BRITISH COLUMBIA

August 8, 2003

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DELIVERED BY FAX

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Dear Sirs/Mesdames:

APPEALS BY BRAD AND KAREN REID dba THOMAS REID FARMS FROM DECISIONS OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD, AS COMMUNICATED APRIL 8, 2002, APRIL 8, 2003 AND APRIL 22, 2003, CONCERNING SPECIALTY CHICKEN PRODUCTION

Brad and Karen Reid dba Thomas Reid Farms are certified organic chicken growers in BC. They have filed three separate appeals of British Columbia Chicken Marketing Board (the "Chicken Board") decisions relating to specialty chicken production. The first appeal relates to a cease and desist order issued before Mr. Reid obtained a permit to produce specialty chicken. The second appeal deals with the grandfathered permit level and permit fees. The third appeal relates to the right to produce chicken at 26079 36th Avenue, Langley. These appeals are scheduled for hearing September 23-25, 2003.

In the interim, Mr. Reid seeks a stay of certain Chicken Board decisions communicated on April 8 and April 22, 2003:

a. setting of back levies of $40,560 + GST from August 15, 2000 to April 30, 2003;

British Columbia Marketing Board

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b. setting of permit level for Brad and Karen Reid at 1600 birds/week;
c. imposition of 0.18/bird permit fee; and
d. denial of right to produce chicken at 26079 36th Avenue, Langley.

The Chicken Board opposes the stay application. The British Columbia Chicken Growers' Association (the "Growers Association") is an intervenor in the first appeal. The Appellants and Respondent have no objection to the Growers Association being granted intervenor status in the second and third appeals. The Panel is of the view that it is appropriate for the Growers Association to have such status granted and we so order. The Growers Association made submissions opposing the stay application and supporting the position of the Chicken Board.

The stay application was heard by written submission. The Panel reviewed the following documents:

a. pre-hearing conference report dated May 28, 2003 (as amended May 30, 2003);
b. letter from Brad Reid dated June 16, 2003;
c. letter from Counsel for the Chicken Board dated June 17, 2003;
d. letter from Counsel for the Growers Association dated June 23, 2003;
e. letter from Brad Reid dated July 10, 2003, with attachments;
f. letter from Counsel for the Growers Association dated July 22, 2003;
g. letter from Counsel for the Chicken Board dated July 28, 2003; and
h. decision of the British Columbia Marketing Board (the "BCMB"): *Bill Pottruff v. British Columbia Egg Marketing Board* (October 25, 2001).

BACKGROUND

Effective August 15, 2000, the Chicken Board introduced new policy rules providing for comprehensive regulation of the chicken industry. The Chicken Board created a New Entrant, Niche Market and Specialty Program (now called the New Entrant Program), the purpose of which was to formalise specialty production under permit by turning it into quota production after a 12 year period (Part 43). In addition, the new Program allowed new entrants to test markets for different types of regulated product by allowing permit production in the amount of 500 birds/week. Based on our review of the pre-hearing conference report, it would appear that Mr. Reid takes issue with this Program and how it impacts his organic chicken operation.

DECISION

The *Natural Products Marketing (BC) Act,* c. 330 gives the BCMB the jurisdiction to stay an order, decision, or determination of a marketing board under appeal: s. 8(8.2). In determining whether a stay is appropriate in the circumstances, the Panel relies on the three part test set out in *RJR-MacDonald Inc. v. Canada (AG)* [1994] 1 SCR 311:

a) Is there a serious issue to be tried?
b) Would the applicant suffer irreparable harm if the application were refused?

c) On the balance of convenience, which party would suffer greater harm from granting or refusing the remedy pending a decision on the merits?

Serious Issue to be Tried. Mr. Reid argues that the four issues on which he seeks a stay are part of a longstanding dispute between the organic industry in BC and the Chicken Board. Since 1996 there have been numerous discussions between the Chicken Board and government about how organic production should be handled. The Chicken Board refuses to recognise the distinct nature of organic production, and instead falls back on its position that "chicken is chicken" and all chicken should be regulated under the *British Columbia Chicken Marketing Scheme, 1961*.

The Chicken Board argues that on the question of whether outstanding permit fees are owed, there is no serious issue to be tried. In a related decision of the British Columbia Supreme Court in *B.C. Chicken Marketing Board v. Brad Reid*, 2002 BCSC 1451, Madame Justice L. Smith enjoined Mr. Reid from producing chicken until such time as he obtained a grower's licence and a permit. A condition of receiving a permit is that certain permit fees be paid, accordingly there is no question but that Mr. Reid owes permit fees. With respect to the setting of 1600 birds/week permit, the Chicken Board argues that this permit level was set in accordance with the August 15, 2000 policy rules (by taking into consideration the Reid's production for the year prior to July 1, 2000). The Reids argue that this method of setting permit is wrong as it fails to take into account present and expected production. The Chicken Board however submits that it applied the August 15, 2000 policy rules correctly and as such, there is no serious issue to be tried.

As for the $0.18/bird permit fee, the Chicken Board argues that such an appeal is long out of time and ought not to proceed. Even if this appeal can be related to organic production to somehow get around the out-of-time issue, the Chicken Board disagrees that there is a serious issue to be tried. A permit administration fee relates to the type of entitlement under which one produces chicken and not to the kind of chicken one produces. As for the requirement that chicken grown under permit must be grown on premises registered to the holder of the permit, the Chicken Board argues that there has not been an error in applying the August 15, 2000 policy rules; the Reids are not registered owners of the Langley property on which they seek to grow chicken. As the Reids have not sought a waiver or an exemption from this section of the policy rules, the Chicken Board has not made a decision on whether such a waiver or exemption is warranted.

For its part, the Growers Association agrees with the submissions of the Chicken Board.

The Panel agrees generally with Mr. Reid that questions relating to how organic production fits within or should fit within the regulated marketing system are serious in nature and need to be addressed by all commodity boards. At the hearing of this appeal on the merits, the Panel will no doubt hear arguments as to how the specific issues raised by Mr. Reid relating to outstanding permit fees, the amount of permit issued, the level of the fee and the requirement that a permit holder produce chicken on property owned by the permit holder need to be considered in light of his organic operation.

Given our decision on the second and third branches of the test however, it is unnecessary to review the specifics of whether each of the identified issues raises a serious issue.

Irreparable Harm: The second branch of the *RJR-Macdonald* test requires the Panel to consider whether the Reids have satisfied the burden of proving that they would suffer "irreparable harm" if the Chicken Board's decisions are not stayed pending appeal.

The Panel agrees with the Chicken Board that the Reids have not demonstrated any evidence of irreparable harm if any of the four decisions are not stayed. With respect to the outstanding permit fees, the mere invoicing of outstanding levies cannot be considered irreparable harm to the Reids. While enforcement proceedings could conceivably lead to irreparable harm (in the nature of financial hardship), the Chicken Board has not taken that step. It is unlikely, given that this appeal will be heard in approximately seven weeks that they would incur that expense in the interim. Further, if what Mr. Reid is seeking is a reduction in the outstanding levy, that is an available remedy after a hearing of the appeal. Harm that can be dealt with by a recalculation or an offsetting is not irreparable. Similarly, with any issue as to the level of the permit fee, it may be that at the hearing on its merits Mr. Reid can lead evidence which shows that permit fees of $0.18/bird are unworkable for an organic producer. However, there is insufficient evidence at this stage to allow the Panel to draw such a conclusion now. Further, even if the Panel ultimately determines that an $0.18/bird fee is inappropriate, the situation could be remedied by setting an appropriate fee and recalculating outstanding levies.

With respect to the setting of permit level at a grandfathered level of 1600 birds/week, the Panel is not satisfied that this decision causes irreparable harm to the Reids. Any decision on the appropriateness of the amount of that permit must await a decision on the merits. Further, the Panel agrees with the Chicken Board that it is not the permit level of 1600 birds which limits the Reid's ability to service their markets. The Reids had their historical production grandfathered; growth in their operation could have taken place in the same way it does for other growers, through acquisition of quota. Further, the Chicken Board's Program allows for the annual acquisition of quota up to 10% of permit holdings without any offsetting of permitted production.

Finally, the Reids argue that requiring permit chicken to be produced on property registered in the name of the permit holder causes them irreparable harm. Currently, they produce chicken on two properties, one owned by Karen and Brad Reid, the other owned by a company in which Mr. Reid is a 50% shareholder. The Chicken Board maintains that this issue is not properly before the BCMB as it is really an appeal of the August 15, 2000 policy rules. The Reids have not requested an exemption or a waiver of this provision, nor has the Chicken Board issued such a decision. Given that there is some question as to whether this issue is even properly before this Panel, it would be inappropriate to issue a stay of this decision. However, the Chicken Board has seven weeks before this matter proceeds to hearing to consider this issue; they should do so. Depending on the Chicken Board's decision, it may or may not be necessary to deal with this issue on appeal.

Balance of Convenience. The third branch of the test 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.

The Panel has decided that the balance of convenience rests with the Chicken Board in its efforts to regulate its industry. If Mr. Reid is successful on appeal, there are meaningful remedies open to the BCMB. A stay is an extraordinary remedy. In a regulated industry, there is a presumption that a commodity board's decisions are valid from the time they are made. If this were not the case, industry stability would be compromised if those subject to regulation were uncertain of the validity of an order or decision. As noted in our October 2, 2000 stay decision in *Hallmark Poultry Processors Ltd. et al v. British Columbia Chicken Marketing Board*:

> 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.

As was recognised in *Attorney General of Manitoba v. Metropolitan Stores* [1987] 1 SCR 110 at p. 129:

> [I]n 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.

In our view the Chicken Board has met the above test. It is charged with the duty of promoting or protecting the public interest and has acted pursuant to that responsibility. Accordingly, the application for a stay is dismissed and the appeal will proceed as scheduled on September 23-25, 2003.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Panel Chair

cc: Jim Beattie, General Manager
British Columbia Chicken Marketing Board