

IN THE MATTER OF THE  
NATURAL PRODUCTS MARKETING (BC) ACT

AND

IN THE MATTER OF A PRELIMINARY ISSUE  
IN AN APPEAL CONCERNING  
ORDER #320

BETWEEN:

PRIMARY POULTRY PROCESSORS ASSOCIATION  
OF BRITISH COLUMBIA

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

**REASONS FOR DECISION**

**APPEARANCES BY WRITTEN SUBMISSION:**

For the British Columbia Marketing Board	Mr. Ross Husdon, Chair Mr. Doug Kitson, Vice Chair Ms. Christine Elsaesser, Member Mr. Harley Jensen, Member Mr. Dedar Sihota, Member Ms. Karen Webster, Member Mr. Jim Collins, Secretary
For the Appellant	Mr. Christopher Harvey, Q.C. Counsel
For the Respondent	Mr. John J.L. Hunter, Q.C. Counsel

**INTRODUCTION**

1. On November 10, 1997, we issued a decision concerning a suspension or “stay” of British Columbia Chicken Marketing Board (Chicken Board) Order #320. The decision was issued with reasons to follow. The following are those reasons.
2. The Chicken Board issued Order #320 on September 25, 1997. That Order provides that, effective September 9, 1997, all registered chicken growers are granted additional quota, referred to as “transitional quota”. The amount of transitional quota growers are granted varies inversely with the amount of quota presently held by a grower. While all growers are granted “transitional quota”, small growers receive more transitional quota than large growers.
3. On October 7, 1997, the British Columbia Marketing Board (BCMB) received an appeal of Order #320 filed by members of the Primary Poultry Processors Association of British Columbia (Processors). The Notice of Appeal does not state the grounds of appeal, but subsequent correspondence filed by the Processors suggests that the appeal centres on allegations that the Chicken Board failed to properly consult with the Processors via the “PPAC process” as envisioned by the *British Columbia Chicken Marketing Scheme*, B.C. Reg. 188/61, as amended.

**PRELIMINARY ISSUE**

4. The Processors' Notice of Appeal requests that "the implementation of this Order be stayed pending consideration and ruling by the British Columbia Marketing Board". The subject of this interim decision is whether a "stay" should be granted. This application proceeded by way of written submissions.

## **JURISDICTION TO "STAY" THE EFFECT OF A CHICKEN BOARD ORDER**

### **Arguments**

5. The first question to address is whether we have legal authority to grant a "stay".

6. In its October 14, 1997 submission, the Chicken Board argues that we do not have legislative authority to "stay" the order pending appeal, relying on this passage from the judgment of the British Columbia Supreme Court in *British Columbia (Mushroom Marketing Board) v. Money's Mushrooms*, [1995] B.C.J. No. 792 ("*Money's Mushrooms*"), at para. 8:

In any event, the Act contains a comprehensive procedure governing appeals to the Marketing Board and there is no provision from which any legislative intention to suspend the Mushroom Board's determination while the appeal is pending could be drawn. It appears to me that, under the Act, the determination of an inferior board is to be complied with until set aside on appeal. Those affected can appeal in very short order. In the interim they must comply. There is in the Marketing Board no authority to dispense with compliance pending the hearing of an appeal and in my view, apart from exceptional circumstances, this court ought not to exercise its discretion in an application under s. 17 to affect or dispense with compliance because an appeal is pending.

7. On October 28, 1997, the Processors responded that the BCMB does indeed have jurisdiction to "stay" the orders of marketing boards pending appeal. In support, it relies on both the "ancillary jurisdiction of administrative tribunals" and the supervisory jurisdiction of the BCMB as enshrined in the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (NPMA). The Processors argue that the comments of the Court in *Money's Mushrooms* are not binding because they are *obiter dicta* (i.e. not necessary to the issue before the Court) and because the Court in that case failed to consider the BCMB's supervisory powers.

8. The Chicken Board's reply (dated November 4, 1997) appears to accept that jurisdiction to grant a "stay" could flow from the BCMB's supervisory authority where it states:

...we accept Mr. Harvey's statement of the law that "the Board's supervisory jurisdiction is separate and distinct from its appellate jurisdiction." The difference may be expressed in this way -- the Board's supervisory jurisdiction is general whereas the appellate jurisdiction is specific to a particular appeal filed by a particular appellant in accordance with the appeal provisions of the statute. There might well be a situation of such importance to the industry that the Board would exercise its general supervisory power *despite* the existence of a pending appeal, but that is very different from assuming an appellate jurisdiction that is not conferred by the governing statute.

## Findings

9. We agree with the Chicken Board that the power to grant a "stay" is not expressly conferred in the "appeal" provisions of s. 9 of the *NPMA*. We also accept that any power to "stay" a marketing board order must be founded in the legislation. However, we conclude that such power is indeed properly founded in our governing legislation. We find that the power necessarily flows from this Board's power of "general supervision over all marketing boards or commissions constituted under the Act" (s. 3(5); see also *Natural Products Marketing (BC) Act Regulations*, B.C. Reg. 328/75, s. 4) and our authority "at any time, [to] amend, vary or cancel an order or rule ... made by a marketing board".

10. This finding is strengthened by both the *Interpretation Act*, which directs that all laws must receive such fair, large and liberal construction as best ensures the attainment of their object, and the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 which finds at p. 7:

In construing statutes such as those under consideration in this appeal, which provide for far reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

11. All marketing boards and commissions in British Columbia fall under the BCMB's general supervision. To exercise that supervisory function effectively, the BCMB must be able to take a proactive approach on pressing issues confronting an agricultural sector. Occasions inevitably arise where the BCMB is required to supervise.

In many cases, the most effective supervision is assistance and encouragement to allow parties to work out conflicts between themselves. In other cases supervision may take the form of recommendations or orders. Those orders may “amend, vary or cancel” an order altogether, or may effectively suspend an order pending more detailed review, in order to avoid serious and undue harm to person, a constituency, or the public interest: *NPMA*,

s. 11(2). This may arise where, for example, it is not practically possible to consider a matter in time to prevent irreparable harm within an industry. Without this full range of authority to supervise the agencies for which we are responsible, our ability to exercise our legislative mandate would be severely impaired. We do not believe the legislature intended such a result.

12. Situations which might warrant a “stay” of an order of a marketing board may come to our attention in a variety of ways. An appeal filed under s. 8 of the *NPMA* is clearly one of them. We see no merit in the argument that our responsibility of general supervision ends when an appeal begins. Our supervisory and appellate powers are not isolated from one another, they exist and work together, “allow(ing) us to function effectively, as the legislature intended”.

13. To the extent that the comments in *Money’s Mushrooms* suggest a different conclusion, we respectfully disagree. The Court’s comments on that point are *obiter dicta*, as they make no reference to this Board’s supervisory authority. It does not appear that the BCMB’s jurisdiction was argued in any detail, if at all. Thus, we do not believe *Money’s Mushrooms* binds us to a different conclusion.

### **SHOULD ORDER #320 BE STAYED PENDING APPEAL?**

#### **The Test**

14. The parties agree that if we have jurisdiction to grant a “stay”, we should be governed by the three part test set out in *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110. We accept that the *Metropolitan Stores* test applies to the present situation where a “stay” is sought as part of an appeal of a marketing board order of general application. It may, however, not be as applicable in circumstances where a decision of a marketing board is “stayed” in the exercise of our supervisory jurisdiction.

15. *Metropolitan Stores* requires the following questions to be answered before granting a “stay”:

- (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.

## Findings

16. The Chicken Board does not dispute that the Processors’ issue of the consultation prior to enacting Order #320 is a serious one. Therefore, we find that the Processors have satisfied the first branch of the *Metropolitan Stores* test. We do not, however, find any evidence before us demonstrating such a flagrant and incontrovertible error that we should “stay” the Order without consideration of other factors. The issues surrounding the adequacy of consultation must await the receipt of proper evidence and argument on the appeal.

17. Having satisfied the first branch of the *Metropolitan Stores* test, we find that the Processors’ application does not satisfy the second branch of the test. The Processors have failed to satisfy their burden of proving that they would suffer “irreparable harm” if Order #320 is not “stayed” pending appeal. The Processors have not pointed to any harm chicken processors would suffer if Order #320 remains in effect pending appeal.

18. The Processors have suggested that “small chicken growers and others” will suffer irreparable harm if this Order is not “stayed”. While the Chicken Board has assured us that the Order “creates a form of quota which will not be exercised for some time”, the Processors suggest that many growers might make business decisions based on the promise of this “future, free quota”. For the purposes of this decision, we proceed on the basis that it is open to the Processors to seek a “stay” based on allegations of harm to others.

19. We do not believe any chicken grower would make irrevocable business decisions based on Order #320 without first ascertaining whether there has been an appeal, and governing themselves in accordance with the risk that such appeal might be successful.

20. In any event, we do not think that a “stay” of Order #320 is necessary to address the Processors’ concern for small chicken growers. The concern could be alleviated by the Chicken Board notifying all growers of the Processors’ appeal, and enclosing a copy of these reasons with a caution to govern themselves accordingly.

21. In view of our conclusion on irreparable harm, it is unnecessary for us to consider the third branch of the *Metropolitan Stores* test.

### **CONCLUSION**

22. The application for a “stay” is denied.

23. The Chicken Board is directed to immediately notify all chicken growers in accordance with paragraph 20 of these reasons.

Dated at Victoria, British Columbia this 13<sup>th</sup> day of November, 1997.

BRITISH COLUMBIA MARKETING BOARD  
Per

*(Original signed by):*

Ross Husdon, Chair