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File: 44200-50/EMB 01-16

DELIVERED BY FAX AND REGISTERED MAIL

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Attention: Mr. Robert P. Hrabinsky

Dear Sirs:

**AN APPEAL FROM A DECISION TO COMMENCE COURT ACTION CONCERNING
THE PAYMENT OF MARKETING LICENCE FEES – PRELIMINARY APPLICATION**

By letter dated August 16, 2001, Mr. Bill Pottruff appealed a decision of the British Columbia Egg Marketing Board (the "Egg Board") to commence a Supreme Court action to recover unpaid marketing licence fees.

By letter dated September 5, 2001, the Egg Board applied to the British Columbia Marketing Board (the "BCMB") to have this appeal summarily dismissed as frivolous, vexatious or trivial pursuant to s. 8(8.3) of the *Natural Products Marketing (BC) Act* ("the Act"). The basis for the request is as follows:

1. The subject matter of the appeal is an action commenced by the Egg Board in British Columbia Supreme Court under Vancouver Registry Action No. S013997. In that proceeding, the Egg Board seeks to recover judgment for outstanding marketing licence fees due from Mr. Pottruff and seeks orders pursuant to ss. 15 and 17 of the *Act* enjoining breach and compelling compliance.
2. The issues raised by the Appellant on his appeal are more properly a defence to the Supreme Court action.
3. Given that the Appellant argues that the Supreme Court action is a frivolous abuse of the Court's resources, his recourse is an application under Supreme Court Rule 19(24) for an order that the claim be struck.

British Columbia
Marketing Board

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4. The commencement of a proceeding in Supreme Court cannot be characterised as an “order, decision or determination of a marketing board” within the meaning of s. 8 of the *Act* such that a right of appeal to the BCMB arises. The decision to commence a Supreme Court action is subsumed within the proceeding. All remedies that can be sought with respect to that decision are properly brought within the Supreme Court proceeding.
5. There is no legitimate issue as to the ability of commodity boards to commence proceedings before the Supreme Court. Such proceedings are expressly authorised by the enforcement provisions found in ss. 15 and 17 of the *Act*.
6. Even if it were the case that the BCMB could hear an appeal arising out of a commodity board’s decision to commence a Supreme Court action, in this case the BCMB has already addressed the prospect of proceedings before the Supreme Court. In its decision dated January 17, 2001 in the matter of *Bill Pottruff v. British Columbia Egg Marketing Board*, the BCMB noted that Mr. Pottruff had operated illegally for approximately five years and had not paid quota or levies (para. 67). Further the BCMB stated that if Mr. Pottruff was not prepared to apply for Temporary Restricted Licence Quota Permit, his options were to purchase quota, downsize his flock to 99 birds or cease production altogether (para. 76). Ultimately the BCMB made the following order:
 85. The Appellant shall have a reasonable period of time, as determined by the Egg Board, to bring his operation into compliance with Egg Board regulations, orders and policies.
 86. If the Appellant refuses to bring his operation into compliance, the Egg Board may enforce its regulations, orders and policies, and shut down the Appellant’s operation in excess of 99 birds.

In his reply of September 13, 2001, Mr. Pottruff understands the Egg Board to be saying that it may proceed to the Supreme Court if an order of the board is not being complied with. However, he maintains that he is in compliance with the BCMB’s decision of January 17, 2001. If the Egg Board was not satisfied with that decision, it could have appealed to the Supreme Court. It did not, and as such, must be taken to have accepted the terms and conditions of the BCMB decision. Mr. Pottruff argues that the Supreme Court action is a “completely unsupported and separate action launched by the Egg Board and subject to appeal”. He argues that the *Act* is clear that any decision on the part of a commodity board is subject to appeal to the BCMB. Finally, Mr. Pottruff argues that any actions he has taken in defending the Supreme Court action were taken out of legal necessity and are not relevant to his appeal.

DECISION

The Egg Board seeks a ruling from this Panel that the within appeal is frivolous, vexatious or trivial and should be dismissed pursuant to s. 8(8.3) of the *Act*. In order to rely on this section, there must first be a valid appeal.

The Appellant seeks to appeal a decision of the Egg Board to enforce compliance with its regulations and orders by application to the Supreme Court. Sections 15 and 17 of the *Act* provide as follows:

- 15 (1) On application by ...a marketing board...and on being satisfied that a provision of this Act or the regulations or a provision of a marketing scheme made by the Provincial board, marketing board or commission under the Act or the regulations..., is not being complied with, the Supreme Court may
- (a) order and require a person to do promptly or within or at the time specified in the order, an act or thing that the court considers necessary for the purpose of compelling that person to comply with this Act, the regulations, the marketing scheme or the order, rule, determination or decision of the Provincial board, marketing board or commission, and
- (b) forbid, restrain or enjoin the doing or continuing of an act or thing that is contrary to this Act, the regulations, the marketing scheme or the order, rule, determination or decision of the Provincial board, marketing board or commission.

...

- 17 (1) An order, rule, determination or decision made by the Provincial board, marketing board or commission or under this Act or the regulations...may be enforced, and the breach of an order, rule, determination or decision may be restrained, without proof of damage and whether or not a penalty is imposed for the breach, by action or proceeding in the Supreme Court.
- (2) An action or proceeding under subsection (1) may be brought or taken by and in the name of the Provincial board or a marketing board or commission, and neither the government nor the Attorney General is a necessary party to the action or proceeding.

The key question arising from the Egg Board's submission is whether its "decision" to seek judicial enforcement action under ss. 15 and 17 is a "decision" or "determination" subject to appeal under s. 8 of the *Act* which provides as follows:

- 8 (1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal ...

In our view, the answer is "no". Section 8(1) must be read in light of ss. 15 and 17 of the *Act*.

As this Board has noted in previous decisions (see for example, *Try Poultry Farms v. British Columbia Chicken Marketing Board*, June 26, 2000), the *Act* creates two enforcement options for commodity boards seeking to ensure effective regulation. One is direct action by the commodity board itself, in the form of licensing or quota enforcement. This option does not require the prior intervention of the Court and is subject to appeal before the BCMB.

The other option is to seek the aid of the Courts under ss. 15 and 17 of the *Act* to enforce its orders. The BCMB does not have jurisdiction to enforce a commodity board's orders. It cannot, for example, issue injunctions or grant money judgments. This is the likely justification for why ss. 15 and 17 expressly permit commodity boards to pursue this option independently of the BCMB.

Indeed, it is must be emphasised that the *Act* itself gives the commodity board the independent right to commence litigation in the Courts to enforce its orders. Once litigation commences, it is for the Courts to determine the validity of a request for enforcement. During that process a Defendant (such as Mr. Pottruff) will have all the rights available at law, including the right to apply for summary dismissal. This is not to say that a Defendant cannot appeal the general orders underlying the enforcement action. This happens all the time. However, the actual decision to commence enforcement proceedings is exclusively that of the commodity board. We agree with the Egg Board that the decision to seek enforcement is "subsumed within the proceeding itself".

To read the words "decision" or "determination" as allowing the BCMB to hear an appeal about whether the lawsuit should even have been filed would in our view run contrary to the plain language of the *Act* and would trench into the exclusive jurisdiction of the Supreme Court. Hearing such an appeal would also raise a number of practical problems. How could the BCMB practically resolve the appeal without deciding the very cause of action before the Supreme Court or trenching on solicitor-client privilege which is such a large component of any decision to take enforcement action? The legislature has wisely decided to prevent these problems by drafting ss. 15 and 17 in the fashion it did.

In reaching this conclusion, we leave open the possibility that, in its general supervisory role and in an extreme case, the BCMB could intervene to direct a commodity board to cease litigation if it was clearly and demonstrably oppressive or motivated by bad faith. However, nothing approaching that standard has been demonstrated here.

The appeal is dismissed. There will be no order as to costs.

RIGHT OF APPEAL

If a person, marketing board or commission is aggrieved or dissatisfied by an order or referral of the BCMB under section 9(1) of the *Act*, the person, marketing board or commission may appeal the order or referral on a question of law to the Supreme Court if the appeal is commenced within 30 days of being served with a copy of the order or referral.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser
Panel Chair