May 27, 2013 File: 44200-50/File #13-03

DELIVERED BY E-MAIL

Kirk Homenick
Naturally Homegrown Foods Ltd.
20110 115 A Ave
Maple Ridge BC V2X 0Z4

Tom Demma
General Manager
BC Vegetable Marketing Commission
207 – 15252 – 32 Ave
Surrey BC V3S 0R7

Dear Sirs:

RE: AN APPEAL FILED BY NATURALLY HOMEGROWN FOODS LTD. PURSUANT TO SECTION 8 OF *THE NATURAL PRODUCTS MARKETING (BC) ACT (the "NMPA")*

1. In a letter to the BC Vegetable Marketing Commission (VMC) dated February 1, 2013, Naturally Homegrown Foods Ltd. (NHGF) requested a reduction of the 2013 annual processor license fee suggesting $100 would be more in line to cover the administrative burden for copying and postage. By way of a letter from VMC dated March 15, 2013 to NHGF, that request was denied.

2. On April 4, 2013, the BC Farm Industry Review Board (BCFIRB) received a notice of appeal from NHGF regarding the decision set out in VMC's letter of March 15, 2013. The appeal was accepted for filing on April 16, 2013 (pursuant to Practice and Procedure Rule 1(5) to the *NMPA*).

3. On April 12, 2013 VMC filed an application with BCFIRB seeking to have the appeal summarily dismissed pursuant to s. 31(1)(c) of the *Administrative Tribunals Act* [RSBC 2004], Ch. 45 (the "*ATA*") on the ground that it is trivial. The VMC argues that as the appellant has paid the increasing processor licence fees up to the 2013 renewal, the substance of the appeal can only involve the $250.00 increase in the annual processor licensing fee for 2013.

POSITIONS OF THE PARTIES

A. Vegetable Marketing Commission:

4. In its written submissions, the VMC states that on October 21, 2010, the Commission determined that except for designated agencies and producer-shippers, annual license fees

would increase by a specified amount over a 3 year period. The VMC says it notified all stakeholders of this decision by way of its November 2010 monthly newsletter and invited comments about the proposed increases before amending its General Order on January 28, 2011.

5. The VMC argues that NHGF would have been aware of the October 21, 2010 decision, as such decisions are communicated by way of newsletters sent to stakeholders and posted on the VMC website, included in annual renewal information to stakeholders and made available in the VMC General Order posted on the website.

6. The VMC states that although NHGF's management has changed in recent years, it did not appeal the October 2010 decision to increase processor fees and such an appeal would now be outside the limitation period to do so under the *ATA.* The VMC states that NHGF paid the annual license fees for 2011 and 2012 without disputing them. For these reasons the VMC argues that the subject matter of NHGF's appeal must be limited to the March 15, 2013 decision to refuse a special accommodation to NHGF over the $250.00 licence increase. The VMC therefore argues that an appeal about a $250.00 licence fee increase is trivial.

B. Naturally Homegrown Foods:

7. In its letter to the VMC dated February 1, 2013, NHGF sought an accommodation of the 2013 annual processor license fee on the following grounds:

   (a) The license fee is unreasonable because it is intended to limit producer cost increases to run the VMC's operations at the expense of processors;
   (b) NHGF is a small processor purchasing significantly fewer potatoes than the majority of growers produce on an annual basis;
   (c) Processors' fees should not be more than producers' fees and should be no more than $100.00 to cover administrative costs;
   (d) There is no reason for a license fee because processors receive little benefit from being licensed; and
   (e) License fees are an added administrative burden.

8. In its Notice of Appeal dated April 4, 2013, NHGF reaffirmed these grounds and sought as a remedy to have its 2013 processor license fee set at a reasonable amount that reflects "*the relative benefits and costs*" suggesting a reasonable licence fee of $50 per year.

9. In its written submissions dated May 6, 2013, NHGF argued that the VMC unreasonably refused to consider a graduated processor license fee for 2013 based on its scale and volume of business. NHFG says this appeal is about a 1000% increase in fees over three years and impacts not only NHFG but all licensed customers of BC regulated vegetable growers.

10. NHFG filed a further submission dated May 17, 2013 (outside the submission schedule) and in further response to the VMC. This submission reiterated the earlier submissions and noted that licensing fees charged by the VMC should be contrasted to those charged by the BC Milk Marketing Board ($10), the BC Turkey Marketing Board ($100) and the BC Cranberry Marketing Commission and the BC Egg Marketing Board which do not have such fees.

DECISION:

11. Section 31(1) of the *ATA*") states as follows:

> S. 31(1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
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> (a) the application is not within the jurisdiction of the tribunal;
> (b) the application was not filed within the applicable time limit;
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
> (d) the application was made in bad faith or files for an improper purpose or motive;
> (e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
> (f) there is no reasonable prospect that the application will succeed;
> (g) the substance of the application has been appropriately dealt with in another proceeding.

12. The parties do not dispute that the VMC's decision to implement a graduated increase in licensing fees over 2011, 2012 and 2013 was made on October 21, 2010 and was implemented by way of an amendment to the VMC's General Order on January 28, 2011. That decision also required all processors to pay the same fee (as opposed to one based on processor scale).

13. In its letter of February 1, 2013, NHGF sought an accommodation of the processor license fee for 2013 however the grounds for that request did not relate to any special circumstances regarding NHGF's particular operations and was instead an attack on the appropriateness of the underlying processor license fee policy.

14. Similarly, in its letter of March 15, 2013 the VMC refused to grant NHGF special accommodation of the processor license fee for 2013, however that is not what the appellant takes issue with in this appeal. Instead, NHGF takes issue with the whole policy underlying the processor licensing fee structure. That decision however, was made as a result of the VMC's October 21, 2010 decision and amendment of the General Order on January 28, 2011.

15. BCFIRB has dealt with a similar set of circumstances in previous decisions such as *Saputo Inc v BC Milk Marketing Board* (BCFIRB, May 29, 2008) where the Panel chair stated at p. 3 as follows:

> "in my view it is improper for aggrieved persons to attempt to 'breath life' into an appeal merely by requesting that a board reconsider an issue. If a person has a legitimate complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period.....where the time to appeal is missed, it is incumbent on the Appellant to show special circumstances why the time to file the appeal ought to be extended." [emphasis added]

16. For the same reasons set out in *Saputo*, I find that if NHGF wanted to challenge the VMC's policy regarding license fee structure, it would be necessary to appeal the original decision made October 21, 2010. In order to do so, it must be able to satisfy BCFIRB that special circumstances exist to extend the time for filing such an appeal. However, NHGF has not done this. Instead, it wrote a letter in February 2013 to the VMC asking for a special accommodation and this request was denied. The fact that the VMC did not find any circumstances that would support such an accommodation does not then give NHFG the ability to challenge the validity of the underlying policy which is clearly what it seeks to do in this appeal.

17. On its summary dismissal application, the VMC submits that the appeal falls within the definition of trivial in that it is of "*small worth or importance*." However, I find that a $250.00 total increase on all processors in the industry would not necessarily be characterized as small. Furthermore, even though the monetary amount of an appeal may be small, it may still have other significant implications. Consequently, I find that the VMC's application cannot be granted on this ground.

18. Instead and for the reasons set out above, I find that NHGF's appeal as it is currently framed is "frivolous" in the sense that it has no reasonable prospect of success given that it is an attempt to attack the VMC's underlying policy decision made in 2011 by way of a request for special accommodation in 2013. As such, I would dismiss the appeal on that basis.

19. In summary, on its appeal NHGF states that it is appealing VMC's failure to make special concessions based on its circumstances. However, instead of providing supporting grounds based on the individual circumstances of NHGF as a processor, the substance of the appeal (as set out in the notice of appeal and the submissions received in this process) is an attack on the VMC's policy decision of October 21, 2010 to require all processors, regardless of size, to pay the same license fee increases over 3 years. Accordingly, the appeal is dismissed pursuant to s. 33(1) (c) of the *ATA.*

20. In accordance with s. 57 of the Administrative Tribunals Act, "an application for judicial review of a final decision of the (Provincial board) must be commenced within 60 days of the date the decision is issued."

ORDER

21. The appeal is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

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Carrie H. Manarin, Presiding Member