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Wendy A. Baker, QC
Miller Thomson LLP
Pacific Centre
400 - 725 Granville Street
Vancouver BC V7Y 1G5

Claire Hunter
Hunter Litigation Chambers
2100 – 1040 West Georgia St
Vancouver BC V6E 4H1

Paul D. McLean
Mathews, Dinsdale & Clark LLP
400 Burrard Street, Suite 1950
Vancouver, BC V6C 3A6

Dear Sir/Mesdames:

**RE: Primary Poultry Processors Association BC v BC Chicken Marketing Board,
Stay Application Decision**

On June 6, 2017, the Primary Poultry Processors Association of BC (PPPABC) filed a Notice of Appeal with the British Columbia Farm Industry Review Board (BCFIRB) with respect to the May 29, 2017 decision (Pricing Decision) of the British Columbia Chicken Marketing Board (Chicken Board) regarding the new pricing formula which came into effect June 11, 2017.

As the PPPABC indicated its intention to file a stay of the Pricing Decision, a submission schedule was established to deal with the application in an expedited fashion. Subsequently, the British Columbia Chicken Growers Association (BCCGA) applied for and was granted intervener status to participate in both the stay application and the appeal hearing.

The PPPABC filed its stay application and supporting affidavits on June 8, 2017. The Chicken Board's response materials were received June 9, 2017. The BCCGA provided its response materials (and amended response materials) on June 12, 2017. The PPPABC's reply and a further affidavit were received June 12, 2017 as well. Based on my review of these materials, I determined that a further oral hearing was unnecessary and advised the parties accordingly.

There is a lengthy history to this matter. In the interest of time and so as not to prejudice any final determinations made by the panel on the appeal, it is not my intention to review all the

**British Columbia
Farm Industry Review Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
780 Blanshard Street, 1st Floor
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Web: www.gov.bc.ca/BCFarmIndustryReviewBoard

events leading up to the Pricing Decision. However some brief background is necessary to put this stay decision into context.

BACKGROUND

Prior to 2009, the price growers received was set through a price discovery process. Growers and processors were required to negotiate a proposed price and the Chicken Board retained its final authority to set price.

In late 2008 and 2009, growers and the processors were unable to negotiate a long term pricing agreement and ultimately, the PPPABC requested that BCFIRB conduct a supervisory review. In June 2010, following a ten day hearing, BCFIRB issued its supervisory decision on the Chicken Board's Pricing Related Recommendations (2010 Supervisory Decision). BCFIRB directed that a new pricing model be implemented using a weighted average of Ontario and prairie production plus a fixed differential (\$0.0435).

This model remained in effect until September 2010 when the processors agreed to a \$0.0480 differential until period A-112 and increasing to \$0.0485 beginning A-113. The pricing model with the modified differential remained in place until A-140 (October 2016) when the differential was raised to \$0.0571.

In 2015, prairie provinces began increasing their historic differentials over the Ontario price. Given the BC pricing model used a weighted average of prairie and Ontario live price, the BC live price moved considerably higher than Ontario (somewhere between eight and approximately nine and a half cents).

In June 2016, the Chicken Board began its review of the pricing formula and consulted with industry stakeholders. This process took more than a year and resulted in the Pricing Decision of May 29, 2017 which established the following new pricing model for mainstream broiler chicken:

Ontario Posted Price based on the historical weight category of 1.84 to 1.95 kg (as agreed by the PPAC on March 4, 2015)

Plus

50% of the difference in feed costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average)

Plus

50% of the difference in chick costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average)

Plus

3.5 cents for catching costs. Changes to the cost of catching will be reflected in the pricing formula and must be submitted to the Board for approval prior to the beginning of a pricing period.

The pricing formula will be evaluated by the Board on an annual basis. This new formula will be used beginning in period A-144. Shipments for this period begin on June 11, 2017.

The PPPABC appealed the Pricing Decision on the basis that it is inconsistent with sound marketing policy, implements a pricing model which is arbitrary and unfair, incorporates a feed differential that is not transparent, is based on information not provided to the processors for comment or review and will result in irreparable harm to the processing and further processing industries in BC including the loss of significant stable national contracts and the retraction of future investment in the processing and further processing sectors. They asked for a stay in the interim and an order that the live price of chicken in BC be based on the Ontario live price only while maintaining a fixed differential of \$0.0435/kilogram or in the alternative, a formula which recognizes the competitive nature of the Canadian chicken processing industry and allows BC processors to be competitive within it.

STAY APPLICATION

In coming to this decision, I reviewed the written submissions from the parties as well as the affidavit evidence from the PPPABC witnesses Scott Cummings, Blair Shier, Kerry Towle and the Chicken Board's witness, William Vanderspek. Much of this evidence will inevitably form part of the pending appeal record, and while the materials were instructive at this stage, the voluminous nature of the documentation and the time constraints involved in this application have meant that my decision below has focused on the key issues and associated evidence presented and will not delve into the level of detail set out in the parties' respective submissions.

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 PPPABC argues that it has demonstrated an arguable case that the Pricing Decision does not accord with sound marketing policy, does not incorporate a transparent data set and process for feed cost calculations, disregards processor input, is not grounded in sound economic analysis and will result in an unsustainably high BC live price. The PPPABC says it has met the low threshold for this branch of the test.

The Chicken Board concedes that the appeal raises a serious issue and the appeal is neither frivolous nor vexatious. While the Chicken Board disagrees with some of the evidence tendered by the PPPABC on this application, it says these disagreements can await a full hearing on the merits of the appeal.

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 PPPABC has satisfied the burden of proving that its members would suffer “irreparable harm” if the Pricing Decision is not stayed pending appeal.

Submissions

The PPPABC argues that absent a stay, its members will suffer irreparable harm including significant negative impact on their businesses, the loss of major stable national contracts and the retraction of future investment in the processing and further processing sectors. The PPPABC says that BC’s processing and further processing sectors are extremely vulnerable to an increase in the BC live price and cannot tolerate a live price that does not operate in tandem with Ontario and which will increase unsustainably along with increasing feed prices.

As evidence of the price sensitivity of its customers, the PPPABC points to the recent loss of the Wendy’s business for Western Canada and new pricing demands received by Sofina Foods Inc. in the past week as evidence. This impact was felt before the higher BC live price and speaks to the challenges price differentials place on the further processed product market.

The PPPABC argues that the price of feed is only going to increase and as such the A-144 price is likely the lowest price to be expected under the new pricing model. They fear that the Pricing Decision will make BC the supply of last resort. Since the BC live price began increasing in 2015, the PPPABC has lost large, national contracts. As the PPPABC relies on long term contracts, it cannot pass the increases along to customers and as such has to “eat” these costs or source chicken from other provinces.

The PPPABC says that when the new pricing model takes effect, it will almost certainly lose business as consumers look to Central Canada and the East to source product. Business will be displaced and will be nearly impossible to get back, given that these contracts are founded upon relationships that have taken years to establish.

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”.

The Chicken Board says that the PPPABC has identified significant negative impacts on its businesses, the loss of national contracts and the retraction of future investment as the basis for “irreparable harm”. The Chicken Board disputes this characterization and says that the immediate impact of the Pricing Decision (as described in the affidavits of Ms. Towle, Mr. Cummings and Mr. Shier) can certainly be quantified in monetary terms.

Further, it says that any financial harm would be limited to the cycles completed prior to the appeal being heard and a decision being rendered. The Chicken Board also says that it will “evaluate the new formula and its components with industry input within one year of

implementation”. In the interim, the General Orders permit a member of the Pricing and Production Advisory Committee (which has processor members) to seek a variation in the minimum live price in exceptional circumstances and no such request has been received.

Relying on an earlier stay decision in *Oranya Farms II Holdings Inc. v. British Columbia Chicken Marketing Board* (BCFIRB, August 21, 2014), the Chicken Board argues that even absent BCFIRB’s authority to award damages, the regulatory system does allow for meaningful remedies to compensate an appellant for monetary losses should an appeal ultimately be successful. It points to the evidence of Mr. Vanderspek of a prior situation where the Chicken Board made an error in setting live price which it addressed by making a price adjustment in a later cycle.

The Chicken Board says the PPPABC’s main concern is the loss of customer contracts. However, the evidence of PPPABC’s witnesses demonstrates that the loss of customer contracts (especially those which occurred before the Pricing Decision) is not necessarily causally linked to the Pricing Decision. The only customer raising a concern with a processor after the Pricing Decision did not take issue with the Pricing Decision itself but sought “Eastern v. Western” pricing when it had only previously requested Western pricing.

The Chicken Board argues that fluctuations in the live price across the provinces since 2015 belie the PPPABC’s assertion that the Pricing Decision will cause irreparable harm if it is not stayed. Any uncertainty in the market created by the Pricing Decision (or this appeal) will not be rectified by a stay, particularly if contracts are to be negotiated in the near future based on some interim price set by BCFIRB.

The Chicken Board takes issue with the PPPABC’s comparisons between Ontario and BC prices and the assertion that processing and further processing sectors cannot tolerate a BC live price that “no longer operates in tandem with Ontario”. The Chicken Board points to distinctions between the markets including catching costs, which are paid separately by processors in Ontario but are included in the price calculation in BC. It says catching costs in BC account for 3.5 cents in the pricing formula.

Finally, the Chicken Board argues that perhaps the most fatal flaw to the PPPABC’s argument is the fact that processors already pay a price to growers higher than the minimum live price set out in the Pricing Decision as they have chosen to pay a 3 cent/kilogram loyalty bonus to growers. Given that the A-144 minimum live price is 0.17 cents lower than the price processors actually paid to growers in A-143, the Chicken Board argues that any harm that processors may suffer from an increase to the minimum BC live price results from their arrangements with their growers and not the Pricing Decision. The fact that the PPPABC increased the bonus paid in the middle of the pricing review, when it was well aware the minimum live price might be increased, should not permit the PPPABC to now argue that the minimum live price set by the Chicken Board is not sustainable.

The Chicken Board argues that to consider the PPPABC’s evidence on the impact of the minimum live price on its businesses, without disclosure of the actual live price paid in A-143 (or the price to be paid in A-144), allows it to manipulate the process and undermine the Chicken

Board's statutory authority to set price in the interests of the industry as a whole and consistent with sound marketing policy.

The BCCGA agrees with the position of the Chicken Board and says that evidence of irreparable harm must be clear and not speculative; the PPABC must establish a permanent loss of market share which it has not done. The BCCGA says the PPPABC's submissions on loss of market share, consistent with its historical submissions before BCFIRB, are entirely speculative and should be given little weight. The fact is that successive price increases since 2009 have not diminished or damaged the BC industry. While Mr. Cummings' evidence is that the live price has been unsustainable since 2015, there is no evidence (beyond conjecture) of hardship or irreparable harm over this period to justify the extraordinary remedy sought by the PPPABC. The BCCGA says this is yet another example of the PPPABC's continued hyperbole whenever a price increase is proposed.

With respect to the submission on assumption of costs, the BCCGA observes that, absent a fair live price, its grower members must "eat" the increased costs which should be shared with processors. BCCGA members were required to "eat" these additional costs through the entire time of the pricing model review and a further one period delay. These costs are not recoverable and cannot be passed on to anyone.

The PPPABC submission in reply focuses on the "fatal flaw" identified by the Chicken Board related to loyalty bonuses (what it calls non-value related premiums). It says any premium paid by the processors is on top of the BC live price; the analysis before BCFIRB is with respect to the live price, and that is the comparator between provinces. Increases that take BC out of step with other provinces will negatively impact competitiveness.

The PPPABC says it is inaccurate for the Chicken Board to point to what processors paid in A-143 including bonuses and conclude that the BC live price in A-144 will be less. This analysis ignores the continuing impact of bonuses which the PPPABC says *must* be paid to reduce grower movement. It argues that the Chicken Board's attempt to use these extraordinary costs, unrelated to value, that processors must pay to maintain their business is evidence that the Chicken Board lacks balance in assessing the industry.

The PPPABC references the 2010 Supervisory Decision and BCFIRB's conclusion that non-value related premiums to reduce grower movement are unconscionable and completely inconsistent with the value chain approach. They argue that rather than taking steps to prevent unconscionable premiums, the Chicken Board is supporting them and suggesting they should be factored into pricing decisions.

The PPPABC argues that the loss of further contracts and business as a result of the Pricing Decision cannot be compensated for should the PPPABC be successful on appeal; this situation is not akin to the *Oranya Farms* decision where the potential loss associated with an organic producer receiving less for product could be easily monetized.

The PPPABC says they have long been warning the Chicken Board that further increases in the BC live price are unsustainable for BC processors and further processors and will result in loss of

business and contracts. This irreparable harm is not speculative and has resulted in demonstrable negative impacts (such as extremely high percentages of Central Canadian processor and further processor product in BC grocery freezers and the loss of the long term contract with Wendy's to a Central Canadian supplier). This is not hyperbole as argued by the BCCGA; instead the PPPABC argues that as major retail and food service customers move their business away from BC processors and further processors, there is an obvious impact to the BC industry. The BC industry only thrives where there are strong long term business relationships with regional and national food service and retail customers. If these customers determine BC is priced too high and move their purchasing decisions to other provinces, the whole BC industry loses.

Decision

I note at the outset that this appeal can be heard in relatively short order. Assuming the cooperation of the parties, it is likely that an appeal could be heard before the fall of 2017. The appeal hearing is the appropriate place to address whether the Chicken Board has struck an appropriate balance between the interests of growers in getting a fair price and the interests of processors in remaining competitive in the national market place. I cannot make that determination here based on the evidence before me.

The PPPABC's main argument on irreparable harm relies on the alleged significant negative impact of the Pricing Decision on their businesses, the loss of major stable national contracts and the retraction of future investment in the processing and further processing sectors. In my view, the evidence on this application has not satisfied that the specter of these negative outcomes is sufficiently clear as to support a finding of irreparable harm.

With respect to national contracts, PPPABC points to the loss of the Wendy's contract to Central Canada. Given that this contract was lost prior to the Chicken Board's implementation of its Pricing Decision, I agree with the Chicken Board that, based on the evidence on this application, there is no sufficient causal connection between the Pricing Decision and the loss of the contract to give rise to a finding of irreparable harm.

Similarly, the evidence on this application does not satisfy me that the PPPABC's reference to "significant amounts of Central Canadian processed and further processed product in BC grocery freezers" can be causally linked to a Pricing Decision that has only just come into effect.

The PPPABC seems to be arguing that the loss of the Wendy's contract coupled with recent communications from customers seeking East - West pricing and Central Canadian product in BC freezers are at least a sign of worse things to come. For its part, the Chicken Board says that its Pricing Decision seeks to address the impact of competition between Western and Central Canada markets and that the PPPABC members' own payment of loyalty bonuses to its growers undermines its position.

I cannot resolve these differing views here. It will suffice to say that in my view, the PPPABC's current assertion of "significant negative impacts" is too vague and speculative to support a finding of irreparable harm pending the decision on appeal, as are its arguments based on

retraction of future investment. Based on the evidence before me, these arguments do not make the case for irreparable harm.

It will be up to the appellant to demonstrate at the hearing on the merits that the Chicken Board has not acted in accordance with sound marketing policy. If the PPPABC is successful on appeal in establishing that the Pricing Decision does not strike an appropriate balance between grower and processor interests, a possible remedy would be a reconfiguration of the pricing formula adjusting the BC live price. Should the panel find that the processors overpaid for chicken in that interim period, there are regulatory mechanisms available to the Chicken Board to compensate the processors. Just as the PPPABC recognizes that it could make a retroactive adjustment to what it pays growers should BCFIRB stay the Pricing Decision and then uphold it on appeal, similar adjustments could be made by the Chicken Board should BCFIRB order a downward adjustment on appeal absent a stay.

The PPPABC argues that there is no regulatory mechanism available to the Chicken Board to rectify or compensate for a lost national contracts or lost business. On this point, I reiterate my earlier finding, on this application, the PPPABC has not demonstrated with clear evidence that national contracts and business will be lost in the interim period before the appeal can be heard.

Having considered the submissions of the parties and based on the evidence reviewed, I am not convinced that the PPPABC has demonstrated through clear evidence that its members will suffer irreparable harm if the Pricing Decision is not stayed in advance of the hearing of the appeal.

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 PPPABC had shown irreparable harm.

Submissions

The PPPABC argues that the balance of convenience favours its members and it is in the public interest to maintain the status quo. This is to be preferred over the implementation of a pricing model which threatens to disrupt the market place. The PPPABC says if a stay is granted it will pay growers in accordance with the pricing formula in place for A-143 and agrees to pay growers retroactively to A-144 the price ordered by BCFIRB. As such, it says there is no prejudice to growers during the period of the stay.

The Chicken Board argues that the PPPABC has not applied the balance of convenience analysis properly. 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).

The Chicken Board argues that the PPPABC seeks to frame the analysis as a balancing of grower and processor interests when in fact what should be balanced is the processors' interests against the harm to the public interest if a stay is granted. The only argument the PPPABC makes is that it preserves the status quo. In the absence of knowing what the processors pay in bonuses, there is no evidence as to what the status quo is. Further, the Chicken Board's evidence is that the new minimum live price does not increase the price over the price paid in A-143 factoring in the 2 cent bonus but in fact would decrease it.

The Chicken Board argues that a stay will harm the public interest as a central regulatory objective of the new pricing formula was to recognize the higher costs of feed and chicks in BC and account for that difference equally between growers and processors. After much analysis and consultation, the Chicken Board made a policy decision that it would not be fair to expect either growers or processors to absorb the full share of the difference in these two main cost components; staying the pricing formula will have the effect of distorting the equity struck with the new pricing formula.

Consistent with BCFIRB's decision in *Oranya Farms*, the pricing formula seeks to regulate the industry in accordance with the Chicken Board's best judgment regarding orderly marketing principles. Its reasoned decision should not be lightly interfered with unless BCFIRB determines interference is warranted after a full hearing on the merits.

Lastly, the Chicken Board addresses the PPPABC's suggestion that if the stay is not granted and it is successful on its appeal, that it will have to recover from over a hundred growers. The Chicken Board argues this cannot be sustained given the regulatory power of BCFIRB to direct the Chicken Board to address any price differential by way of a price order for a future cycle.

The BCCGA agrees with the submission of the Chicken Board and says that BCFIRB has recognized that there is a presumption that legislation promotes the public interest and a that a stay of that legislation would harm the public interest: *Skye Hi Farms et al v. British Columbia Hatching Egg Commission*, BCFIRB, March 6, 2014. It argues that the onus is on the PPPABC to demonstrate that there would be a benefit to the public interest in staying the legislation.

Decision

As first instance regulator, the Chicken Board must make policy judgments regarding sound marketing policy. Without addressing the merits of the appellants' arguments on this appeal, here the Chicken Board has made a policy decision to develop a new pricing model for setting the minimum BC live price for chicken going forward. This is a complex decision that involves not only a consideration of the higher costs associated with production in BC but also the live price in other provincial markets and the competition those prices create between provinces. It impacts

processors, growers and the industry generally. The Chicken Board has taken considerable time to consult and made what it sees as its best attempt at balancing the competing interests of growers and processors to ensure stability in the marketplace. Whether or not the Chicken Board has acted in accordance with sound marketing policy will await a full hearing on the merits. In the interim, however I agree that the PPPABC has not overcome the presumption set out in *RJR – MacDonald* above that a stay of the Pricing Decision would harm to the public interest.

Having made that finding, I further find that the PPPABC has demonstrated no clear public interest that would be served by returning to the previous pricing model pending appeal. Given that the appeal is a matter of public record, to stay the Pricing Decision and return to the A-143 price while the appeal is heard and decided would do little to promote further stability and certainty in the chicken industry pending appeal and would certainly not provide any basis for negotiations for long term contracts.

In my view, any harm to the PPPABC pending appeal does not outweigh the harm to the public interest resulting from a stay of the decision pending appeal. This is not a simple “bi-polar” case of a regulator making a decision that is limited to an individual party’s rights or interests. It is a decision that impacts the entire chicken industry as a matter of economic policy, and where the public interest involves competing industry interests that would be adversely affected if the stay is granted. The balance of convenience, in the period until the appeal is decided, favours maintaining the Pricing Decision until the appeal is heard and decided.

As noted earlier, BCFIRB will, with the parties’ cooperation, move to have the appeal heard as soon as reasonably possible.

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

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Chris Wendell
Presiding Member