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Dear Sir/Mesdames:

RE: Primary Poultry Processors Association BC v BC Chicken Marketing Board

On July 5, 2018, the British Columbia Farm Industry Review Board (BCFIRB) received an appeal from the Primary Poultry Processors Association of BC (PPPABC) relating to a June 27, 2018 decision of the British Columbia Chicken Marketing Board (Chicken Board) implementing a new pricing formula for the live price of chicken (Pricing Decision). As part of its appeal, the appellant seeks a partial stay of the Pricing Decision pending the outcome of the appeal “to the extent necessary to allow the Processors to pay the difference in chicken prices between the 2018 pricing formula and the 2017 pricing formula (excluding the \$0.012 modular loading levy) into trust pending the BCFIRB’s final decision on this appeal”. As the partial stay application impacts BC growers, the appellant invited the BC Chicken Growers Association (BCCGA) to apply for intervener status in the appeal so it could make submissions on the requested stay.

Although BCFIRB contacted the BCCGA, an application for intervener status was not received prior to the July 6, 2018 letter from BCFIRB establishing the submission schedule.

Subsequently, in a letter dated July 10, 2018, the BCCGA advised that it intended to seek intervener status and would like to make a submission in the stay application and could do so by July 12, 2018. In light of the tight time constraints, I granted the BCCGA intervener status in this appeal and gave it until close of business on July 11, 2018 to file any submission and supporting affidavits.

**British Columbia
Farm Industry Review Board**

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Documents Received and Reviewed

The appellant's written submission and affidavit of Scott Cummings, Chief Financial Officer of Sunrise Farms was received July 6, 2018. The Chicken Board's submission and two affidavits of William Vanderspek, Executive Director of the Chicken Board (one relating to this appeal, the other filed in the appeal of the A-144 pricing decision (July 2017)) was received on July 10, 2018. The BCCGA's submission was received and affidavit of Dale Krahn, President of the BCCGA was received July 11, 2018. The appellants reply was received July 12, 2018. I have reviewed the submissions in their entirety but in the interests of timeliness I only refer to them as necessary to support this decision.

In brief, the appellant is seeking what it calls a partial stay whereby the Pricing Decision would not be stayed but rather, while still respecting the Pricing Decision, the processors would place the difference in chicken prices between the 2018 Pricing Formula and the A-150 Formula in trust, pending the appeal. It says this partial stay should be granted as the Notice of Appeal discloses a serious issue to be tried, the implementation of the Pricing Decision before a decision on the merits will result in irreparable harm to the processors, and the balance of convenience as well as the public interest favours the processors. Without a stay, the appellant says that its processor members risk permanently losing access to funds (the differential between the 2018 Pricing Formula and the A-150 Formula) as once it pays growers for chickens, those funds are not recoverable, severely undermining the effectiveness of any remedy on appeal.

The Chicken Board argues that the appellant has failed to meet the onerous threshold justifying the granting of a stay. It says the appellant has not demonstrated that the implementation of the Pricing Decision which sets a minimum price will cause any harm let alone harm that is irreparable in nature. The processors are actually prepared to pay the minimum price set just not to growers. Finally, the Chicken Board argues that the appellant has failed to overcome (or even address) the presumption that the Pricing Decision promotes the public interest and as such the balance of convenience lies in favour of refusing the application for a partial stay.

The BCCGA agrees with the Chicken Board that the appellant has failed to meet the onerous hurdle warranting a stay. The BCCGA challenges the appellant's assertion that there is no meaningful remedy in relation to overpayments as the Chicken Board has previously used price adjustments to compensate for incorrect payments. Even if this would be administratively inefficient, that is not the test for irreparable harm. Further, the BCCGA says that the appellant's assertion that attempting to recover overpayments directly from growers would cause "irreparable harm" to the processor/grower relationship is too vague and speculative. Finally, the BCCGA says that the balance of convenience lies in favour of refusing the application for a partial stay and allowing the Chicken Board to exercise its judgement in regulating the industry.

BACKGROUND

This is another appeal by the PPPABC against a pricing decision of the Chicken Board. In June 2017, the PPPABC challenged the pricing decision of May 29, 2017 (period A-144). As part of that appeal, the PPPABC sought a stay of the pricing decision pending appeal which was

dismissed. This stay decision sets out the factual background which I do not intend to repeat here but for completeness I have provided a link: [Primary Poultry Processors Association British Columbia v. British Columbia Chicken Marketing Board](#) (BCFIRB, June 16, 2017).

I note that the June 2017 appeal did not proceed to hearing and instead the parties participated in a mediation on September 8, 2017 which resulted in a new pricing agreement following which the PPPABC withdrew its appeal. I note that subsequently (May 16, 2018), the PPPABC filed an appeal in relation to the Chicken Board's implementation of the pricing agreement arrived at through mediation. This matter has not yet been heard.

On June 11, 2018 and in advance of the expiry of the pricing agreement arrived at through mediation, the Chicken Board circulated an interim pricing decision on the formula for minimum price to the PPPABC, BCCGA and the BC Broiler Hatching Egg Commission inviting submissions. A further meeting was held June 27, 2018 following which the Chicken Board issued its Pricing Decision, a 12-page document comprised of a summary of the documents, submissions reviewed, and its explanation of how the decision was consistent with sound marketing policy and SAFETI principles.

The affidavit of Mr. Cummings deposes to a number of deficiencies in the Chicken Board's process in coming to the Pricing Decision and his view that the PPPABC received little engagement or feedback on its submission prior to receiving the Pricing Decision. These issues will need to be canvassed upon the hearing of the appeal.

It is this Pricing Decision that is under appeal and which the appellant now seeks to partially stay.

DECISION

Section 8.1(1) of the *Natural Products Marketing (BC) Act*, c. 330 (NPMA) gives BCFIRB the authority conferred under s. 25 of the *Administrative Tribunals Act* to stay an order, decision, or determination of a marketing board. In determining whether a stay is appropriate in the circumstances, BCFIRB relies on the three part test set out in *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1S.C.R. 311 and its predecessor, *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110, now reflected in Rule 6 of BCFIRB's Rules of Practice and Procedure for Appeals:

- (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, and
- (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 appellant's submission and supporting affidavit demonstrate an arguable case that the Pricing Decision does not accord with sound marketing policy. As such, I am satisfied that the appeal raises serious issues to be tried and the decision of whether or not to issue a partial stay does not turn on this branch of the test.

Irreparable Harm: In considering this second branch of the test, I must consider whether the appellant has satisfied the burden of proving that it would suffer “irreparable harm” if the Chicken Board’s Pricing Decision is not (partially) stayed pending appeal. Having reviewed the parties’ submissions, I am not satisfied that the appellant has satisfied this second branch of the test. The appellant argues that it will suffer serious and irreparable harm if it cannot protect its financial position on appeal. If the appeal is successful and its processor members are found to have overpaid growers for chicken, it says there is a meaningful risk of unrecoverable overpayment. Once processors pay growers for chickens, those amounts will likely be put to other uses and transferred to unrelated third parties. Further, the regulatory system provides no meaningful remedy to compensate an appellant for monetary losses should an appeal ultimately be successful. At best, the Chicken Board can force growers to retroactively reimburse processors for amounts overpaid through future price adjustments, or alternatively, they will not be reimbursed for overpayments under a revised pricing formula. It argues the first option is administratively inefficient compared to paying the alleged overpayment into trust and the second option is unjust.

As a precedent for the position that overpayments will be unrecoverable, the appellant points to the pricing decision following the September 8, 2017 mediation where it says the Chicken Board “misapplied” a \$0.012 modular loading levy to the calculation of the BC live price for chickens during periods A-146 to A-150. It says processors “will likely have no effective recourse for recovering the overpayment made to BC growers as a result of the alleged misapplication of the \$0.012 modular loading levy, should the appeal be successful”.

Further, the appellant argues that retroactive reimbursement of overpayments from growers would cause harm to the relationship between processors and growers which relationship is crucial to a sustainable chicken industry in BC.

The Chicken Board argues that the only issue to be decided on this branch of the test is “whether a refusal to grant relief could so adversely affect the applicant’s own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.” The Supreme Court of Canada in *RJR-MacDonald* found that the term “irreparable” referred to the nature of the harm, rather than its magnitude and defined “irreparable harm” 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”. Examples included instances where “one party will be put out of business by the court’s decision”; “where one party will suffer permanent market loss or irrevocable damage to its business reputation”. *RJR-MacDonald* at p. 341.

The Chicken Board says that the “irreparable harm” articulated by the appellant is that without the partial stay, it risks permanently losing access to funds constituting the differential between the pricing formula under the Pricing Decision and the A-150 pricing formula (less the modular cost) if it is successful on the appeal. Further, if it is required to collect from the growers, it will irreparably damage its relationship with growers.

The Chicken Board points out that the appellant does not take the position that making payment under the new pricing formula constitutes irreparable harm as it is not seeking to be relieved of the obligation to make payments at or above the minimum price. Rather it seeks to pay a portion of the minimum price into trust. It has provided no evidence of the actual prices being paid to growers in prior or future periods, or whether implementation of the minimum price formula set out in the Pricing Decision will in fact necessarily lead to any increase in the amount paid by processors to growers. Mr. Vanderspek's evidence is that in many cases the actual prices paid by processors in prior periods exceeded the minimum price in part because of bonuses negotiated between processors and growers. These bonuses are paid without Chicken Board involvement or advice.

Mr. Vanderspek's evidence in both affidavits is that processors have in many cases been paying a 3 cent bonus to the growers on their own volition, without advising the Chicken Board. The Chicken Board calculates the increase in the minimum price between the A-150 and A-151 as a 0.9 cent difference between the BC and Ontario live price. It argues that if processors were to simply cease paying 3 cent bonuses above minimum price, they would remain competitive with Ontario. The amount the processors are seeking to pay into trust on this stay application is calculated by the Chicken Board to be the equivalent of \$0.024 per kilogram for period A-151. On that basis, it argues that refusal of the stay may not result in any harm at all to the processors, let alone harm of an irreparable nature.

Further, the Chicken Board says that even if the appellant has established some harm, any such harm is not irreparable in nature. The submission that it will be otherwise difficult to collect overpayment from growers is a harm which can be quantified in monetary terms. It does not meet the threshold for "irreparable harm" as set out in *RJR-MacDonald* and the prior decisions of BCFIRB in *Oranya Farms II Holdings Inc. et al v. British Columbia Chicken Marketing Board* (BCFIRB, August 21, 2014) and the June 2017 Stay decision where BCFIRB found that there were regulatory mechanisms available to the Chicken Board to compensate the appellants in the event an appeal was successful.

As to Mr. Cummings' concern that if the new Pricing Decision is implemented, BC processors will see their customers begin to implement purchasing strategies to avoid the high BC costs, and that it will be difficult to regain those contracts, the Chicken Board argues that this evidence suffers from the same weaknesses articulated in the June 2017 Stay Decision. It is too vague and speculative to support a finding of irreparable harm pending the decision on appeal. No specific contracts are named nor are any specific contractual terms of concern described. Mr. Cummings does not even depose that processors' customers are aware of (or concerned with) the actual prices (including bonuses) that processors pay to the growers, let alone the minimum prices set by the Chicken Board that may or may not be the prices paid by processors.

The BCCGA's submission makes many of the same points as the Chicken Board so I will not repeat them here. Notably, however the BCCGA says in the event of a BCFIRB panel finding that an overpayment had in fact been made, Mr. Vanderspek's evidence from his June 2017 affidavit is that the Chicken Board has previously utilized price adjustments to compensate for

incorrect payments made in the past. Even if this type of remedy could be described as administratively inefficient, that is not the same as irreparable harm.

With respect to the potential for harm to the grower/processor relationship, Mr. Krahn's evidence is that the parties have an amicable relationship, pricing agreements are expected and a usual part of the relationship and if the processors were to collect on overpayments, he does not expect any breakdown of the commercial relationship or any exceptional ill will on behalf of BCCGA members.

In its reply on the issue of irreparable harm, the appellant makes four main points. It says the actual price paid by processors to growers is not relevant to this application; what is relevant is the lack of an effective remedy and the risk of irreparable harm to the grower/processor relationship. Second, it argues that it is the lack of an effective remedy that makes the harm suffered irreparable within the meaning of *RJR-MacDonald*, a point the Chicken Board failed to address in its submission. Third, while the appellant concedes that the Chicken Board can, in theory, use future price adjustments to compensate processors for over payments, in this case the remedy is not meaningful due to administrative difficulties and the risks associated with pursuing such a remedy. Finally, the appellant says the conciliatory statements of BCCGA President Mr. Krahn are inconsistent with the BCCGA's recent communique threatening retaliatory actions against processors. It argues that BCFIRB should put more weight on the communique than Mr. Krahn's affidavit.

In my view, the appellant has not demonstrated irreparable harm. The issue on this appeal is whether the Pricing Decision which adjusts the minimum price of chicken upwards by a differential of \$ 0.024 per kilogram is consistent with sound marketing policy. The appellant has not argued that payment of this differential, until such time as an appeal is heard and a decision rendered, will cause their businesses irreparable harm. Rather the argument is that there is a risk that processors won't be able to recover any overpayment if successful and any efforts to seek repayment directly from growers would be detrimental to the processor/grower relationship which is crucial to a sustainable chicken industry in BC. In support, the appellant points to the fact it has not been reimbursed for overpayment under the previous pricing decision arising out of the September 2017 mediation where the Chicken Board "misapplied" a \$0.012 modular loading levy in support of its position. This argument is difficult to understand given that the implementation of the mediated September 2017 pricing decision was only just recently appealed and an appeal date has not even been set, let alone a determination made as to whether there was in fact an overpayment which needs to be addressed.

In this case, if the panel were to determine that this Pricing Decision was flawed and that an over payment had indeed occurred, there are effective mechanisms within the regulatory system that allow the processors to recover any overpayment. On this point, I note that in his affidavit of June 12, 2017, Mr. Vanderspek testified as to how the Chicken Board can make adjustments to compensate processors for overpayment (see paragraph 9). As processors pay growers directly, upon a finding of an overpayment, they could apply a deduction against growers' future production. While the appellant disputes that such adjustments will be effective, the basis for that assertion is unclear.

I am not prepared to make any finding on this interim application regarding "irreparable harm" to the grower/ processor relationship based on the contradictory views of the parties on this issue.

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

Balance of Convenience: The appellant argues that it will suffer greater harm from the refusal of the partial stay application than would the Chicken Board or growers if the partial stay was granted. It argues that the proposed partial stay of the Pricing Decision avoids harm to the PPPABC, while minimizing harm to the Chicken Board and growers, and is in the public interest. As it argued above, if BCFIRB does not grant the partial stay, processors will be unable to effectively collect the difference between the amounts paid pursuant to the 2018 Pricing Decision and a more sustainable pricing formula and it will be deprived a meaningful remedy for overpayments should it be successful on appeal. It says retroactive compensation from growers, is administratively difficult and likely to inflame relations between growers and processors. In contrast, it argues that neither the Chicken Board nor BC growers will suffer any significant harm from the proposed partial stay.

In contrast to the 2017 Stay Decision, the appellant says it does not seek to inhibit the Pricing Decision but rather it seeks to hold back funds to create an equitable compromise between processors, growers and the Chicken Board. It says this is less disruptive to the Chicken Board's regulatory function than a full stay and as such, there is a lower threshold to overcome the presumption of public interest.

In my view, the appellant's application fails on this branch of the test as well. I agree with the submissions of the Chicken Board and BCCGA that the balance of convenience favors the Chicken Board. While I agree that a partial stay may be less disruptive than suspending the Pricing Decision, as with the case the June 2017 Stay Decision, that is not the test.

On the balance of convenience test, the June 2017 Stay Decision states at page 10:

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 (do) harm to the public interest.

...

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.

In my view, despite the fact the appellant seeks a partial stay, the above passage is equally applicable to the present circumstances. I am not convinced that the fact that the Chicken Board has enacted yet another price increase is sufficient to warrant the extraordinary relief the appellant seeks.

Accordingly, the application for a partial stay is dismissed.

Per:

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD



John Les, Chair
Presiding Member