



January 21, 2016

File: 44200-50/File #15-14

**DELIVERED BY EMAIL**

Neal teBrinke  
Mountain View Acres  
[REDACTED]  
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Agassiz BC [REDACTED]

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Dear Sir/Mesdames:

**RE: AN APPEAL BY MOUNTAIN VIEW ACRES FROM A DECISION OF THE BC CHICKEN MARKETING BOARD ASSESSING AN OVER MARKETING LEVY AND LICENSE SUSPENSION FOR PERIODA-136**

On December 15, 2015, the British Columbia Farm Industry Review Board (BCFIRB) received an appeal from Neal and Natalie teBrinke dba Mountain View Acres regarding a November 23, 2015 decision of the British Columbia Chicken Marketing Board (Chicken Board) to impose penalties for over-production (over-marketing levies and a one period license suspension). On January 11, 2016, the Appellants applied for a stay of the Chicken Board's decision to not issue it an allocation for A-136. BCFIRB established a submission process and I have now received and reviewed the January 11, 2016 submissions of the Appellants, the January 15, 2016 response and supporting affidavit from the Chicken Board and the Appellants' reply dated January 20, 2016.

**BACKGROUND**

The chicken industry in Canada is supply managed on a national allocation system. The federal-provincial agreement provides for a national allocation by Chicken Farmers of Canada, from which the Chicken Board receives its provincial allocation.

The Chicken Board enforces period by period compliance with the quota amounts allocated to individual growers. Growers are expected to grow their quota in the period allotted within identified over and under production tolerances. Growers who overproduce by more than the set tolerance are subject to a penalty (which may include an "over-marketing levy", license suspension and a reduction in quota allotted in a given period).

The Chicken Board's General Orders provide:

23.5 An allotment of quota from the Board to a grower in the prescribed form is personal to the grower to whom it is allotted. All chicken must be produced and marketed pursuant to the allotment by the grower to whom the quota has been allotted and at the registered premises in respect of which that grower's quota has been allotted.

52.1 The Board may refuse to allot a quota, or may reduce, refuse to increase, or cancel a quota allotted to a grower who fails to comply with or has contravened any provision of the Act, the Scheme or these General Orders, or any order or direction of the Farm Industry Review Board or any order or direction of the Chicken Board. In addition, the Chicken Board may take similar action against every other grower who has been a party with a grower to any production or marketing of chicken contrary to these General Orders.

The facts underlying this appeal do not appear to be in dispute. In August 2015, after finding themselves in an over-production situation, the Appellants sent a portion of their flock to an alternate processor (other than the one they are contracted to ship to) for custom killing. The Chicken Board alleges that this was done to avoid over-marketing penalties. When the Chicken Board became aware of this unauthorized production, and given that this was a second incident of over-production for the grower, it imposed an over-marketing levy on the unauthorized production and suspended the grower's license for one period. The Chicken Board subsequently reallocated the Appellants' A-136 production to other growers shipping to the Appellants' contracted processor.

The Appellants appealed the Chicken Board's decision on the grounds that the penalty was excessive and would create hardship for the processor and interfere with the grower-processor relationship.

## **DECISION**

### **The Stay Application**

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 is also set out in Rule 7(1)(b) of the Rules of Practice and Procedure for Appeals under the *Natural Products Marketing (BC) Act* which 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;
- (ii) What harm to the applicant, that cannot be remedied, would occur if a stay is not granted;
- (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.

### **Serious Issue to be Tried**

The Chicken Board argues that this appeal is one of those rare cases that does not raise issues that meet the low threshold of being neither frivolous nor vexatious. Here, it is uncontroverted that the Appellants acted in breach of the Chicken Board's General Orders on a matter at the core of its regulatory mandate (production), that this was a second offence and the prior penalty was an insufficient deterrent to committing the offence. The Chicken Board says there is no dispute that it had the authority to impose the penalty and that the penalty imposed was a moderate response given the prior non-compliance.

The Appellants do not squarely address the issue of a serious issue to be tried. Its argument appears to be that the amount of the penalty is “disproportionate” and “grossly inflated” and made in circumstances where there are no guidelines for the imposition of the penalty.

I am not prepared to find that this appeal is frivolous or vexatious as the core of the Appellants’ argument is that the penalty was excessive in the circumstances.

Given that conclusion, I accept that there is a serious issue to be tried and I anticipate that the Appellant will elaborate on his argument at the hearing scheduled for February 9, 2016.

### **Irreparable Harm**

In considering this second branch of the *RJR-MacDonald* test, I must consider whether the Appellants have satisfied the burden of proving that they would suffer “irreparable harm” if the Chicken Board’s decision is not stayed pending appeal.

The Appellants argue that “time is of the essence as the A-136 deadline is fast approaching” and a stay would allow BCFIRB time to review the appeal. Without a stay, they say the deadline will be over and the financial hardship of losing that production will be “irreversible” (presumably because the opportunity to grow production in A-136 will be lost).

In response, the Chicken Board argues that there is no irreparable harm to the Appellants if the November 23, 2015 decision is not stayed. The loss of profits in one growing cycle can be quantified in monetary terms. If the Chicken Board was found to be in error, any penalty in production and any allotment refused in A-136 could be reinstated in a later cycle as long as the producer has sufficient room to grow in excess of its quota holdings. The Chicken Board argues that this fact can be inferred given that the Appellants’ over production of its quota is at the very heart of this appeal.

I agree with this submission in its entirety and find that the Appellants have not demonstrated irreparable harm. Given that conclusion, it is unnecessary to go further and consider the balance of convenience, however I do so in order to give the parties the benefit of my complete reasons.

### **Balance of Convenience**

The third branch of the test involves a determination of who will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The Appellants argue that the balance of convenience favours them and there is no harm to the public if the stay is granted as the penalties could be reinstated if the appeal was unsuccessful.

The Chicken Board argues that the balance of convenience favours it, arguing that protecting the Chicken Board’s authority to impose penalties on growers who fail to comply with the General Orders is in the public interest. It says that the Appellants have not discharged the onus on them to demonstrate how granting a stay would benefit the public interest.

The Chicken Board relies on the stay decision in *Oranya Farms Ltd. v. British Columbia Chicken Marketing Board* (BCFIRB, August 21, 2014), where the presiding member concluded:

In my view, 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.

I agree with the submissions of the Chicken Board and in the absence of evidence to the contrary, I find the balance of convenience favours the Chicken Board. A stay would negatively impact the Chicken Board's ability to exercise its best judgement to manage production in period A-136. Given that the Chicken Board has taken steps to ensure that the requirements of the Appellants' processor have been met by allocations to other growers, to change those arrangements now would be disruptive to growers and the processor, and not in the public interest.

I would dismiss the application for a stay on this basis as well.

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

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



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John Les  
Chair