BRITISH COLUMBIA

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Dear Sirs:

APPEALS BY K & M FARMS AND IRELAND FARMS CONCERNING THE NON-RENEWAL OF GROWER VENDOR QUOTA AND OTHER LICENCES

On July 30, 2004, a Panel of the British Columbia Farm Industry Review Board (the "Provincial board") conducted a hearing under the *Natural Products Marketing (BC) Act* ("*NPMA*") by way of telephone conference call, to consider two applications for stays pending appeal from decisions of the British Columbia Turkey Marketing Board (the "Turkey Board"). One of the stay applications was made by the Appellant K & M Farms ("K & M"). K & M's notice of appeal and request for a stay was filed with the Provincial board in a July 13, 2004 letter signed by one of its proprietors, Mark Robbins, which stated in part:

> K & M Farms also requests that the panel members that hear this appeal not include Ms. Christine Elsaesser. Kathy Robbins, the K in K & M, recently wrote a letter to the Minister of Agriculture, Food and Fisheries regarding Ms. Elsaesser [sic] comments regarding the farm community, consequently, it would be difficult for her to be completely unbiased in this matter.

As set out below, the law states that a party is required to make an allegation of bias before the panel, and that such panel should include the member against whom the allegation was levelled. Accordingly, a Panel was convened consisting of (then) Provincial board Chair Ross Husdon, Vice-Chair Christine Elsaesser and (then) member Richard Bullock.

The bias allegation was the first issue addressed at the hearing. As the bias issue was raised by Mr. Robbins alone, the other Appellant (Dan Ireland) did not participate in the recusal application and the Turkey Board took no position. The Panel then adjourned and deliberated. The Panel returned and dismissed the recusal application, advising the parties that written reasons would follow regarding the Panel's finding that the application was unfounded. These are those reasons.[1]

BACKGROUND

The background that follows requires an appreciation that the Provincial board, which supervises marketing boards and commissions, and hears regulated marketing appeals under the *NPMA*, is also charged with administering another statute, the *Farm Practices Protection (Right to Farm) Act* ("*FPPA*"), under which it hears complaints regarding whether various disturbances are the result of "normal farm practice".

On February 16, 2004, Kathy Robbins wrote to the Minister of Agriculture, Food and Fisheries taking issue with a comment "that has come to my attention" as having been made by Ms. Elsaesser with respect to the *FPPA* at a Strengthening Farming seminar conducted for Ministry employees. Ms. Robbins stated that the content of the comment that had come to her attention was this: "farmers need to recognize that it is a privilege to farm in the ALR". Her letter went on to state:

> A privilege to farm! Is it a privilege to eat? Perhaps Ms. Elseasse [sic] should have added: "Let them eat cake." Is the goal of the ALR to protect farmland for farmers, or for landowners who want huge lots with massive housing in a rural setting?

Ms. Robbins received replies to her letter from the Minister and the then Chair of the Provincial board, Mr. Husdon. In his letter dated April 22, 2004, Mr. Husdon stated in part:

> Ms. Elsaesser's comments regarding "privilege" were made in the context of the *Farm Practices Protection (Right to Farm) Act* (the "*Act*"). To the extent that the *Act* removes the ability of neighbours to obtain a remedy in nuisance from the Supreme Court for those practices of a farmer which fall within "normal farm practices", the protections offered by the *Act* are a privilege.
>
> The thrust of the comments was that if farmers wanted to protect this privilege, it is not enough to adopt the position that farming within the ALR gives them carte blanche to do as they please. Unfortunately, while administering complaints under the *Act*, the Provincial board hears this position all too often. Advocating farm practices which are not supportable is not in the best, long term interest of the industry.

This exchange of letters is the basis of Mr. Robbins' allegation of bias against Ms. Elsaesser. In his oral submissions to the Provincial board with respect to the issue of bias, Mr. Robbins stated that he thought it was important to bring this issue (the exchange of letters) to the Panel's attention. Beyond that, he did not have any further comments.

[1] After dismissing the recusal application, the Panel then moved to consideration of the stay applications. Its decision on those applications was released on August 3, 2004.

DECISION

The Panel advised Mr. Robbins that in hearing his allegation of bias, we would follow the protocol set out in *Eckervogt v. British Columbia*, 2004 BCCA 398 at para. 47, where the British Columbia Court of Appeal stated:

> If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed.

As noted above, the law holds that it is entirely proper for the member against whom the bias allegation is made to hear the application and participate in the decision about recusal: see *Robertson v. Edmonton (City) Police Service*, [2004] A.J. No. 805 (Q.B.) at paras. 118-124 and cases cited therein, including *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, where the Supreme Court of Canada required the recusal application to be made to the judge to whom it was targeted, and where that judge issued the reasons for dismissing the recusal application.

According to long established principles, the test for bias is examined from the perspective of an informed person, with the necessary information, viewing the matter realistically and having thought the matter through: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394. In *Wewaykum Indian Band v. Canada*, 2003 SCC 34, the Court stated that the inquiry is "highly fact-specific" and stated as follows at para. 76:

> [It] is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpre J. added these words to the now classical expression of the reasonable apprehension standard:
>
> > The grounds for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

The British Columbia Court of Appeal has expressed the same principle in *Adams v. British Columbia (Workers Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at para. 13:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

Applying that law to this case, the Panel concludes that the allegation of bias against Ms. Elsaesser is without foundation. Mr. Robbins' sole complaint is that his wife (and co-Appellant) wrote a letter complaining about something she understood Ms. Elsaesser to have said in a seminar at which she was not in attendance. Mr. Robbins' claim of bias seems to relate to

the fact that his wife having complained about Ms. Elsaesser's comments now casts doubt on Ms. Elsaesser's ability to conduct a hearing in a fair and unbiased manner, and to bring an impartial mind to bear on their case. There being no bias in fact, the question is whether the exchange of correspondence nonetheless creates a reasonable apprehension of bias.

If decision-makers could be disqualified merely by the act of a person sending a letter complaining about them, there would be very few people left to make decisions. Such a principle would give traction to the undesirable practice of "judge shopping" and potentially eliminate a board's ability to hear an appeal or complaint if enough complaints were made against board members. This is one reason the law does not allow an individual to dictate who his or her decision-maker shall be, but rather requires bias allegations to be determined based on an objective test. It is also why the law requires bias allegations to be based on concrete evidence rather than suspicion: *Adams, supra*.

The Panel is satisfied that an informed person would require something more than a complaint by a party about a statement made by a panel member in a different context before there could be a finding of a reasonable apprehension of bias. To support an allegation of reasonable apprehension of bias, a party must show something more in the way of an action or comment on the part of that panel member which may lead an informed person to conclude, on a demonstrable foundation, that a perception of bias exists. In this case, the complained of comments attributed to the Vice Chair were not specific to the Appellants nor to any issues arising out of their turkey operations or in fact any issues arising in this appeal. Rather they were statements made about agriculture in general, and arose in the context of making general comments about a different statute from the one at issue on K & M's appeal. Further, the context of the comments that were of concern to Ms. Robbins was explained to her, and there is no suggestion that Ms. Elsaesser or the Board Chair responded to the complaint in an inappropriate fashion.

In *Wewaykum*, the Supreme Court of Canada stated that "the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption" (para. 59). This principle applies to quasi-judicial decision-makers as well. Members of administrative tribunals such as the Provincial board are charged with the serious responsibility of determining people's rights and remedies with respect to disputes within the tribunal's jurisdiction. Part of the territory of being a decision-maker in any context is accepting that, from time to time, people may write complaint letters. Despite this, all panel members have an obligation to discharge their responsibilities in a fair and unbiased manner.

Administrative tribunals take allegations of bias against board members very seriously because they go to the core of the board's ability to function as a quasi-judicial decision-maker. This is why allegations of bias should not be made lightly without proper foundation, as they can potentially and unfairly harm the credibility of both the board and its members. As stated by Southin J.A., for the Court of Appeal, in *Vancouver Stock Exchange v. British Columbia (Securities Commission),* [1990] B.C.J. No. 2049 (C.A.) at p. 4 (Q.L.):

> To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people is an affront of the worst kind, and unless it is well founded upon the evidence it is not something that should ever be said.

This claim is not "well founded on the evidence".

For the reasons given above, the Appellant K & M's bias objection is dismissed.

Dated at Victoria, British Columbia, this 27th day of August 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
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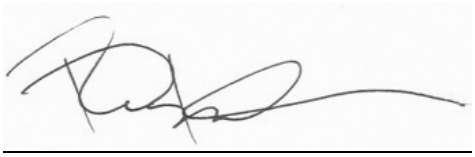

Richard Bullock
Chair
for the Panel