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DELIVERED BY FAX

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Attention: Ms. Maria Morellato

Dear Sirs/Mesdames:

AN APPEAL BY THE BC EGG HATCHERY ASSOCIATION FROM A DECISION, AS COMMUNICATED IN A LETTER DATED MARCH 7, 2003, OF THE BC CHICKEN MARKETING BOARD CONCERNING OVER-HATCH PLACEMENTS

Introduction

By letter dated March 10, 2003, the British Columbia Egg Hatchery Association (the "Hatchery Association") appealed the March 7, 2003 decision of the British Columbia Chicken Marketing Board (the "Chicken Board") advising that, effective March 12, 2003, all over-hatch chicks placed by growers will be subject to all Orders governing "over" and "under" marketing. The Chicken Board decision in question defines "over-hatch" chicks as the product of a better than average hatch of eggs from breeder flocks.

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The Hatchery Association has sought a stay of the Chicken Board decision pending appeal. This decision concerns the stay application.

In order to address the stay application, it is necessary to understand the issue that arises on the merits of the appeal. In this regard, it is important to recognise that chicken production involves a planned, integrated production system with a number of steps. It commences with the ordering of broiler breeder flocks, those flocks coming into production, then the laying of hatching eggs. These eggs are sold by broiler hatching egg producers to hatcheries, which in turn hatch the eggs into chicks. When the chicks are 1-2 days old, the hatcheries sell the chicks to chicken growers who then grow the chicks into chickens that, once grown, are sold to processors who slaughter and sell chicken to the consumer. Within this production system, there are two first instance regulatory bodies: the Chicken Board, which governs chicken production, and the British Columbia Broiler Hatching Egg Commission (the "Hatching Egg Commission") which governs broiler hatching egg production and the price of chicks.

In theory, there should be a balance in this system between the broiler hatching eggs laid and hatched and the chicken ultimately grown and sold for processing. In reality, however, a perfect balance is difficult to achieve. This is a system of living things. A hatching egg producer's quota of broiler breeders (which lay hatching eggs) may produce variable numbers of eggs such that, at any given time, there may be oversupply or undersupply of eggs for the hatcheries. Moreover, not all broiler hatching eggs are successfully hatched into chicks; there is a certain failure rate of eggs placed in incubators. Therefore, in order to ensure the placement of the appropriate number of chicks to chicken growers under the provincial allocation and individual allotments, the hatcheries plan chick production based on average hatch rates. As is evident from the above, this is an inexact science and on occasion the eggs put into incubators hatch more chicks than required to produce the quantity of chicken allocated to chicken growers by the Chicken Board. This is the "over-hatch".

How best to deal with "over-hatch" has been an issue for the Chicken Board and the Hatching Egg Commission for several years. Given that the Chicken Board represents chicken growers and the Hatching Egg Commission represents broiler hatching egg producers, their interests are not necessarily identical on this issue. The Chicken Board wants to ensure that chicken production on a period-by-period basis does not exceed the provincial allocation under the Federal-Provincial Agreement for chicken, thereby avoiding any over production penalties to BC under that agreement. The Hatching Egg Commission wants to ensure that hatching egg producers are compensated for the hatching eggs they produce, and that their production cycle, in which flock placements are planned many months in advance, is not disrupted.

There are a number of possible policy solutions to the over-hatch issue. While these need not be described in detail for purposes of this decision, it is useful to outline them in simple terms. One option is to limit breeder flocks in order to prevent over supply in chicken. A second is to limit

over-hatch by diverting some hatching egg production to the breakers rather than to the hatcheries. A third is for the hatcheries to dispose of any over supply of chicks, in order to ensure that chicken farmers do not over produce. A fourth is to allow all over-hatch to be sold to growers, and then waive over production penalties for individual growers where this is due to receipt of over-hatch. A fifth option is to place responsibility on growers for any over production they receive from hatcheries.

As noted in the Chicken Board decision under appeal, the Chicken Board's approach over the past number of periods was a version of the fourth option. As described in the Chicken Board decision under appeal:

Until now, growers who placed [over-hatch] chicks were not levied on over-production beyond the 5% tolerance if over production was due to over-hatch. However, all over-production is carried into a subsequent period. The Board set a limit of a [sic] 40,000 chicks per period.

The Chicken Board decision in question reflects a shift to the fifth option above, particularly in light of the Chicken Board's concern that there has been a steady and significant growth in the over-hatch over the past number of periods, often well in excess of the 40,000 chicks per period identified by the Chicken Board.

As noted above, the Hatchery Association seeks a "stay" of the effect of this decision pending the hearing of this appeal.

Due to the pressing nature of the issue, the stay application was heard by telephone conference call on March 13, 2003. The Hatching Egg Commission applied for and was granted Intervenor status in support of the Hatchery Association on its stay application. The Chicken Board opposes the Hatchery Association's stay application. The British Columbia Chicken Growers Association (the "Growers Association") was also granted Intervenor status in support of the Chicken Board's position.

Decision

The *Natural Products Marketing (BC) Act* was amended in 1999 to make it clear that the BCMB has the jurisdiction to stay an order, decision, or determination of a marketing board under appeal: s. 8(8.2).

In determining whether a stay is appropriate in the circumstances, the Panel finds the three part test set out in *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 SCR 110 instructive. The test can be summarised as follows:

- (a) First, the decision-maker must conduct a preliminary and tentative assessment of the merits of the appeal. Where, as here, the public interest is at issue, the question is whether there is a "serious question to be tried".

- (b) Second, the litigant seeking the “stay” must show that, unless it is granted, they would suffer irreparable harm.
- (c) Third, the decision-maker must consider the “balance of inconvenience” – it must ask which of the two parties would suffer greater harm from the granting or refusal of the interim stay, pending a decision on the merits. In cases where a party seeks to effectively “suspend” the operation of an order, the public interest must be taken into account.

Serious Issue to be Tried: The Chicken Board and the Growers Association took little issue with the first branch of the test. On its face, the Hatchery Association’s appeal raises a serious policy question to be tried and as such, it is not necessary for an extensive review of the merits of the appeal.

Irreparable Harm: As to the second branch of the *Metropolitan Stores* test, the Panel must consider whether the Hatchery Association has satisfied the burden of proving that its members would suffer “irreparable harm” if the Chicken Board’s March 7, 2003 decision is not stayed pending appeal. The Hatchery Association argues that the effect of the Chicken Board’s decision is to “remove” 25,000 chicks/week from the hatcheries. Chicks are living creatures and, given the effective date of the decision, their “removal” will require that they be destroyed. Removal will result in a collective loss to the hatcheries of \$10-12,000/week and a further loss of income to the hatching egg producers. These increased costs flow through to the chicken grower and ultimately to the consumer. In addition, there is the further loss of revenue to the chicken growers and processors associated with lost production (approximately 48,000 kgs/week). It must be noted that these losses are not recoverable and will occur even though it is unlikely that the placement of over-hatch, pending the hearing of this appeal, will result in *any* over production penalty this cycle.

The Hatching Egg Commission supports the Hatchery Association and argues that hatching eggs are not “widges”. Simply because one regulator abruptly alters its approach cannot change the production life cycle in broiler hatching eggs. It will take 9 weeks for the broiler hatching egg sector to adjust to the Chicken Board’s decision. Further, in the life cycle of broiler hatching egg production, over-hatch is often offset by under hatch. To reduce over-hatch in the manner dictated by the Chicken Board will likely result in broiler hatching egg producers under producing their provincial allocation. The end result could be a permanent loss of allocation to BC, given the rules contained in the Federal Provincial Agreement for broiler hatching eggs.

The Hatching Egg Commission also questions the data relied on by the Chicken Board in support of its decision, and submits that it is not at all clear that over-hatch is as pronounced a problem as the Chicken Board suggests. The Hatching Egg Commission suggests that the appropriate course is a moratorium on the Chicken Board’s decision to allow all interested parties to properly review and assess the data.

In response, the Chicken Board argues that there is no irreparable harm to the Hatchery Association if the March 7, 2003 order is not stayed. Rather, if this type of order is not put in place, it is the chicken growers who will be irreparably harmed. They may be subject to national over production penalties. While hatcheries could agree to compensate growers for any over production penalties resulting from over-hatch, they have not done so. Further, the current level of over-hatch is not living within the spirit of the Federal-Provincial Agreement for chicken under which allocations are set and is not in the spirit of supply management. Over production results in depressed market prices and lower returns to growers. The unilateral placement of chicks through placement of over-hatch runs completely counter to provincial and national efforts to control supply.

The Chicken Board argues that it has demonstrated flexibility towards the concerns of the Hatchery Association and the Hatching Egg Commission; that was the basis for the 40,000 bird/cycle over-hatch accommodation. Irreparable harm flows to the entire industry if processors and hatcheries circumvent the provincial allocation through uncontrolled placement of over-hatch.

The Growers Association supports the submissions of the Chicken Board and argues that the Chicken Board has demonstrated a great deal of latitude in trying to accommodate the hatcheries, more so than in other provinces. However, over-hatch is compromising the supply management system and the Chicken Board must act to prevent over production and over production levies. Rather in this instance, the harm is to the growers who run the risk of over production penalties. Even if the hatcheries choose to compensate growers for their over production penalties, the concern of over producing the provincial allocation and incurring national penalties remains.

The Panel has considered the submissions of the parties. We are not convinced that, for purposes of the Federal-Provincial Agreement, BC is in fact going to be over produced in A-51. The Chicken Board's records indicate that to date 146,685 over-hatch chicks have been placed. There are two more weeks of placements remaining in A-51 and the Chicken Board predicts that there could be in excess of 200,000 over-hatch chicks placed. Given that an average broiler is approximately 1.9 kgs, BC could be around 380,000 kgs over produced. BC's allocation for A-51 is 30,000,000 kgs. That allocation can be exceeded by 2% before triggering any over production penalties under the Federal-Provincial Agreement. Thus, it does not appear that *any* national penalties will be assessed for the current period, although other production-related issues may impact on the final production figures. While individual growers may be penalised by the Chicken Board for being over produced, they have the ability to ensure – if there is a stay pending appeal – that the number of chicks they purchase does not exceed their previous over production tolerances.

In contrast, the Hatchery Association and broiler hatching egg producers stand to lose production immediately upon the March 7, 2003 order taking effect. Individually these losses are not large – \$10-12,000 per week for the hatcheries and a surplus of eggs for the Hatching Egg Commission to address – but they are not recoverable if the appeal is allowed. There is also lost revenue from a significant loss of production, albeit it is processors and chicken growers that will feel this loss, and we must recognise that the Growers Association is supporting the Chicken Board in this application.

On balance, the Panel finds that the Hatchery Association has demonstrated that its members would suffer irreparable financial losses if the March 7, 2003 decision were not stayed pending appeal, even if those losses are not enormous.

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. Applying that test to this application is difficult. Unlike most applications for a stay that involve the competing interests of an aggrieved party and a commodity board, in this instance we have not only the competing interests of the Chicken Board and the Hatchery Association but the interests of the Hatching Egg Commission as well.

The Chicken Board has the authority to regulate chicken production in the province. In exercising this authority, it has passed an order suspending the placement of over-hatch to regulate the supply of chicken. The Hatching Egg Commission supports the Hatchery Association's application for a stay of this order, as it will have a detrimental effect on the broiler hatching egg industry that the Hatching Egg Commission regulates. Where is the broader public interest, in suspending the order or upholding its effect?

In the end, the Panel has decided to act in favour of maintaining the status quo pending appeal. The Chicken Board's order reflects a significant change in the regulation of the chicken industry, which change affects the interests of another regulator. The restriction of over-hatch placement affects the ability of another supply managed commodity board to regulate its industry. As the BCMB has suggested in previous decisions, due to the integration of their industries, certain decisions require special attention by both the Chicken Board and Hatching Egg Commission in order that the regulatory interests of each is properly recognised and taken into account in decision-making.

An additional (though relatively minor) factor we have considered is that the order, if it takes effect on March 12, 2003, has unequal application to growers. Those who have already placed over-hatch chicks in A-51 receive an amnesty from the March 7 order; those who have yet to place chicks that are in the pipeline of production will, during the same period, potentially be penalised by it.

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We think that the balance, in these unique circumstances, favours maintaining the status quo for the period until the appeal can be heard and decided. The effect of this stay is that the Chicken Board's 40,000 bird over-hatch limit remains in place. While it is evident that hatcheries will exceed this limit in A-51, and subject to any other resolution, with planning that limit can be met in A-52. The Panel anticipates that hatcheries will make every effort to meet this limit in A-52 and that growers will monitor their own farms to ensure that they do not fall into an over production situation. Finally, the Panel expects that the Chicken Board will enforce its over production penalties, consistent with the over-hatch limits in place under the status quo.

All this said, the Panel must emphasise that the stay will be brief. The Panel directs that this appeal proceed on an expedited basis, and be heard and completed no later than March 31, 2003.

There are issues to be addressed between the Chicken Board and the Hatching Egg Commission including (but not limited to) the appropriate level of over-hatch to be permitted, the actual Period A-51 production numbers, and the potential economic impact on all sectors of the industry. Therefore, in the interim the parties are encouraged to attempt to resolve this issue amongst themselves. The BCMB (apart from the appeal panel) is prepared to assist in these discussions and is prepared to mediate or facilitate these discussions should the parties desire.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser
Vice Chair

cc: Mr. Dave Cherniwchan, General Manager
BC Broiler Hatching Egg Commission

Mr. John Durham
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Ms. Sarah Pike
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