



# BRITISH COLUMBIA

August 27, 2004

File: 44200-50/CMB 04-07  
44200-50/CMB 04-04  
44200-50/CMB 04-10  
44200-50/CMB 04-11

## **DELIVERED BY FAX**

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Attention: Wendy A. Baker

Dear Sirs/Mesdames:

### **AN APPEAL BY THE BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION FROM PART 7 AND PART 8 OF THE JUNE 15, 2004 GENERAL ORDERS OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD**

#### **Background**

There are currently four appeals before the British Columbia Farm Industry Review Board (the "Provincial board") dealing with the issue of direction of product or assurance of supply to processors. Currently, the parties have agreed that the three appeals commenced by Lilydale Co-operative Ltd. ("Lilydale") and seven of its growers should be heard together on September 8-10, 2004. For ease of reference, these appeals will be called the Redirection Appeals.

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Farm Industry Review Board

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The British Columbia Chicken Growers' Association (the "Growers' Association") has also commenced an appeal of Parts 7 and 8 of the newly enacted General Orders of the British Columbia Chicken Marketing Board (the "Chicken Board"). For ease of reference, this appeal will be called the General Orders Appeal.

Lilydale is an intervenor in both the seven growers' appeal and the General Orders Appeal. The seven growers are intervenors in the two Lilydale appeals. The Growers' Association is an intervenor in all three Redirection Appeals. Hallmark Poultry Processors Ltd. and Sunrise Poultry Processors Ltd. (the "Processors") are intervenors in the Redirection Appeals and in the General Orders Appeal. All these intervenors may appear at any hearing, present evidence and cross examine. As well, the British Columbia Broiler Hatching Egg Commission has been granted intervenor status in all these appeals to the extent that it may observe the proceedings and is copied on correspondence related to the appeals.

On August 16, 2004, the Provincial board received a request from Counsel for the Chicken Board that the portion of the General Orders appeal relating to Part 7 (Assurance of Supply) also be scheduled to proceed during September 8-10, 2004. Counsel for the Processors supports this request. Counsel for the Growers' Association strongly opposes this request.

### **Submissions of the Parties**

Counsel for the Chicken Board argues that the portion of the General Orders Appeal dealing with Part 7 (Assurance of Supply) should be heard with the three Redirection Appeals. Given that Part 7 of the General Orders relates to the policy considerations behind the Chicken Board's direction of product decisions at issue in the Redirection Appeals, it is difficult to see how the Redirection Appeals can be heard without a consideration of the underlying policy. Even if such a separation were possible, the Chicken Board argues that it would be a highly inefficient way to proceed. Further, if the Provincial board does not support the Chicken Board's Assurance of Supply policy, the Redirection Appeals would be dealt with on a much narrower basis.

Counsel for the Processors agrees with Counsel for the Chicken Board and maintains that the issues raised by the Redirection Appeals cannot be addressed without a consideration of Part 7. Part 7 is a codification of prior Chicken Board practice (the very practice at issue in the Redirection appeals). Given that the rationale for redirection of product from Lilydale is based on principles of assurance of supply, it is unrealistic to consider the Chicken Board's reasoning in making its redirection orders in isolation from the assurance of supply principles now found in Part 7. Further, in defending all four appeals, the Processors anticipate bringing forward evidence relating to the demands of the Processors' markets for chicken supply, production requests made by the Processors, the allocation received by BC from Chicken Farmers of Canada ("CFC"), how the allocation is shared amongst processors, how the allocation process has

worked since August 2000, the Processors' ability to meet market demands without assurance of supply and how re-direction of product away from Lilydale supported assurance of supply principles. As such, Counsel for the Processors argues that there is little practical benefit in splitting the appeals.

Counsel for the Appellants advises that all three Appellants oppose the request for consolidation of all or part of the General Orders Appeal with the Redirection Appeals. She argues that contrary to the submissions of the Chicken Board and the Processors, the issues raised in the Redirection Appeals are both more specific and quite distinct from those in the General Orders Appeal and as such, any consolidation order would be very prejudicial to the Appellants. Any concerns about overlap of evidence between the appeals could be efficiently dealt with by applying the same evidence to two proceedings without a re-hearing of the evidence. This approach would likely require the same Panel in both appeals.

Counsel for the Appellants argues that the subject matter and the remedies in the Redirection and General Orders Appeals are distinct. Of fundamental concern in the Redirection Appeals is the Chicken Board's interference in existing contractual relations between Lilydale growers and their processor, in circumstances where Lilydale growers as co-op members are shareholders of Lilydale and are being forced to provide product to a competitor. As a result of redirection, Lilydale growers suffered thousands of dollars of lost profits. Counsel for the Appellants argues that the redirection of product exceeds the jurisdiction of the Chicken Board, going beyond what is required or permitted in a supply management system. It is categorically unfair, draconian and not in the interests of good business or orderly marketing.

In contrast, the General Orders Appeal is brought on behalf of all growers and will not focus on the redirection of product to a competitor but rather will focus on the "process and substance" of the General Orders and how they were passed as well as the detrimental effects of eliminating competition. This issue is distinct and much broader than the interference with existing contractual relations raised in the Redirection Appeals. Counsel for the Appellants also takes issue with the suggestion that the hearing of the issues with respect to Part 7 be severed from Part 8. As these provisions are dove-tailed, together they lock-in processor market share and significantly reduce competition in the processing sector, they must be heard together. A further complicating factor is the request by Vancouver Island chicken growers for a processing plant on Vancouver Island. While this would not be an issue in the Redirection Appeals, it does raise serious issues with respect to Parts 7 and 8 of the General Orders. Proceeding to hear the Part 7 issue now as the Chicken Board and the Processors suggest, makes little sense and masks a full evaluation of the impact of Parts 7 and 8 on the entire chicken industry.

In addition to the foregoing concerns, Counsel for the Appellants also maintains that she is not able to fully prepare for a hearing of the Part 7 appeal on September 8 as a key witness, the President of the Growers' Association, is unavailable until September 6. It serves no purpose to

force the Growers' Association to present its case when it has not had a proper opportunity to prepare and when there is no need for the appeal to proceed on an expedited basis. Further, there is a real risk of prejudice to the Lilydale growers whose product will be redirected, if their appeal does not conclude in the September 8-10 period and a decision is not forthcoming before September 19, 2004.

In response to the submissions of Counsel for the Appellants, Counsel for the Chicken Board and the Processors both reject the notion that the issues raised in the two appeals are different or distinct. At issue in both appeals is whether the Chicken Board has the ability to assure supply to the processors, where such assurance requires the occasional redirection of product from a grower to a different processor. In order to answer these issues, the Provincial board will have to examine the environment in which processors now operate, where routinely processors cannot meet their needs for chicken through allocated domestic production. The Provincial board will have to determine whether, in such a situation, the Chicken Board has the power and/or obligation to fairly distribute the allocation amongst processors and if so, which interests will factor most heavily in this determination.

Counsel for the Chicken Board makes the observation that while Counsel for the Appellants has focused on how she will argue these appeals, she has failed to appreciate how the appeals will be defended. The Chicken Board will be asking the Provincial board to support its policy of assuring supply to processors based on recent market share. If that support is forthcoming, grower concerns must give way to industry stability. The only way processor supply can be assured is through direction of product from growers to processors when necessary, to achieve the assured supply.

## **DECISION**

The Panel has carefully considered the submissions of the parties.

Ms. Morellato, who is counsel for all the Appellants and the Intervenor Growers' Association in the Redirection Appeals, and is counsel for the Appellant Growers' Association and the Intervenor Lilydale in the General Order Appeal, takes the position, for the reasons summarised above, that it would be inappropriate to combine the appeals. The Provincial board recognises that it would be exceptional to force counsel to prosecute an appeal contrary to such a judgment, and the Provincial board is not prepared to do so. However, as the parties understand each other's positions, and have agreed on dates for the Redirection Appeals, the Provincial board does wish to make several points clear to all parties and intervenors in relation to what will be at issue on the Redirection Appeals.

Regardless of how the Appellants propose to argue the Redirection Appeals, they cannot control how the Chicken Board and the Processors respond by way of defence. While the Appellants

propose to keep the Redirection Appeals to discrete issues relating to interference with contractual relations, the Chicken Board and Processors make it very clear that as far as they are concerned a proper defence to that claim necessarily involves a full airing and consideration of the policy of assurance of supply.

The Panel must consider the defence advanced, and cannot be fettered only by looking at the Appellants' case. Whether or how the Appellants choose to respond to that defence, the Panel must consider what the Respondent and Processors now advise will necessarily be an examination of the policy considerations behind the redirection of product. This will necessarily involve a consideration of BC's allocation from CFC and how that allocation is distributed. Counsel for the Processors suggests that the Provincial board will have to determine whether the Chicken Board has the authority to distribute the allocation from CFC and if so, the relevant factors to be taken into account in allocating production to processors. As part of this issue, the Provincial board may well have to determine whether processors are entitled to an assurance of supply sufficient to overcome even the case advanced by Lilydale.

If the Appellants are successful in their appeal, they would be entitled to the remedy they seek, a ruling that the Chicken Board erred in directing product to another processor and a direction that the growers ship to Lilydale in Period A-61. However, the Appellants must be conscious of the potential outcome if the Redirection Appeals are unsuccessful. If the Panel were to uphold the Chicken Board's decision to direct product, it is a real possibility that the Panel's decision may, based on the defence we have been told will be put forward, consider the merits of the policy decision to direct product and the circumstances which led to the decision to direct product. The Panel, to some extent, may consider all the various issues raised by Counsel for the Processors and Counsel for the Chicken Board in their submissions above.

Given the foregoing, it is possible that should the Redirection Appeals proceed ahead of the General Orders Appeal, some of the issues raised by the General Orders Appeal (especially with respect to Part 7) may be the subject of a decision and findings relevant to certain issues arising on the General Order Appeals. While this is not necessarily so, it is a possibility. In that case, while a subsequent Panel hearing the General Orders Appeal would not be bound by *stare decisis*, the result reached in the Redirection Appeals might entail practical and even legal issues.

As stated at the outset, counsel for the Appellants has chosen how she wishes to proceed with these appeals. That is counsel's right. The Panel is not going to interfere in that decision and order that the appeal with respect to Part 7 of the General Orders be heard during the September 8-10 hearing. But the Panel exercises this deference with the clear message that the Appellants cannot fetter the responses of the Chicken Board and the Processors to their case. Similarly, the Provincial board will decide those issues which we feel must be decided in the context of those appeals.

Maria Morellato  
John J.L. Hunter, Q.C.  
Wendy A. Baker  
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Counsel are to govern themselves accordingly.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Christine J. Elsaesser  
Vice Chair

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