



BC Farm Industry Review Board

May 29, 2020

File: N2002

DELIVERED BY EMAIL

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Dear Sirs:

RE: K & M FARMS V BC TURKEY MARKETING BOARD – STAY DECISION

Introduction

On May 14, 2020, the British Columbia Farm Industry Review Board (BCFIRB) received an appeal from K & M Farms of the May 12, 2020 decision (the May 12th decision) of the British Columbia Turkey Marketing Board (the Board) to not direct a processor to custom slaughter or primal cut turkeys for K & M Farms in 2020.

On May 25, 2020, BCFIRB received a second appeal from K & M Farms of the May 22, 2020 decision (the May 22nd decision) of the Board, which was a supplementary decision to the May 12th decision. The May 22nd decision cancelled the placement of poultts scheduled by K & M Farms for May 26, 2020 and directed K & M Farms to submit a revised grower program showing suitable placement and slaughter dates before it would receive any future placements.

On May 26, 2020, BCFIRB received an application from K & M Farms, asking BCFIRB to stay the May 22nd decision of the Board, pending appeal. On May 26, 2020, the Board provided its response and K & M Farms' reply was received May 27, 2020. I have reviewed these submissions.

For the reasons that follow, K & M Farms' stay application is dismissed.

Legal Framework

Section 8.1(1) of the *Natural Products Marketing (BC) Act* gives BCFIRB the authority conferred under s. 25 of the *Administrative Tribunals Act* to stay an order, decision, or determination of a marketing board. Stays are only granted in exceptional circumstances.

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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.

Background

There is an extensive history to this appeal which I do not intend to repeat here. For present purposes and to place this decision into context, K & M Farms has been producing heavy hens and toms (9-11kg) to direct market consumers since 2001. There are only two processors in British Columbia that are able to process birds of this size – Sofina Foods and Rosstown Natural Foods. Both processors declined K & M Farms' request to process its birds for the 2020 production year. K & M Farms informed the Board and requested that the Board direct its production to a processor. The Board declined the request in the May 12, 2020 decision.

On May 22, 2020, the Board issued a supplementary decision on this matter cancelling the placement of poults that K & M Farms had scheduled to place on May 26, 2020 pursuant to its grower agreement with Sofina. The Board calculated that the early placement would have resulted in a shipment of turkeys with an average weight of over 11kgs, which was "*irreconcilable with the Board's May 12 decision*". The May 22nd decision directed K & M Farms to submit a revised grower program showing suitable placements and slaughter dates before the Board would approve any future placements.

Submissions of K & M Farms

On whether there is a serious issue to be tried, K & M Farms says the Board's May 22nd decision would effectively shut down K & M Farms' niche market for pasture-raised heavy hens. K & M Farms submits that timing is critical to its business model: "*For turkeys to grow to be heavy hens (9-11kg dressed weight) for Thanksgiving, they must be placed in late May or early June.*"

K & M Farms' main argument relates to irreparable harm. It says that cancelling the May 26th poult placement has prevented K & M Farms from providing heavy hens for its customers at Thanksgiving. In general, K & M Farms claims that by preventing it from growing turkeys over 11kg live weight, the Board has ended its niche market business and permanently denied consumer choice.

Submissions of the Board

The Board does not dispute that there is a serious issue to be tried. For the Board the issues are as follows:

- K & M Farms is projected to overproduce over 2000kg for the 2020/21 Quota Year.
- K & M Farms' grower program called for placement in the week of June 2, 2020. The early placement of poults on May 26 would result in even heavier birds than the Board expected, with an average weight of over 11kg.
- Sofina Foods is the only processor capable of handling turkeys above 11kg, but Sofina Foods has demonstrated to the Board that directing it to provide custom processing services for K & M Farms would be reckless given the current pressures on processors relating to COVID-19.

Consequently, the Board denied K & M Farms' scheduled placement and directed that the hens be received at a later date (approved by the Board) to ensure that the turkeys are an acceptable weight for custom processing by a willing processor. The Board also ordered that no toms be placed at all because Sofina is the only processor equipped to handle tom processing in BC. The Board had already decided it would not direct Sofina to provide custom processing and cut-up services in the May 12th decision.

On the issue of irreparable harm, the Board submits that its decisions and directions do not "shut down" or prevent K & M Farms from producing for its customers. The Board indicates there are processors who are ready to custom slaughter turkeys for K & M Farms without direction from the Board if the turkeys are produced to a suitable size. The Board further states that K & M Farms is unwilling to make an effort to secure mutually acceptable arrangements with another processor.

In addressing the balance of convenience, the Board submits that capacity for poultry processing is further strained by the impacts of COVID-19, including increased facility shut-downs because of outbreaks, absenteeism and new restrictions and requirements from WorkSafe, health authorities and the Canadian Food Inspection Agency. These factors are detailed in the May 12th decision and considered as part of the Board's refusal to direct custom processing at this time. Reference to these considerations was also included in the Board's submissions as follows:

In 2019, the Board adhered to the 2018 FIRB decision and directed custom processing for K & M Farms. In the course of the subsequent appeal brought by Rosstown, we learned about some of the issues and hardship our decision caused on the processing sector. The resulting 2019 FIRB decision clearly called for cooperation on behalf of K & M to help in reducing the need for repeated direction for your production. Despite the Board's efforts, K & M has not been willing to make the changes required in order to meet the expectations of the FIRB's 2019 decision. On the contrary, it appears to the Board that K & M has adopted an increasingly strident view that the effect of the BCFIRB's decisions is to give K & M an absolute right to impose its will on unwilling processors, without any regard for

the industry as a whole, and without the requirement for any effort on its part to secure mutually acceptable arrangements.

The lack of co-operation from K & M, the lessons we learned from the 2019 direction decision, and the advent of a worldwide pandemic, have now convinced the Board that it would not be consistent with sound marketing policy to direct custom processing services for K & M. In fact, it is the Board's view that any such order made on behalf of K & M, having regard to the circumstances as they have developed since your original request, could result in harm to the sector as a whole and its employees.

Reply of K & M Foods

K & M Farms says that the Board's May 22nd decision blocks it from producing the heavy hen turkeys (9-11kg dressed) that its niche market has been purchasing for 20 years. K & M Farms assert that blocking a source of supply for consumers and limiting consumer choice is "*a betrayal of the public trust to manage the turkey industry in the consumer interest*".

K & M Farms' submissions contested the assertion by the Board that K & M Farms is being uncooperative, stating that they have had arrangements with processors for the turkeys in the past, and that they currently have arrangements with another processor for its custom-kill chicken production and free-range chicken production. K & M Farms further challenge the Board's claims that there are other potential processors willing to work with it.

Ultimately, K & M Farms maintains that the May 22nd decision is a failure of the Board as a public regulatory body to work in the public interest by limiting consumer choice, and as a result, the test for substantial public harm is met.

Analysis and Decision:

Serious issue(s) to be Tried:

The Parties agree that there is a serious issue to be tried – namely that the timing of poult placement will affect the size and availability of turkeys for Thanksgiving. Their interpretations of the consequences differ. For K & M Farms, the cancelled poult placement puts its ability to deliver product for Thanksgiving in peril. For the Board, cancelling the May 26th poult placement is a proactive management strategy to prevent the production of turkeys that are beyond the capacity of processors to manage.

I am satisfied that the appeal raises serious issues to be tried and the decision of whether to issue a stay does not turn on this branch of the test.

Irreparable Harm:

In considering this second branch of the test, I must consider whether K & M Farms has satisfied the burden of proving that it would suffer “irreparable harm” if the Board’s May 22nd decision is not stayed pending appeal.

K & M Farms’ argument is that the May 22nd decision would cause irreparable harm to its business by preventing it from supplying turkeys to a niche market that it has developed over the past 20 years. K & M Farms expresses concern that it would not be able to find replacement poults fast enough, as poults need to be placed in late May or early June to be marketed for Thanksgiving. K & M Farms does not, however, present any concrete evidence or affidavits about its own efforts to secure alternate processing, or the specific business impact of producing slightly smaller turkeys.

In its submission, the Board states that it has offered assistance to K & M Farms to find replacement poults if K & M Farms provides an updated grower plan, including an agreement with a processor.

The burden of proof lies with K & M Farms to prove irreparable harm. In my view, K & M Farms failed to provide evidence beyond the broad assertions in its submissions or address the mechanisms suggested by the Board to help K & M Farms continue production in 2020. Similarly, K & M Farms did not provide any specific information about why its market specifically needs heavy hens or explain why they are unable to adapt with the current circumstances. As a result, I find that K&M Farms has failed to meet the test for irreparable harm in this stay application.

Balance of Convenience:

The third branch of the test involves determining who will suffer the greater harm for granting or refusing a stay, pending a decision on the merits. I am not persuaded by K&M Farms’ arguments that consumer choice is a right that should always outweigh the cost and impact to others in the turkey industry.

The Board argues that the balance of convenience favours dismissing this application. The Board has a responsibility to maintain orderly marketing and make decisions that would protect the public interest – part of that responsibility includes managing for future risks and uncertainty. The processing sector has already been impacted by the pandemic and the full impact on public health, institutions and the economy are still unknown.

To delve further into analyzing the circumstances of the Board’s decisions would effectively pre-empt the matters already under appeal. The Board addressed this in its submissions, making the argument that a stay application should be founded on maintaining the status quo pending appeal, and that K&M is in fact attempting to have BCFIRB sidestep the appeal process and substantively overturn the decision of the Board by allowing the poults to be placed. Given the potential consequences of a stay of the May 22nd decision, I am satisfied that it would cause more harm to the public interest to stay the Board’s decision pending appeal.

Accordingly, the application for a stay is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD:

A handwritten signature in cursive script, appearing to read "T. Leigh".

Tamara Leigh, Presiding Member