. The Appellant is directed to advise the BCMB of its intentions regarding its appeal within 14 days of receiving notice of the Court of Appeal's final decision.

BRITISH COLUMBIA MARKETING BOARD  
Per

*(Original signed by):*

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Christine J. Elsaesser, Vice Chair

cc: Ms. Christine Rickson, Executive Assistant  
British Columbia Chicken Marketing Board

cc: Mr. John Giesbrecht  
MJ Farm Ltd.