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File: 44200-50/CMB 02-08

DELIVERED BY FAX

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Attention: Mr. John J.L. Hunter, Q.C.

Dear Sirs/Mesdames:

**AN APPEAL BY MJ FARM LTD. FROM A FEBRUARY 21, 2002 ORDER OF THE
BRITISH COLUMBIA CHICKEN MARKETING BOARD TO CEASE PRODUCTION
AND MARKETING**

On April 22, 2002, the British Columbia Marketing Board (the "BCMB") held a teleconference call hearing to hear submissions on the following preliminary issues:

- a) Is the appeal out-of-time in accordance with s. 8(1)(a) of the *Natural Products Marketing (BC) Act* (the "Act")?
- b) Are there special circumstances under s. 8 (1)(b) of the *Act* warranting an extension of the filing period?
- c) Are the BCMB's decisions in *Pottruff v. BC Egg Marketing Board*, October 21, 2001, and/or *Fred Reid Olera Farms v. BC Egg Marketing Board*, January 21, 2002, relevant to this appeal?

In addition to oral submissions, the BCMB also reviewed the following documents:

- a) February 21, 2002 Chicken Board Order concerning MJ Farm Ltd. ("MJ Farm")
- b) March 5, 2002 Notice of Appeal from MJ Farm
- c) March 5, 2002 letter from Mr. John Durham on behalf of MJ Farm
- d) March 7, 2002 letter from Mr. Durham
- e) March 13, 2002 letter from Mr. Jim Collins to the parties
- f) March 22, 2002 letter from Mr. John Hunter, Q.C.
- g) March 25, 2002 memo from Mr. Durham

British Columbia
Marketing Board

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- h) April 2, 2002 letter from Mr. Hunter
- i) April 8, 2002 letter from Mr. Collins to the parties
- j) April 17, 2002 letter from Mr. Hunter
- k) April 18, 2002 submission from Mr. Durham
- l) April 22, 2002 submission from Mr. Durham.

Mr. John Giesbrecht of MJ Farm argues that his appeal is not out of time. He was not included in any consultation process leading to the enactment of the August 15, 2000 new Regulations of the British Columbia Chicken Marketing Board (the "Chicken Board"). He did not become aware of the existence of the new Regulations until well after August 15, 2000. Further, he argues that as a game bird producer, his production has never been regulated by the Chicken Board. It was not until he was contacted by a Chicken Board employee and advised that as a silkie producer he should now have quota that he realised circumstances had changed. He received the first order to cease production in October 2001. He responded in detail to the Chicken Board explaining the history of his operation and his industry. The Chicken Board did not respond to Mr. Giesbrecht's many questions but did allow him to continue producing silkies for slaughter "until the Board has made its decision". By Order dated February 21, 2002, the Chicken Board ordered Mr. Giesbrecht to immediately cease the production and marketing of chicken. In the same letter the Chicken Board advised Mr. Giesbrecht of his right to appeal to the BCMB within 30 days of receiving the Order.

Mr. Giesbrecht argues that his appeal, filed with the BCMB on March 7, 2002, was in time. In the alternative, he submits that special circumstances exist to extend the time for filing his appeal. These circumstances include:

- The failure of the new Regulations to meet the new market guidelines set out by the BCMB in its 1999 Review of the Regulated Marketing System.
- The disqualification of specialty producers from the benefit of the NISA (Net Income Stabilization Account) Program.
- The unfairness of requiring a specialty producer to acquire quota when he receives none of the benefits of quota. He must negotiate his own price, invoice his own customers, and be responsible for his own collection.
- The lack of any analysis of the export component of the specialty business.
- The likely result that extending regulation to Mr. Giesbrecht will devastate a family and a farm that has created a unique business over many years.

Finally, Mr. Giesbrecht argues that neither the *Pottruff* or *Olera Farms* decisions are applicable to this case. The Appellants in both of these cases were very knowledgeable about the supply-managed system and both were producing product that displaced regulated product. In this case, the appeal is not from a decision of a commodity board to commence court action; this appeal is from a commodity board's decision to order a producer to cease chicken production and marketing. If Mr. Giesbrecht is unsuccessful on this appeal, then the enforcement provisions of the *Act* may come into play. In the meantime, he argues that the appeal should proceed.

The Chicken Board argues that this appeal is properly characterised as an appeal of the August 15, 2000 new Regulations which purport to regulate “all classes of chicken”. MJ Farm is a specialty chicken producer. It has refused to comply with the new Regulations and apply for permit, nor has it paid the producer levies or otherwise accepted the Chicken Board’s authority over its operations. Mr. Giesbrecht takes the position that, as MJ Farm is a silkie producer, it does not fall within the jurisdiction of the Chicken Board’s new Regulations. However, Mr. Giesbrecht did not appeal the new Regulations. Instead since January 2001, he has had repeatedly asserted his position that as the silkie is not a meat bird, it does not fall within the new Regulations. The Chicken Board argues that it should not be penalised for trying to work out this dispute with Mr. Giesbrecht by allowing the clock to be restarted on an appeal.

With respect to the enforcement order, if Mr. Giesbrecht can satisfy the British Columbia Supreme Court that a silkie is not a chicken, then presumably the enforcement proceedings would fail. If he cannot so satisfy the Supreme Court, the issue is resolved, the new Regulations apply, and an enforcement order will be issued.

The Chicken Board further argues that the appeal is well out-of-time and there are no special circumstances justifying Mr. Giesbrecht’s 18-month delay. There is no justification to support the stay of the enforcement proceedings. The Chicken Board should be free to seek enforcement of its orders in the Supreme Court. Again, if the Chicken Board can satisfy a Judge that a silkie is a chicken, enforcement will proceed as a matter of course.

The Chicken Board argues that the BCMB’s decisions in *Pottruff* and *Olera* are relevant and lead to the conclusion that this appeal is not properly brought. In *Pottruff*, the BCMB determined that the decision to commence enforcement proceedings in the Supreme Court is not appealable to the BCMB. The underlying order is appealable but enforcement proceedings brought under enabling legislation falls within the exclusive jurisdiction of the Supreme Court. In *Olera*, the BCMB reinforced the *Pottruff* decision and confirmed that the underlying regulation could be appealed to the BCMB. In this case, the dispute revolves around the Chicken Board’s regulatory authority over MJ Farm. This assertion arises not out of the Chicken Board’s February 21, 2002 order but rather it arises out of the decision of the Chicken Board to enact the new Regulations in August 2000.

In response, Mr. Giesbrecht concedes that a silkie is a chicken. However, a purebred silkie is a unique product. Its production and sale has no impact on the regulated chicken industry. The Chicken Board’s generic approach to the chicken industry has not dealt fairly with the interests of the silkie producer. Further, the time for Mr. Giesbrecht to appeal should not start as of the date of enactment of the new Regulations in August 2000, nor should it start in January 2001 when Mr. Giesbrecht apparently met with Chicken Board staff. If someone is going to be put out of business by virtue of the new Regulations, if they are going to lose the benefit of an income stabilisation program, if they are going to give up their security, pay levies and receive nothing back, something formal should be required. With so much at stake, the Chicken Board should at the very least be required to demonstrate that it informed Mr. Giesbrecht of his right to appeal.

DECISION

Based on the submissions of the parties, the Panel has been unable to come to a final decision on the out-of-time issue. Documents were referred to during the course of the hearing which were not disclosed to the Panel. Further, it appears that prior to the February 2002 enforcement order of the Chicken Board, there were numerous meetings between the Appellant and Chicken Board staff and members. The Panel has not been made privy to what transpired in those discussions although elements of conversations formed part of the submissions of the parties.

The Chicken Board argues that *Pottruff* applies and its decision to enforce its new Regulations is not appealable to the BCMB. The Panel does not agree that the issue can be resolved so easily. Given the lengthy discussions between the parties, one reasonable interpretation of the February 2002 order is that it is in fact a decision on the part of the Chicken Board to not exempt MJ Farm from the new Regulations: *British Columbia Chicken Marketing Scheme, 1961*, s. 4.01(b). It appears from the Appellant's submissions that throughout 2001, it sought exemption on some level from the new Regulations. At one point, the Appellant agreed to obtain a permit, subject to certain conditions. It does not appear that any agreement was achieved on these conditions. The fact that the Chicken Board was considering the Appellant's position is reflected in its November 26, 2001, letter, where the Chicken Board allowed him to continue producing silkies for slaughter "until the Board has made its decision". The Chicken Board wanted "more time to consider your (MJ Farm's) requirements".

It seems that the Chicken Board was considering the issue of what if any relief it could give the Appellant. If the February 2002 order is understood as a decision by the Chicken Board to not exempt MJ Farm from the new Regulations, then that decision would be appealable to the BCMB. On this view, when the Chicken Board made its decision in February 2002, it in effect decided that no special consideration would be given to MJ Farm and the new Regulations would apply, without total or partial exemption. As such, there would be no need even to apply for an extension of time. If this characterisation were correct, it would not be a matter of "penalising" the Chicken Board for trying to work things out with Mr. Giesbrecht, since an appeal is not a "penalty". It remains the right of a producer aggrieved or dissatisfied by a commodity board's particular decision with respect to that producer.

The Panel considered whether it ought to ask for further evidence and submissions from the parties as to the proper characterisation of the Chicken Board's decision-making in this instance. However, as any determination by the Panel will require both oral and documentary evidence, it would be cumbersome and potentially duplicative to proceed by way of further preliminary argument, particularly since the appeal itself does not appear to require a lengthy hearing. Accordingly, the Panel directs that this matter proceed to hearing. The parties can address further evidence and argument, with respect to the three preliminary issues identified in this decision, as part of those proceedings.

The Panel would observe finally that since hearing the arguments of the parties in this matter, the Supreme Court issued its decisions in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, (24 April 2002), Vancouver Registry No. L012392 and *British Columbia Chicken Marketing Board v. British Columbia Marketing Board and Jim Hong* (24 April 2002), Vancouver Registry No. L013023. While the Court's decision does not determine the outcome of the threshold questions discussed earlier, it does alter the standard of review that the BCMB has historically applied on appeals, and thus will likely affect the merits of the appeal if the Panel decides it appropriate to consider the merits. The Panel would therefore request the parties to come prepared to address the implications of the Court's decision for their respective positions.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

cc: Mr. John Giesbrecht
MJ Farm Ltd.