



## BC Farm Industry Review Board

August 6, 2024

File: N2305

### DELIVERED BY EMAIL

Mark Robbins  
K&M Farms



Claire Hunter, K.C.  
Hunter Litigation Chambers



Dear Parties:

### RE: K&M FARMS V BC CHICKEN MARKETING BOARD

#### Introduction and Procedural Background

On August 4, 2023, the British Columbia Farm Industry Review Board (BCFIRB) received an appeal from Mark Robbins dba K&M Farms with respect to an August 1, 2023 letter from the BC Chicken Marketing Board (Chicken Board) denying K&M Farms' request to grow pasture production on leased land.

Based on the text of the Chicken Board's August 1, 2023 letter, it was unclear to BCFIRB whether the letter contained an 'order, decision, or determination' of a board or commission such that it was properly appealable under section 8 of the *Natural Products Marketing Act* (NPMA). BCFIRB issued a process letter on August 29, 2023, requesting positions from parties on this issue.

The Chicken Board took the position that the August 1, 2023 letter did not contain a decision of the Chicken Board and in fact, the decision to deny K&M Farms' request had been made January 18, 2023 and March 10, 2023. On this basis, the Chicken Board applied for the appeal to be summarily dismissed. K&M Farms opposed the summary dismissal application.

Subsequently, on October 3, 2023, K&M Farms requested the appeal be put in abeyance as the Chicken Board had proposed changes to its General Orders which could resolve K&M Farms' issue on appeal. The email stated:

I wanted to advise you (if you do not already know) the BCCMB has proposed changes to the general orders that would allow use of leased land for quota production. If finalized that would resolve my concern.

The Board is having an open house today for feedback. I am confident from the comments when it was introduced that it will get full grower support.

Can we put my appeal on hold until the changes are finalized and then of course withdraw it.

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The Chicken Board consented, and the appeal was adjourned.

On May 30, 2024, BCFIRB wrote to the parties asking about the status of the appeal given the Chicken Board's new leased land policies. By letter dated June 6, 2024, the Chicken Board advised BCFIRB that on June 5, 2024, K&M Farms' lease had been approved and it requested that K&M Farms withdraw its appeal or BCFIRB dismiss it.

In its response dated June 11, 2024, K&M Farms asked for the appeal to continue stating as follows:

The new Board orders regarding use of leased land for quota production does not provide K & M Farms with any security in the medium or long term. The new Board requirements do not meet the December 1, 2022 request. K & M requests that the appeal continue.

K & M requests the adjournment continue until after the Board's new entrant review is completed.

### **Summary Dismissal Application**

By letter dated June 20, 2024, the Chicken Board renewed its application for summary dismissal relying on its September 5, 2023 application which argued that the appeal was filed outside the time (30 days) required by s. 24 of the *Administrative Tribunals Act* (ATA). The Chicken Board argued that its August 1, 2023 letter was not a decision but simply correspondence with K&M Farms reiterating earlier decisions issued by the Chicken Board on January 18, 2023 and March 10, 2023 which decisions declined K&M Farms' request to grow pasture production on leased land.

In addition, the Chicken Board points to its recent decision of June 5, 2024 approving K&M Farms' request to grow pasture production on leased land. It argues that, as a result of this new decision, K&M Farms' appeal is now moot. The Chicken Board further submits that it would be improper to proceed with the appeal based on the reasons set out in K&M Farms' June 11, 2024 letter as they are entirely outside the scope of the issue raised in the original August 4, 2023 Notice of Appeal.

### **Submission of K&M Farms**

K&M Farms opposes the summary dismissal application arguing the Chicken Board's August 1 letter is an appealable decision. K&M Farms states the Chicken Board made a representation in its January 7, 2023 letter that it was engaged in a process to review the orders regarding use of leased land for quota production. By undertaking such a review process, the Chicken Board extended any decision on landownership that K&M Farms could appeal until that review process was completed. As such, K&M Farms says the window for appeal should be extended until the final decision on landownership rules was issued – which decision was communicated in the August 1 letter.

On the second issue, K&M Farms argues that the Chicken Board's approval of its lease does not make its appeal moot. In order to meet niche market demand and its own long-term business needs, K&M Farms requires access to leased farmland through the standard BC Assessment three-year farmland lease. K&M Farms cannot stop production for two or more years waiting for the Chicken Board to make a decision.

K&M Farms also suggests it is BCFIRB's responsibility to consider broader impacts to industry. In 2005, BCFIRB directed marketing boards to establish new entrant programs and at that time K&M Farms was a permit holder that was then converted to quota production. It would be inconsistent with BCFIRB's directive if this path to growth was not renewed through the Chicken Board's current new entrant grower program review. K&M Farms suggests the Chicken Board's new entrant program may need to revisit the question of the use of leased land for pasture production. K&M Farms questions why leasing land with BC Assessment farmland lease agreements is permitted for growing regulated product under permit, but not growing regulated product under quota.

### **Final Reply of the Chicken Board**

By email dated July 17, 2024, the Chicken Board indicated it would not be providing any further reply with respect to its summary dismissal application.

### **Decision**

Section 8 of the *NPMA* provides for an appeal from "an order, decision or determination of a marketing board or commission" as follows:

#### **Appeals from a marketing board or commission order, decision or determination**

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 to the Provincial board.

K&M Farms' original Notice of Appeal describes the grounds of appeal as dissatisfaction with "the BCCMB Letter/Decision of Aug 1, 2023, declining K&M Farms' request to grow pasture production on leased land" and alleges "the decision is inconsistent with government policy and Farm Industry Review Board directives to encourage farm based differentiated product that supplies a niche market."

For context, the Chicken Board's August 1 letter states as follows:

The Board made its decision respecting this matter and communicated to K&M Farms on January 18th, 2023 and again on March 10th, 2023 and no appeal was filed at the British Columbia Farm Industry Review Board (BCFIRB) within the 30 day requirement. The Board considers this matter closed.

This decision remains in effect until rescinded, varied or amended by further order of the Board. In previous letters, the Board did inform K&M Farms that a review of the land ownership policies is underway. There will be an opportunity to provide feedback when industry is consulted but should be noted there is no guarantee on what this potential policy change may include.

The Chicken Board originally sought summary dismissal of this appeal pursuant to section 31(1) of the ATA on the basis that the actual decisions declining K&M Farms' request were made in January and March 2023 and as such, the appeal was filed outside the 30 days required by section 24(1) of the ATA.

Section 31(1)(b) of the ATA provides as follows:

**Summary dismissal**

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(b) the application was not filed within the applicable time limit;

As the appeal was adjourned in October 2023, BCFIRB did not consider the Chicken Board's summary dismissal application. However, based on the information before me, I find that K&M Farms' August 4, 2023 appeal was an attempt to circumvent the application of the limitation period by purporting to appeal from an affirmation of an earlier decision. This approach has been rejected by the BCFIRB in numerous cases including *Mountain Valley Dairy Ltd. v BC Milk Marketing Board* (July 22, 2015), *Schwaerzle v. BCMMB* (March 24, 2009), *Saputo vs. BC Milk Marketing Board* (May 9, 2008), and *Klaas Korthuis dba Try Poultry Farms. v British Columbia Chicken Marketing Board*, (October 18, 1999).

I find the following analysis in the *Mountain Valley Dairy* decision (page 5) persuasive:

The appellant has sought on three separate occasions to have the Milk Board change the regulatory regime to accommodate its circumstances, which efforts have been unsuccessful. I do not think it is significant to this analysis that the regulatory changes sought by the appellant may have varied over time. Arguably none of the letters would have been sufficient to create a right of appeal as what the appellant is challenging is an existing regulatory framework and not a particular exercise of discretion by the Milk Board to address special circumstances in the application of an existing regulation. The essential elements of this regulatory regime have been in place for nearly 10 years and similar to the *Saputo* decision quoted above, such an appeal would be out of time

Given my finding that the August 1, 2023 letter does not contain an "order, decision or determination" of the Chicken Board, it follows that there is no associated right of appeal and I would have dismissed the appeal on that basis. However, as noted above circumstances have further evolved as the appeal was adjourned by consent to allow the Chicken Board to review its General Orders and its polices related to leased land. K&M Farms was of the belief that the proposed changes to the General Orders would allow use of leased land for quota production and if finalized, would resolve its concerns and its appeal would be withdrawn.

On June 5, 2024 the Chicken Board issued its new decision approving a lease of farmland by K&M Farms for use in the quota production of broiler chicken for a five year term and registered on the lessor's land title as required by the Chicken Board's new General Orders.

In a letter dated June 11, 2024, K&M Farms argues that its original request in December 1, 2022 (which was turned down) was for approval of its existing standard BC Assessment farmland classification lease, with a 3 year term and not registered on the lessor's title. Given that the Chicken Board's June 5, 2024 decision does not give K&M Farms what it originally asked for, K&M Farms argues that it should be entitled to proceed with its appeal.

In my view, K&M Farms' argument is nonsensical. Its June 11, 2024 letter clearly acknowledges that the Chicken Board has created a new leasing policy and it has applied this new policy to K&M Farms' circumstances and made a new decision. Instead of denying the request to produce quota production on lease land (which was the result of the 2023 decision), the Chicken Board has now granted the request on specific terms not previously considered. While K&M Farms' June 11, 2024 letter identifies a list of issues with the new policy, I agree with the Chicken Board that these grievances with the requirements of the new General Orders, the new decision and other irrelevant matters, do not fall within the proper scope of an appeal of the 2023 decision denying the lease altogether. As a result, I agree with the Chicken Board that the decision which is the subject of the Notice of Appeal has been overtaken by a new decision of the Chicken Board. As such, any appeal of that earlier decision is now moot and hearing such an appeal serves no purpose.

On the basis identified above, I summarily dismiss this appeal pursuant to ss. 31(b),(c) and (g) of the ATA as it was not filed within the applicable time limit, it is frivolous and gives rise to an abuse of process. Further, the substance of the appeal has been appropriately dealt with by the Chicken Board in other proceeding.

While I understand that the term "frivolous" can appear somewhat jarring to persons who are not legally trained, as used in statutes the established meaning of a "frivolous" appeal is one lacking in substance. To expend resources to hear such an appeal would abuse the tribunal process because it would lead to no possible good. I understand why an appellant could take offence to the suggestion that an appeal is frivolous, but my finding should not be interpreted as a finding that the appeal was made with any malintent.

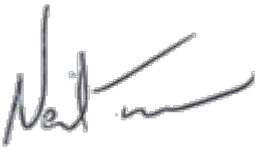
**Order**

The appeal is dismissed and I make no order as to costs.

Dated at Victoria, British Columbia this 6<sup>th</sup> day of August, 2024.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

A handwritten signature in black ink, appearing to read "Neil Turner". The signature is written in a cursive style with a long horizontal stroke at the end.

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Neil Turner, Presiding Member