



# BRITISH COLUMBIA

File: 44200-50/CMB 02-02

May 21, 2002

## **DELIVERED BY FAX**

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

Dear Sirs/Mesdames:

### **AN APPEAL BY ROSSDOWN FARMS LTD. FROM A DECISION, AS COMMUNICATED IN A LETTER DATED DECEMBER 11, 2001, OF THE BC CHICKEN MARKETING BOARD CONCERNING THE ISSUANCE OF A GRANDFATHERED SPECIALTY PRODUCTION PERMIT**

The above appeal was scheduled to commence May 21, 2002. On May 14, 2002, the British Columbia Marketing Board (the “BCMB”) adjourned the May 21 hearing with reasons to follow. These are those reasons.

On May 3, 2002, the BCMB received a request for an adjournment of the May 21 hearing from Counsel for the Appellant, Rostdown Farms Ltd. (“Rostdown”). The reason for the adjournment request was that the Rostdown appeal relied on the BCMB’s decision in *Jim Hong v. British Columbia Chicken Marketing Board*, October 2, 2001. As that decision was recently reversed by the Supreme Court in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board and Jim Hong* (24 April 2002), Vancouver Registry No. L013023, and is presently the subject of a pending application for leave to appeal to the Court of Appeal, the Appellant seeks to adjourn its appeal pending a decision from the Court of Appeal.

By letter dated May 8, 2002, Counsel for the British Columbia Chicken Marketing Board (the “Chicken Board”) advised that it opposed the adjournment.

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British Columbia  
Marketing Board

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On May 13, 2002, the BCMB Panel conducted a hearing by telephone conference in order to hear further oral submissions from the parties on this issue. Counsel for the Appellant argued that there is no prejudice to the Chicken Board by granting an adjournment, and furthermore that if the Chicken Board prevails at the Court of Appeal, in all probability this appeal will be abandoned, saving the Appellant and the BCMB additional cost. The Appellant says that any argument that the *Hong* appeal is not applicable to the Appellant's circumstances is a substantive argument, and is an unnecessary consideration in the context of an adjournment application.

Counsel for the Chicken Board conceded that if the Appellant could guarantee that its appeal would be abandoned if the Court of Appeal rules in favour of the Chicken Board in the *Hong* matter, then that would be a powerful reason to grant the adjournment application. However, in the absence of such a guarantee, the appeal should proceed as scheduled. It is not enough for the Appellant to demonstrate there is no prejudice resulting from an adjournment. The *Natural Products Marketing (BC) Act* ("the *Act*") requires appeals to be heard within 60 days of the appeal being filed. In the face of a legislative requirement that appeals be heard promptly, the Appellant must show more than no prejudice to the Chicken Board in the granting of an adjournment.

## DECISION

The Panel's obligation to hear appeals within 60 days is subject to its power to "adjourn a hearing for the period it considers appropriate on the request of the person bringing the appeal or of the marketing board or commission from which the appeal is being made or on its own initiative": s. 8(7) of the *Act*.

The grounds for the Appellant's appeal are set out as follows in the Pre-Hearing Conference Report:

That as a matter of law, *Hong Lee Farms* applies to Rosdown Farms Ltd. as there is little difference between the two farms in terms of their entitlement to a grandfathered specialty production permit.

A review of the Pre-Hearing Conference Report suggests that the basis for this appeal is that the *Hong* decision sets a precedent which, if followed by the BCMB, would result in the Appellant obtaining the relief it seeks.

It is clear to the Panel that if this appeal were to proceed to hearing now on the grounds set out in the Pre-Hearing Conference Report, the Appellant would in all likelihood be unsuccessful as a result of the decision in *Hong*. In this event, the Appellant would then have to decide whether to accept the decision despite the ongoing appeal, or incur the cost of appealing the BCMB's decision to the Supreme Court (which would likely be bound by Metzger J.'s decision), and then further seek leave to appeal to the Court of Appeal issues already the subject of leave applications in the *Hong* and *Mundhenk* matters.

There is no question on this application that the decision of Metzger J. is the law unless and until set aside by a higher court. At the same time, we must recognize that this is the Appellant's appeal, and the Appellant has applied for an adjournment because it has considered its position, including the potential costs of any delay, and concludes that an adjournment is clearly in its interests. The Appellant understands that the Chicken Board's decision stands in the interim.

The Appellant has not applied for any interim relief pending appeal. It is difficult to disagree with the Appellant that in view of the appeal proceedings underway, those proceedings will, if leave is granted, address issues potentially going to the heart of the present appeal. There is prejudice involved in forcing the Appellant to proceed with this appeal amid the uncertainty of appeal proceedings from a Court decision that has effected a dramatic change in the operation of the appeal system as it has functioned for two decades.

The Appellant's wishes and interests are not conclusive, but on the other side, the Chicken Board has not satisfied us that there is any prejudice to the Chicken Board occasioned by adjourning the appeal. The Chicken Board's decision remains in place. The Chicken Board has not pointed to any prejudice that a delay would occasion to its ability to defend the appeal either by way of lost evidence or by way of prejudice to its procedural fairness interests. Nor has the Chicken Board pointed to any prejudice to its ability to administer the permit system effectively.

The May 21, 2002 appeal hearing is adjourned. The period for the adjournment is until such time as the Court of Appeal renders a final determination in the *Hong* appeal. The Appellant is directed to advise the BCMB of its intentions regarding its appeal within 14 days of receiving notice of the Court of Appeal's final decision.

BRITISH COLUMBIA MARKETING BOARD  
Per

(*Original signed by*):

Christine J. Elsaesser, Vice Chair

cc: Ms. Christine Rickson, Executive Assistant  
British Columbia Chicken Marketing Board