IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
IN THE MATTER OF AN APPEAL
FROM THE DECISION OF THE BRITISH COLUMBIA
CHICKEN MARKETING BOARD PASSING REGULATIONS
DATED AUGUST 15, 2000

BETWEEN:

HALLMARK POULTRY PROCESSORS LTD.,
SUNRISE POULTRY PROCESSORS LTD., J.D.SWEID LTD.,
SUNWEST FOOD PROCESSORS LTD., ASHTON ENTERPRISES LTD.,
WAYSIDE FARMS INC., DOGWOOD POULTRY LTD. and
HIGH PLAINS POULTRY FARMS LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS ASSOCIATION

INTERVENOR

REASONS FOR DECISION
STAY APPLICATION

APPEARANCES

For the British Columbia Marketing Board	Ms. Christine Elsaesser, Vice Chair Ms. Satwinder Bains, Member Mr. Richard Bullock, Member
For the Appellants	Mr. Christopher Harvey, Q.C. Counsel
For the Respondent	Mr. John J.L. Hunter, Q.C. Counsel
For the Intervenor	Ms. Maria Morellato, Counsel
Date of Hearing	September 25, 2000
Place of Hearing	Abbotsford, British Columbia

INTRODUCTION

1. On August 15, 2000, the British Columbia Chicken Marketing Board (the "Chicken Board") issued new Regulations. These Regulations repealed the General Orders (1987) as amended and all previous Chicken Board policies and guidelines invoked thereunder. On August 25, 2000, Hallmark Poultry Processors Ltd., Sunrise Poultry Processors Ltd., J.D.Sweid Ltd., Sunwest Food Processors Ltd., Ashton Enterprises Ltd., Wayside Farms Inc., Dogwood Poultry Ltd. and High Plains Poultry Farms Ltd. (the "Appellants") appealed the new Regulations to the British Columbia Marketing Board (the "BCMB").

2. While not specified in the Notice of Appeal, it appears that the Appellants primarily take issue with Part 25 of the new Regulations, which revises the Chicken Export Program. As part of the relief sought, they requested a stay of the effect of the new Regulations pending a hearing of their appeal.

3. The BCMB's jurisdiction to grant a stay on appeal was recently made express in section 8(8.2) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 ("the *Act*"):

> (8.2) The Provincial board may order that an order, decision or determination of a marketing board or commission that is under appeal is stayed pending the outcome of the appeal.

4. Intervenor status was granted to the British Columbia Chicken Growers Association.

5. The stay application was heard on September 25, 2000. As well, a Mr. Christian Mundhenk filed a written submission in support of a stay on behalf of 89 Chicken Ranch Ltd. et al, who are also appealing provisions of the new Regulations.

ISSUE

6. The Appellants' Notice of Appeal requests that "the effect of the Regulations" be stayed until this appeal has been heard and determined. The application for a stay is made "on the basis that the Regulations represent a comprehensive change in the way the chicken industry operates and the significant disruption to the industry should not be brought into effect prior to a review by the B.C. Marketing Board."

SHOULD THE REGULATIONS BE STAYED PENDING APPEAL?

The Test

7. The Appellants argue that a stay is necessary to:

   a) preserve the status quo pending hearing by the BCMB;
   b) ensure the prior orders of the BCMB are complied with; and
   c) prevent irreparable harm to the Appellants.

8. In making this argument, they maintain that a modified approach to applying the three part test set out in *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 SCR 110, is necessary. The Appellants argue that the above adaptation is appropriate in this particular situation where the BCMB, with both appellate and supervisory functions, has had continuing involvement in the issues. The BCMB has determined in past proceedings where the public interest lies and has made prior directions which, the Appellants argue, must be complied with until the BCMB rules otherwise.

9. The Respondent maintains that the proper approach to considering a stay application is the three-part test set out in *Metropolitan Stores*:

> (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.

10. This test has been more recently considered by the Supreme Court of Canada in *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.

11. The Respondent concedes that the appeal of the Regulations raises a serious question to be tried. Thus, it is not necessary for an extensive review of the merits of the case in this application as the first branch of the test under *Metropolitan Stores* has been met.

12. On the second branch of the test (irreparable harm), the Respondent argues that the proper analysis is found in the following passages from *RJR—MacDonald*:

> The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt within the third part of the analysis. Any alleged harm to the public interest should be considered at that stage.
> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' 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. (p. 341)

13. The Respondent argues that the Panel must determine whether there would be irreparable harm to the Appellants if they are unsuccessful in having the Regulations stayed for one to three months, and then are successful at the appeal in challenging the Regulations.

14. The third branch of the test to be applied is the balance of convenience, or inconvenience as it is referred to in *Metropolitan Stores*. This 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.

15. The Respondent argues that this case is not unlike a constitutional case where the public interest is a special factor to be considered; the Chicken Board is a public authority charged with a duty to protect the public interest. The Regulations under appeal were enacted pursuant to that same authority. Accordingly, the Respondent argues that the Supreme Court of Canada's comments with respect to constitutional cases are applicable to these circumstances as well.

16. In this case, the Appellants are seeking a suspension of the Regulations. The Respondent argues that a detrimental effect on the public interest can be assumed. There is a large disincentive to suspend validly enacted regulations without a hearing on the merits.

17. With respect to the status quo, the Respondent again refers to the *RJR–MacDonald* decision at p. 347 where it states that preserving the status quo has limited value in private law cases and plays no part in the consideration of a *Charter* case. The Respondent argues that this case falls close to a *Charter* case in that it involves a public authority. As such, the Respondent argues that the Appellants are wrong when they assert maintaining the status quo as a reason to stay the Regulations pending appeal.

18. The Intervenor agrees that the three-part test in *Metropolitan Stores* applies to this application and gives examples of two cases considering the three part test in the marketing board context: *British Columbia (Milk Marketing Board) v. Middleton*, [1995] BCJ No. 1706 (BCSC) and *Leth Farms Ltd. v. Alberta Turkey Growers Marketing Board*, [1998] AJ No. 1351 (Alta. CA).

19. The Intervenor also argues that if the Appellants cannot prove irreparable harm, that is the end of the matter. The balance of convenience test is only considered once irreparable harm has been proven.

Findings

20. Section 8(8.2) of the *Act* gives the BCMB discretion to stay a commodity board's order pending appeal. How that discretion is exercised will depend on the context. However, we find that the three part test outlined in *Metropolitan Stores* provides an appropriate guide for the exercise of that discretion, particularly where, as here, the appeal is from a commodity board order of general application.

21. The Appellants say that a stay is necessary to preserve the status quo pending BCMB hearing.

22. Marketing boards have first instance authority to regulate their stakeholders. They have a responsibility to make changes where they consider those changes to be in the public interest. Unless otherwise specified, their orders speak from the date of

pronouncement and do not require BCMB approval. This is particularly so with regard to legislative orders that affect the whole industry. The "status quo" preceding a change in general orders is not to be preserved for its own sake. Whether the previous "status quo" is to be preferred to the new "status quo" following from a regulatory change is to be decided according to the principles from *Metropolitan* Stores, which, as noted above, we consider appropriate in this context.

23. The Appellants argue that a stay is necessary to ensure that prior orders of the BCMB are complied with. In particular, the Appellants argue that the Chicken Board has failed to comply with the direction in the BCMB's February 19, 1998 Supervisory Decision. That Decision required that any changes to the BC Export Program after two years and for the duration of the [National Allocation Agreement] requires mutual consent between the processors and the Chicken Board, after discussion by PPAC and the Joint Committees or if consensus is not reached, binding arbitration by the BCMB. The Appellants argue that in enacting the Regulations, which in effect create a new export program, the Chicken Board did not have the consent of the processors or the approval of the BCMB. The Appellants argue that the Chicken Board has failed to comply with prior BCMB orders before enacting Regulations that completely alter the BC Export Program.

24. Had the Appellants satisfied us that the new Regulations were a direct and unequivocal breach of an existing and applicable order of the BCMB, a case might exist for pre-emptive action by the BCMB. This exception was recognised in *Metropolitan Stores* as occurring in those rare cases where a *Charter* breach was so clear and blatant to justify a finding by a judge hearing an interlocutory motion. For present purposes, it will suffice to say that given the wording of the BCMB's February 19, 1998 direction which was tied to the National Allocation Agreement, and the fact that the NAA has been declared void, no such clear case has been made out pending the hearing on the merits. As such, we adopt the approach in *Metropolitan Stores* which cautions against a detailed inquiry into the merits on a stay application.

25. We observe that the Respondent and Intervenor concede that the enactment of new Regulations raises a serious issue. We find that the first branch of the *Metropolitan Stores* test is satisfied.

26. Having satisfied the first branch of the *Metropolitan Stores* test, we must consider whether the Appellants have satisfied their burden of proving that they would suffer "irreparable harm" if the new Regulations are not stayed pending appeal. It should be noted that the appeal is currently scheduled to proceed on October 10, 2000.

27. The Appellants argue that the effect of the new Regulations is to disrupt the stability and economic balance of the chicken industry in BC. The new

Regulations are not based on any form of economic analysis but rather some political or philosophical idea of what supply management should be.

28. The Appellants say that the effect of these Regulations is to eliminate their ability to maintain market share. They argue that in the four or five months it will take for a decision to be rendered in this appeal, they will lose market share with no guarantee of recovering markets if they are ultimately successful on this appeal.

29. The Appellants have sizeable investments in the chicken industry in BC. They are not satisfied that the new Regulations, which lower the cap on export production from 15% to 10%, will allow them to continue to operate at profitable levels. In addition, the requirement that export production be planned removes the flexibility which allows them to respond to the variable export demands.

30. Mr. Peter Shoore, President of Sunrise Poultry Processors Ltd. and Sunwest Food Processors Ltd., points to a potential customer in Portland, Oregon who has agreed to market a frozen flavoured wing product commencing January 2000. It is unknown at this time how much product this customer will take. Under the new Regulations, this type of arrangement must be planned now to ensure the product is available in January. However, the level of advance planning required makes meeting this type of unknown and variable demand impossible. Mr. Shoore advises that if he cannot source product locally, he will obtain the approval of External Affairs to import product for export. He states that this is a shame when we have barns and hatcheries able to supply the product locally.

31. The Panel finds that the Appellants have not satisfied the second branch of the test. The evidence falls short of proving that the Appellants would suffer "irreparable harm" if the new Regulations are not "stayed" pending appeal. In the specific example set forth by Mr. Shoore, he refers to the method by which he could avoid the "harm" allegedly created by the new Regulations. Further, many of the provisions relating to the export program do not come into effect for some months. It is more difficult to assess what harm could befall growers or hatcheries if export production is filled in this manner. However, the Panel is aware that growers generally support the new Regulations and the hatcheries have not chosen to participate in this application.

32. In view of our conclusion on irreparable harm, it is unnecessary for us to consider the third branch of the *Metropolitan Stores* test. However, in the event that we are wrong on our assessment of irreparable harm, we are satisfied for the reasons set out below that the Appellants have not met the balance of convenience test.

33. According to Mr. Justice Beetz in *Metropolitan Stores* at p. 129, the third test involves "a determination of which of the two parties will suffer the greater harm from granting or refusal of an interlocutory injunction, pending a decision on the merits". Applying that test to this application, the Panel is of the view that the

balance of convenience favours the Respondent. As noted by the Supreme Court of Canada in *Metropolitan Stores:*

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely. (p 346)

34. In our view, this passage is applicable in the present circumstances. The Chicken Board is a public authority charged with the duty of promoting and protecting the chicken industry. It has enacted regulatory orders of general application. It has done so after a period of industry consultation, in which the Appellants were given an opportunity to make submissions. For present purposes, *Metropolitan Stores* instructs that we must assume for this application that these orders are necessary to ensure a stable and effective chicken industry in the province. In these circumstances, we find that it would irreparably harm the public interest to suspend these regulations pending the appeal. Further, we have no hesitation in concluding that the prospect of such harm to the public interest pending appeal outweighs any harm to the Appellants of complying with these orders.

ORDER

35. The application for a "stay" is denied.

36. The will proceed to hearing commencing on October 10, 2000.

Dated at Victoria, British Columbia this 2nd day of October, 2000.

BRITISH COLUMBIA MARKETING BOARD
Per:

(Original signed by):

Christine J. Elsaesser, Vice Chair
Richard Bullock, Member
Satwinder Bains, Member