



August 3, 2004

File: 44200-50/TMB 04-09
44200-50/TMB 04-12

DELIVERED BY FAX

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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, the British Columbia Farm Industry Review Board (the “Provincial board”) conducted a hearing by way of telephone conference call, to consider the applications by the Appellants, Mark and Kathy Robbins dba K & M Farms and Dan Ireland dba Ireland Farms, for stays pending their respective appeals from the decisions contained in two June 28, 2004 letters from the British Columbia Turkey Marketing Board (the “Turkey Board”). In these letters, the Turkey Board purports to give written notice of its intention to not renew the Appellants’ licences under the Grower/Vendor Program.

The stay application is made pursuant to section 8(8.2) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (the “Act”):

8(8.2) The Provincial board may order that an order, decision or determination of a marketing board or commission that is under appeal is stayed pending the outcome of the appeal.

In addition to the stay application, Mr. Robbins raised an allegation of bias against the Panel Chair, Christine Elsaesser. As a matter of protocol, Mr. Robbins was required to make his allegation of bias arguments before the Panel including the party against whom the allegation

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was levelled. The Turkey Board took no position with respect to this application. The Panel adjourned the conference call to deliberate. Upon rejoining the conference call, the Panel advised the parties of its decision that the allegation of bias was unfounded and that written reasons would be provided with respect to this issue. Those reasons will be issued under separate cover. The Panel proceeded to hear the stay applications.

BACKGROUND

Mr. Robbins and Mr. Ireland produce small flocks of free range turkeys which they market to consumers, and in Mr. Ireland's case small retailers, under the Turkey Board's Grower/Vendor Program. They have been operating under this Program since 2002. It appears that Mr. Robbins has a flock of approximately 250 turkeys while Mr. Ireland's flock is considerably larger at 800-1000 birds.

Although the facts are unclear, since becoming licenced grower/vendors, there have been a number of issues between the Appellants and the Turkey Board. There was a suggestion that the Appellants have over-placed turkeys and failed to provide the Turkey Board with confirmation of the numbers of turkeys produced and persons to whom the birds were sold. For their part, the Appellants allege that the Turkey Board has created "administrative impediments" which make it difficult for them to operate under their licences. Both Appellants have similar operations for free range chicken and yet have experienced none of the difficulties that they experience with the Turkey Board.

By letters dated June 28, 2004, the Turkey Board advised both Appellants that their licences would not be renewed. In Mr. Ireland's case, four licences (Grower/Vendor, Poulter Broker, Live Haul Trucker and Processor) were not renewed. The Panel did not have a copy of this letter before them but according to Mr. Ireland's written submission the reason given for non-renewal was as follows:

As the board has not received the information requested with regard to poulters placed, it is unable to renew your licence for the 2004/2005 quota year until such information is provided.

ARGUMENTS

The Appellants' argument for a stay is straightforward. They have held licences since 2002. They maintain that they have provided the Turkey Board with all the information that they have requested yet their licences have not been forthcoming. The Appellants argue that they have a reasonable expectation that their licences will be renewed on an ongoing basis as long as they are in compliance with the Turkey Board's General Orders. Where there is an allegation of non-compliance, as here, the Appellants argue that s. 16 of the Turkey Board's General Orders applies and they should be given an opportunity to "show cause" why their licences should not be cancelled. The Appellants maintain that they have been denied this opportunity. In support of this position, Mr. Robbins relies on the Provincial board's recent stay decision in *Pan-O-Ramic Farms (1990) Ltd. v. British Columbia Milk Marketing Board*, March 31, 2004.

For its part, the Turkey Board concedes that no “show cause” hearing was held. Rather, it argues that s. 16 of the General Orders is not applicable as we are not here dealing with the cancellation of a licence but rather non-renewal. As the Appellants have failed to provide the Turkey Board with the information it has requested, their licences have not been renewed. Further, the Turkey Board argues that when one looks at the actual placements on the Appellants’ farms, they have already placed more poults that would be required to meet their Grower/Vendor licence. In such circumstances, it is not appropriate that the Appellants receive a further licence to produce more birds.

The Panel asked the parties to address the three part test set out in *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1S.C.R. 311 and its predecessor, *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110 to determine whether a stay was appropriate in the circumstances:

- 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. At the outset of the hearing, the Panel advised the parties that as the issue on appeal relates to the ability of the Appellants to operate as Grower/Vendors and as such their ability to operate their businesses, we were prepared to accept that the appeals raised serious issues to be tried. The remaining issues to be considered are whether the Appellants will suffer irreparable harm if a stay is not granted and which party would suffer greater harm if the stay were not granted.

Irreparable Harm. In considering the second branch of the *RJR-MacDonald* test, the Panel must consider whether the Appellants have satisfied the burden of proving that they would suffer “irreparable harm” if the Turkey Board’s June 28, 2004 decisions are not stayed pending appeal.

The Appellants argue that the failure to issue their licences will result in irreparable harm to their businesses. As small producers who market directly to customers and small retailers, a failure to meet customer demands could result in customers and contracts being lost to unregulated producers in the short and long term. It is the unregulated sector, not conventional turkey production, which is the Appellants’ competition. The Appellants argue that given their whole business is geared to making all their income on two days a year, Thanksgiving and Christmas, they do not have the same flexibility as conventional producers. They cannot slide production off into another cycle to make up for losses incurred in an earlier cycle. Without their licences, they will not meet their Thanksgiving and Christmas markets and as a result will suffer considerable financial hardship.

As for timing, the Appellants argue that their hatcheries must be notified immediately to set eggs so that poults can be placed by the end of August. Failure to do so will place the Appellants in a position where they could not access poults from legal sources. In other years, there are often surplus poults and this issue would not arise. However, due to Avian Influenza, hatcheries do not have any excess production. The Appellants argue that ordering a stay in these

circumstances is not precedent setting nor is it prejudicial to the Turkey Board as the amount of production involved represents less than 1/100 of 1% of the BC turkey industry.

The Turkey Board argues that it will suffer irreparable harm if the stay is granted and its orders are not complied with. If producers receive licences to produce in circumstances where they have already placed poults in excess of their licences, there is a real risk of over production to the province and an undermining of Turkey Board authority. If BC over produces its national allocation, all producers will be assessed a penalty.

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 a stay, pending a decision on the merits.

The Appellants argue that as the non-renewal of their licences has the potential to ruin them financially, the balance of convenience favours them. The quantities of production are small and will not impact on the ability of the Turkey Board to regulate its industry or create an over production situation.

The Turkey Board argues that as the regulator of the turkey industry, the balance of convenience favours them. Their orders must be complied with in order to ensure industry stability and to order a stay in these circumstances sets an unfortunate precedent. The Turkey Board also suggests that a stay is not necessary. Contrary to the Appellants' submission that poults must be ordered immediately for placement at the end of August, the Turkey Board suggests that the date for placement could be delayed to as late as September 22, 2004 and the Appellants could still meet market demands. Accordingly, if the appeal can be heard in August, there is no need for a stay.

The Appellants argue that this position demonstrates how little the Turkey Board understands their production methods. Mortalities are considerably higher for free range birds as they are raised outside and as such are susceptible to predation. Weight gain is slower and birds take longer to reach maturity. The timing for the conventional turkey industry is simply not applicable to specialty production. They reiterate their position that poults must be ordered from the hatcheries by the end of July in order to have placement by the end of August to meet market demands.

DECISION

In our view, the case for a stay has been made out. On the issue of irreparable harm, the Appellants have satisfied the Panel that should a stay not be granted and should the Appellants be successful on appeal, there is uncertainty whether poults can be acquired so that the Appellants can meet their Thanksgiving and Christmas markets. The Appellants would suffer considerable financial harm and it would be difficult for them to make up this production. In light of the foregoing and given that the Turkey Board has advised:

- a) while it believes that poults would be available, it cannot guarantee that it could access poults for the Appellants' placement deadlines; and

- b) that if the Appellants are unsuccessful on their appeal, any excess poultts could be placed elsewhere,

it is our view that the balance of convenience favours granting the stay pending appeal.

ORDER

The applications for stays of the June 28, 2004 decisions giving notice of non-renewal are granted. Accordingly, the Appellants' licences which were in effect in the 2003 production year will continue as if renewed.

This decision, however, is without prejudice to the Turkey Board's ability to enforce its General Orders with respect to compliance issues and suspension and cancellation of licences should such circumstances arise.

DIRECTIONS

As a result of this application, a number of issues have surfaced which must be dealt with on appeal. The first issue to be resolved is what process must be followed by a commodity board when it decides not to renew a licence, given that producers have an expectation of continuing to operate year after year as long as they are in compliance with board orders and the program is continued?

Was the process followed by the Turkey Board in these instances satisfactory in light of the allegations of non-compliance, including but not limited to the failure to supply certain information and the alleged over production?

Was there a requirement to give the Appellants the benefit of the show cause provision found at s. 16 of the General Orders even though these appeals deal with non-renewal and not cancellation or suspension of a licence?

The Panel heard reference to the fact that the two Appellants are Ministry of Agriculture, Food and Fisheries employees responsible for the development and promotion of small lot agriculture. There appears to be a suggestion that the Appellants may have placed themselves in a conflict of interest position. What role, if any, can the allegation of conflict of interest play in the Turkey Board's determination of the issue of renewal?

The Panel heard reference to an allegation that one of the Appellants placed turkey poultts during the recent depopulation order issued by the Canadian Food Inspection Agency. What role, if any, can this allegation play in the Turkey Board's determination of the issue of renewal?

The Panel has set out the foregoing in order that the parties can consider their respective positions and be prepared to address these issues at the hearing of this appeal. The parties are directed to confirm their availability on August 16 and 17, 2004 with the Provincial board office. At this point a one-day hearing for each appeal would appear adequate.

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Dated at Victoria, British Columbia, this 3rd day of August 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair