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

Hunter Voith
Litigation Counsel
1200 – 900 West Hastings Street
Vancouver, BC V6C 1E5
Attention: John J.L. Hunter, QC
Sarah P. Pike

Dear Sirs/Mesdames:

**AN APPEAL BY THE BC CHICKEN GROWERS ASSOCIATION FROM A
MAY 2, 2003 DECISION OF THE BC CHICKEN MARKETING BOARD REMOVING
THE OVER-MARKETING LEVY FOR PERIOD A-53**

On May 16, 2003, the British Columbia Marketing Board (the “BCMB”) conducted a telephone conference call to hear a preliminary application by the British Columbia Chicken Growers Association (the “Growers Association”) for a stay pending appeal of a May 2, 2003 decision of the British Columbia Chicken Marketing Board (the “Chicken Board”) removing the over-marketing levy for period A-53.

BACKGROUND

The chicken industry in Canada is supply managed on a national allocation system. The federal-provincial agreement dictates a “bottom up approach” whereby processors’ market requirements form the basis for each province’s allocation. Each processor advises the Chicken Board of its market requirements for domestic and export production, on a period by period basis. The Chicken Board submits these numbers to the Chicken Farmers of Canada (“CFC”) following which BC receives its provincial allocation. Over the last several periods, BC has received a lower allocation than what the processors sought in the first instance.

Since the enactment of new policy rules in August 2000, the Chicken Board has enforced period by period compliance with the quota amounts allocated to individual growers. Growers are expected to grow their quota in the period allotted to within identified over and under production tolerances. Growers who over produce by more than the set 5% tolerance are subject to a

**British Columbia
Marketing Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria, BC V8W 9B5
Telephone: (250) 356-8945
Facsimile: (250) 356-5131

Location:
3rd Floor
1007 Fort Street
Victoria

monetary penalty (an “over-marketing levy”). In addition, growers who over produce in excess of the set tolerance have their production correspondingly reduced six periods later.

In addition to the provincial penalties, the CFC requires BC, as a whole, to produce its allocation. Production in excess of 102% of the allocation is subject to a monetary penalty payable by the Chicken Board to the CFC.

The Chicken Board has observed that an unintended result of its over-marketing levy is that some growers have adopted a conservative approach to ordering chicks. There has been a tendency for growers to under-estimate, as opposed to over-estimate, their production. According to the Chicken Board, this trend has resulted in BC under producing its allocation over several cycles. Given that the summer is historically a high consumption period for chicken, the processors have expressed concerns to the Chicken Board about the impact of under production at a time of peak demand. In response to these concerns, the Chicken Board conducted a special meeting by conference call on May 2, 2003. In order to encourage full production of the A-53 allocation, the Chicken Board decided to remove the over-marketing levy for period A-53 only. The motion states as follows:

Given that BC processors are expressing concern that the level of allocation for A-53 is inadequate to meet all of their projected requirements, particularly in light of production in recent periods that has on an average been below CFC allocation, it is ordered that, in order to assist in meeting BC’s full allocation, the Board lift the monetary over-marketing levy for A-53 only. Over-marketing levies will apply in all periods in advance of A-53 and in periods subsequent to A-53.

It is further ordered that the Board immediately send a letter to the growers informing them of the lifting of the monetary over-marketing levy for A-53 and urging communication with their hatcheries/processors on ways to best meet their allocations while remaining within BC’s 5% over-production tolerance. Growers are also to be reminded that the CFC 2% over-marketing tolerance, based on an average of A-52 and A-53, remains in place.

On May 14, 2003, the Growers Association appealed the above decisions of the Chicken Board and “as this decision has serious ramifications for chicken producers and the industry”, also requested a stay.

DECISION

In coming to this decision, the Panel has had the benefit of hearing from chicken growers Ralph Leyenhorst and Rick Thiessen, as well as Chicken Board General Manager, Jim Beattie. In addition, we heard the submissions of counsel for the Growers Association and the Chicken Board. The Panel has considered these submissions in coming to our decision. Time constraints do not allow us to review the arguments in any great detail.

The *Natural Products Marketing (BC) Act*, c. 330 gives the BCMB the authority 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 (A.G.)* [1994] 1 S.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. The Growers Association argues that this appeal raises a serious issue to be tried. They argue that the order appealed from is fundamentally flawed in that it circumvents supply management and encourages a “free for all” which will lead to over production. The Chicken Board’s order in effect treats production tolerances as targets, contrary to the disciplined approach of supply management. The Chicken Board does not dispute that this appeal raises a serious issue preferring to focus its argument on the second branch of the test.

The Panel agrees that this appeal, on its face, raises serious policy issues relating to supply management. The real issue on this stay application is whether the Growers Association (and its members) will suffer irreparable harm if a stay of the May 2, 2003 orders is not granted.

Irreparable Harm. In considering this second branch of the *RJR-MacDonald* test, the Panel must consider whether the Growers Association has satisfied the burden of proving that its members would suffer “irreparable harm” if the Chicken Board’s May 2, 2003 decision is not stayed pending appeal.

The Growers Association argues that, since up to 45% of the eggs are already set for period A-53 (and thus any over production crystallised), if a stay is not granted now, an appeal will be too late to provide growers with any remedy. Over production in excess of 102% will result in a monetary penalty of at least \$0.44/kg levied by the CFC. All growers will be responsible for this penalty and they will be left with no recourse. While there was a suggestion by the Chair of the Chicken Board that the processors have agreed to pay half of any penalty, there is no legal obligation for processors to pay anything.

In response, the Chicken Board argues that there is no irreparable harm to the Growers Association if the May 2, 2003 order is not stayed. First of all, the order *removes* potential monetary penalties for A-53, a remedy sought by many growers in recent appeals. This does not create irreparable harm. While the Chicken Board recognises that there may be some risk that growers will over produce beyond 102% (combined for A-52 and A-53) and there could be a CFC penalty, this is pure speculation at this point. However, the Growers Association is not denied a remedy should the BCMB disagree with this order on appeal. The Chicken Board argues that, if a stay is granted now, its order will be negated and the status quo (the tendency to under produce) would be restored. The Chicken Board’s desire for 100% production for the

summer months would effectively be thwarted and there would be no available remedy on appeal. This, argues the Chicken Board, would amount to irreparable harm.

The Panel has considered the submissions of the parties. Based on the evidence heard, we are not convinced that the Growers Association will suffer irreparable harm if this order is not stayed. First of all, every grower is obligated to grow his allotted quota. The order does not remove this obligation. Nor does the order impact a grower's ability to produce his allotment. Second, the threat of over production resulting in a CFC monetary penalty is purely speculative at this point. Growers can control over production, and the Chicken Board's order encourages them to do so. However, even if BC is subject to a monetary penalty for A-53, the Chicken Board has the ability to ensure that the penalty is not paid either directly or indirectly from compliant growers. The Chicken Board is aware of this and apparently has an agreement with the processors to cover some portion of any potential penalty assessed against BC for period A-53. It is also common sense that the burden of any monetary penalty should be covered by those individual growers who willingly and indiscriminately chose to over produce.

If on the hearing of this appeal on its merits, the Growers Association's arguments are persuasive and the order is set aside, there are meaningful remedies open to the BCMB. One potential starting place would be to look at the reason behind any over production. Discipline remains in the sense that each grower who over produces runs the risk of consequences should the order be overturned. Given that one remedy open to the BCMB would be to re-instate all or part of the over-marketing levies otherwise in place for A-53, growers ought to be alert to any possibility that their production might greatly exceed the Chicken Board's goal of 100%.

As the Growers Association 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. 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 Growers Association argues that the balance of convenience favours them. With the provincial over-marketing levy being lifted, growers remain exposed to significant monetary penalties if BC is over produced beyond 102%. If a stay is granted, this risk is alleviated. Further the order is flawed; it undermines the national supply management system and sends the wrong message to our provincial counterparts. It was put in place in response to processors' demands and without adequate consultation with growers. There are other less disruptive ways to increase production. If processors would communicate the exact kill date to their growers for a period, a grower could more accurately plan his production. The threat of over production resulting from holding out production several more days than planned would thereby be alleviated. The Growers Association also disputes the very premise behind this order being enacted – a demonstrated history of under production. The Chicken Board's own published

numbers show that BC was marginally *over produced* over the past nine cycles. The Chicken Board however, maintains that CFC's official, audited numbers are the basis for its conclusion that BC has been under produced for several cycles.

These issues 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 the context of the stay application. These issues will no doubt be canvassed fully at the hearing of this appeal on its merits.

The Chicken Board argues that the balance of convenience favours it. If the stay is granted, it will be left without a remedy on appeal. Returning to the status quo will encourage the tendency to under produce and BC will enter the high consumption summer months without the benefit of 100% production.

The Panel has decided that the balance of convenience rests with the Chicken Board. The Chicken Board is attempting to regulate the industry in a new and creative way. The Panel is not convinced that a stay is warranted. If the Growers Association is successful on appeal, there are meaningful remedies open to the BCMB. As we 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". Our stay decision in the *Hallmark* case also quoted from *Metropolitan Stores, supra*, at p. 129, which noted that other than in exceptional cases, irreparable harm to the public interest 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". In our view the test is met here.

Accordingly, the application for a stay is dismissed. The Panel does however recognise the serious nature of these issues and is prepared to make itself available for an expeditious hearing of this appeal.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser
Panel Chair

cc: Jim Beattie, General Manager
BC Chicken Marketing Board