May 27, 2005 File: 44200-50/VMC 05-01

DELIVERED BY FAX

MacKenzie Fujisawa
Barristers & Solicitors
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6
Attention: Christopher Harvey, Q.C.

Blake, Cassels & Graydon
Barristers & Solicitors
Suite 2600, Three Bentall Centre
PO Box 49314
595 Burrard Street
Vancouver, BC V7X 1L3
Attention: Maria Morellato

Taylor Jordan Chafetz
Barristers & Solicitors
Suite 1010 – 777 Hornby Street
Vancouver, BC V6Z 1S4
Attention: James P. Taylor, Q.C.

Dear Sirs/Mesdames:

APPEAL BY CALAIS FARMS LTD. FROM A MARCH 31, 2005 DECISION OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION CONCERNING THE TRANSFER OF PRODUCT

On April 27, 2005, the British Columbia Farm Industry Review Board (the "Provincial board") received an appeal by Calais Farms Ltd. ("Calais") from a decision of the British Columbia Vegetable Commission (the "Commission") concerning transfer of product between agencies. In its Notice of Appeal Calais also seeks a stay of the Commission's decision.

In support of its application for a stay, Calais prepared written submissions dated April 28, 2005. The Commission and the Intervenor, BC Hot House Ltd. ("BC Hot House") in their submissions of May 4, 2005 opposed the application for a stay. Calais replied to these submissions on May 5, 2005. The Panel reviewed the submissions of the parties and determined that an oral hearing was unnecessary. This is our decision on the stay application.

BACKGROUND

The vegetable greenhouse industry in BC operates under a quota system whereby producers apply for square meters of production quota to produce certain vegetables. The Commission

goes through a planning process for each year to determine whether any new production quota will be issued and how that production will be allocated between agencies.

In this case, Atwal Farms ("Atwal") was allocated an additional 40,000 square meters of pepper quota, which product was to be shipped through BC Hot House. It appears that subsequent to this allocation, Atwal entered into a business relationship with the Appellant, Calais Farms Ltd. ("Calais") whereby Calais undertook to grow some of the additional production.

An issue has arisen between the parties as to the intent of Calais. The Commission maintains that it was its understanding up until late November or early December 2004 that Calais would ship its product to BC Hot House in 2005. In December 2004, the Commission wrote to all greenhouse producers confirming their particular quota allocation and the agency through which their product was to be marketed. Around this time, Calais advised the Commission that it was considering changing agencies. This request was formalised by an application dated February 11, 2005 where Calais sought to market its product through Global Greenhouse Produce Inc. ("Global") in 2005, with a packing arrangement with Merom Farms Ltd. ("Merom").

On March 31, 2005, the Commission issued its decision with respect to the Calais application. It directed Calais to continue to market its product through BC Hot House for the 2005 season and directed Global not to market any of Calais' regulated product. Calais appealed this decision and by way of its stay application seeks to be permitted to market its regulated product through Global.

DECISION

Before embarking on the analysis of whether a stay is appropriate in these circumstances, the Panel observes that there is significant dispute between the parties as to the facts and the appropriate interpretation and conclusions which can be drawn from those facts. In such circumstances, it is difficult to make any preliminary decisions in the absence of a full hearing. Further, many of the arguments and issues raised by the parties go to the merits of the appeal and given the summary nature of this application, it is not appropriate for the Panel to deal with them in this context. These issues will no doubt be canvassed fully at the hearing of this appeal on its merits.

Section 8.1(1) of the *Natural Products Marketing (BC) Act*, c. 330 gives the Provincial board the authority conferred under s. 25 of the *Administrative Tribunals Act* ("*ATA*") to stay an order, decision, or determination of a marketing board. Section 25 of the *ATA* states that "[t]he commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise." Section 15 of the *ATA* confers on the Board authority to grant interim relief. 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 (A.G.)* [1994] 1S.C.R. 311 and its predecessor, *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110:

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: There is little argument raised on this first branch of the test and as such the Panel accepts for the purposes of this application that this appeal raises a serious issue to be tried. The focus of argument is on the second and third branch of the test.

Irreparable Harm: In considering this second branch of the *RJR-MacDonald* test, the Panel must consider whether Calais has satisfied the burden of proving that it would suffer "irreparable harm" if the Commission's March 31, 2005 decision is not stayed pending appeal. We have reviewed the Appellant's submissions with respect to this branch of the test and do not find it persuasive. First, we do not agree that we should under this branch consider the harm beyond that which might be suffered by Calais as Appellant. Calais is a producer of green house vegetables. As the matter currently stands, Calais must ship its regulated product to BC Hot House as opposed to the agency of its choice, Global/Merom. There is no suggestion that Calais will suffer irreparable harm under this arrangement; Calais will be paid for its regulated product. Global and Merom are not Appellants. Second, we are not satisfied that a proper evidentiary foundation has been given for the $400,000 Calais' counsel asserts it would lose if it is required to market through BC Hot House pending the hearing of the appeal. Finally, it is difficult to see how, even if lost profit could be established, this amounts to irreparable harm under the test in *Metropolitan Stores*.

As Calais has not demonstrated irreparable harm, it is unnecessary for the Panel to go further and consider the balance of convenience; however we do so in order to give the parties the benefit of our complete reasons.

Balance of Convenience: In this case, the balance of convenience rests with the Commission as regulator of the greenhouse industry. The Commission's role is to promote orderly marketing. The March 31, 2005 decision is clearly an attempt by the Commission to promote order and stability in the industry through planning. The Commission has held a hearing and delivered considered reasons with respect to this issue. In the absence of compelling reasons, it is inappropriate for this Panel to interfere with the Commission's decision by issuing a stay.

Marketing boards have first instance authority to regulate their stakeholders and make decisions in the public interest. In *Metropolitan Stores, supra,* at p. 129, it is noted that in the usual course, the test of irreparable harm to the public interest will "almost 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." In our view, that test is met here.

Accordingly, the application for a stay is dismissed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

Christine J. Elsaesser
Vice Chair

pc: Murray Driediger, General Manager
British Columbia Vegetable Marketing Commission