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DELIVERED BY FAX

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Dear Sirs/Mesdames:

**AN APPEAL BY LILLIAN FEHR AND BILL FRIESEN FROM THE AUGUST 15, 2000
REGULATIONS OF THE BC CHICKEN MARKETING BOARD**

**AN APPEAL BY LILLIAN FEHR AND BILL FRIESEN FROM A NOVEMBER 15, 2002
DECISION OF THE BC CHICKEN MARKETING BOARD**

On April 15, 2003, the British Columbia Marketing Board (the "BCMB") conducted a telephone conference call to hear a preliminary application by the British Columbia Chicken Marketing Board (the "Chicken Board") to dismiss the above captioned appeals of Lillian Fehr and Wilhelm Friesen (the "Appellants") as out-of-time or alternatively, to restrict the grounds of appeal.

BACKGROUND

The Appellants, Mr. Friesen and Ms. Fehr have been specialty chicken producers in Surrey since 1993. They produce silkies, a black skinned chicken sold primarily as a soup ingredient and Taiwanese chicken, a meat bird for consumption in the Asian market.

Until August 2000, when the Chicken Board passed its "Regulations", which were in fact new policy rules repealing its General Orders (1987) as amended and all previous policies and guidelines enacted thereto, specialty chicken was not regulated. Ms. Fehr became aware of the

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new policy rules on September 29, 2000 and on October 18, 2000, she filed her initial appeal and took issue with the following sections:

- a) Part 9, ss. 34, 36, 37 (Transporting of Chicken)
- b) Part 11, s. 45 (Setting of Price)
- c) Part 27 (Barn Space Requirements)
- d) Part 43 (New Entrant, Niche Market and Specialty Program)
- e) Part 45 (Seizure)
- f) Schedules 2, 3, 5, 6, 12, 14 (Transportation, Weighing, Pricing, Levies, Barn Space Requirements, Permit Issuance Guidelines)

Ms. Fehr indicated in her notice of appeal that she was appealing the new policy rules as "they neither address my niche poultry business of many years nor allow me to continue in business if (sic) am to comply". No issue is taken with this delay in filing the appeal of the new policy rules.

On December 14, 2000, the Appellants and the Chicken Board participated in a pre-hearing conference at which time the Appellants agreed to adjourn their appeal and attempt to resolve their issues directly with the Chicken Board. During 2001 and 2002, the Appellants continued to discuss their issues with the Chicken Board. Although some issues were resolved, others remained outstanding. On April 22, 2002, Mr. Friesen wrote to Chicken Board General Manager, Jim Beattie, setting out his remaining issues. These included:

- 1) Past Production is recognized only in terms of ability to keep raising poultry at the same rate...

The 'grand-fathered' poultry grower should be provided the industry increases as for standard quota holders.

The 'grand-fathered' poultry grower should be able to purchase additional quota without losing (sic) existing permit levels. This does not create an increase in the market, but simply penalizes the grower.

- 2) Right to export live product.

W. Friesen has again, worked over the years to establish a market for live poultry in the United States. All of the US criteria are met and this in no way impacts upon the Canadian market. W. Friesen should be able to continue this export without restriction from the BC Chicken Marketing Board.

In summary, W. Friesen is being governed by the rules for new permit holders with the only recognition for the previous years of production being the right to continue at the same rate.

In the fall of 2002, counsel for the Appellants contacted the Chicken Board seeking information with respect to the Appellants' permits. A further pre-hearing conference was held on December 5, 2002 resulting in counsel for the Appellants preparing further particulars of the issues and grounds for the appeals.

BCMB Dispute Resolution Manager, Jim Collins, summarised the points discussed in the pre-hearing conference call as follows:

1. The Appellants agreed to provide input on specialty production issues into the Chicken Board's review of the August 15, 2000 regulations. Given that the November 30 deadline has passed, Jim Beattie will facilitate the acceptance of a late submission.
2. It was agreed that the export issue, as identified in Mr. Beattie's November 5 (sic) letter and during the conference, is to be discussed separately between the parties. To meet the 30-day filing deadline, the Appellants may file an appeal of the November 15 letter pending the outcome of their discussions with the Chicken Board.
3. It was agreed that Counsel for the Appellants will, at his earliest convenience, provide further particulars as to the issues and grounds for the 2000 appeal. Once in receipt of those particulars, Counsel for the Chicken Board will provide a response submission raising, if and as she deems necessary, any out-of-time issue and/or concerns regarding the scope of the issues on appeal.
4. It was agreed that another pre-hearing conference will be conducted early in the new year, once the outcome of #3 is known. Depending on what happens with respect to #2, the export issue (appeal) may also be addressed during that conference.

A pre-hearing conference was also conducted on December 14, 2000. Given some of the questions raised during yesterday's call about the status of the 2000 appeal, I am attaching my note to file from that conference for your information. There has been other correspondence to and from this office regarding the appeal; however both parties should already have that.

The November 15, 2002 letter referred to in item 2 above was a letter from the Chicken Board General Manager addressed to Permit Holders, Quota Holders and Processors. Ms. Fehr and Mr. Friesen, as permit holders, received a copy of this letter. The letter made several points:

- permit production, like quota, must be planned and accounted for each period
- permit holders are to grow their full permit every period
- without permission of the Chicken Board, annualised permit production is unacceptable
- over and under production penalties apply to permit holders
- permits are for the production of domestic product only. This does not mean that a processor cannot export product, however growers are generally restricted to raising the level of permit they possess.
- Growers raise export only when the Board allocates export production to a grower following a request by a federally inspected and certified primary processor.
- Only Farm Fed and Wingtat may request export production, as they are the only federally certified processing plants.
- A grower may export live or eviscerated birds only after obtaining the proper licences from the Chicken Farmers of Canada. This product must come from growers' existing permit amount and must be grown on their registered premises.

By a note dated December 11, 2002, Mr. Friesen filed an appeal on behalf of himself and Ms. Fehr of the "Regulations expressed by Jim Beattie of the B.C.C.M.B. in the letter date (sic) November 15-02".

By way of a letter dated January 30, 2003, the BCMB received further particulars of the issues and grounds for the appeals prepared by counsel for the Appellants. In that document, the Appellants frame their appeal as:

All aspects of the British Columbia Chicken Marketing Board Regulations made on August 15, 2000, as amended (the "Regulations") should not be applied to Wilhelm Friesen and Lillian Fehr's production, marketing and export of chicken without consideration for their "grandfathered" status as producers, marketers and exporters prior to the inception of the Regulations.

Counsel for the Appellants also identified the following reasons as to why the permit granted by the Chicken Board to the Appellants was unfair:

- the requirement that it be held for 12 years before the Appellants can apply for an allotment of quota equal to the permit;
- the lack of an export aspect;
- the non-transferability, even to a company owned solely by the Appellants;
- its termination upon the death of the survivor of the Appellants;
- the denial of a pro rata share of growth;
- the restriction in the acquisition of more than 10% of the permit in quota without a corresponding loss of permit;
- the requirement that birds grown under permit not be grown on the same farm as quota birds.

By letter dated February 11, 2003, the Chicken Board took issue with the Appellants' further particulars of the issues under appeal arguing that a general appeal of all the August 15, 2000 policy rules was out-of-time. The delay which the Chicken Board takes issue with is the eighteen months from the initial pre-hearing conference until the fall of 2002 when the Appellants attempted to re-instate their appeal. Further, the Chicken Board suggested that the proper course, after the passage of so much time, was for the Appellants to participate in the industry-wide review of the policy rules then underway. It was likely that this review would alter the August 15, 2000 policy rules with respect to the very issues of concern to the Appellants. If the BCMB dismissed this appeal and the Appellants remained dissatisfied, they would be able to appeal the Chicken Board's decision to implement revised policy rules.

If the appeals are not dismissed as being out-of-time, the Chicken Board argues in the alternative, that the appeals should be severely restricted. As set out above, Ms. Fehr's initial appeal was quite broad. After a pre-hearing conference and much discussion between the parties, the issues were narrowed. Mr. Friesen's April 22, 2002 letter to Mr. Beattie indicates that the only issues still outstanding were that the Appellants should receive pro rata increases in their permit similar to quota holders: they should be able to purchase quota without losing permit and should be able to export product to the US without restriction.

The Chicken Board suggests that the appeal should be limited to the above grounds with one exception. The third issue, which Mr. Friesen again appealed on December 11, 2002 as a result

of Mr. Beattie's November 15 letter to industry, should be dismissed as there is no decision of the Chicken Board reflected in Mr. Beattie's letter. As the Appellants did not raise this as an issue in a timely manner after the August 15, 2000 enactment of the new policy rules, this aspect of the appeal should be dismissed.

The Appellants argue that these appeals are not out of time. Initially, as lay people, they made the Chicken Board aware of their concerns regarding the new policy rules and worked with the Chicken Board to try and resolve their issues. Unfortunately, full resolution has not been possible. Further, the Chicken Board and the Appellants mutually agreed to delay pursuing this appeal in the summer of 2002 when, as a result of a decision of the Supreme Court of British Columbia, there was some question regarding the BCMB's scope of review of commodity board decisions.

With the assistance of counsel, the Appellants have now clarified the issues under appeal. The issues with respect to transportation, pricing, seizure, weighing and levies have been resolved.¹ The remaining issue is whether the Appellants are entitled to a fair allocation of production rights, which if granted may require amendments to the August 15, 2000 policy rules or an exemption for established specialty producers such as the Appellants.

The further issue relating to export rights arises out of Mr. Beattie's November 15, 2002 letter. Strictly speaking, the Appellants have always been concerned about the impact of Part 43 of the new policy rules on their ability to export production to the United States. As such, the Appellants take the position that this second appeal is not really necessary. However, as Mr. Beattie's letter sets out an interpretation of the policy rules which is inconsistent with assurances made to the Appellants by the Chicken Board, out of an abundance of caution they appealed the letter.

DECISION

Having heard the arguments of counsel, the BCMB is not satisfied that this appeal should be considered out-of-time. The Appellants, initially unrepresented, notified the Chicken Board of their specific issues with the new policy rules. Their initial grounds were very broad but through negotiation and further discussion these issues have been significantly narrowed. These efforts should be rewarded and not be used to prejudice the Appellants' right of appeal.

Further, the Appellants do not now seek to go back and open up issues resolved to their satisfaction. What they seek to appeal is the same fundamental issue which led them to appeal in the first place; they do not feel that the permit program, as designed, adequately reflects their position as long time specialty chicken growers with established domestic and export markets. The fact that the Appellants' counsel now frames this issue a bit differently and seeks, by way of remedy, an exemption does not make this a different appeal.

Accordingly, the Panel finds that the initial appeal was filed within time.

¹ With respect to the issue of barn space, although there was a resolution originally reached, the Appellants have filed an appeal of the transitional plan put in place by the Chicken Board to cover the Appellants operation. This appeal is to be dealt with before June 30, 2003.

With respect to the second appeal filed from Mr. Beattie's November 15, 2002 letter, the Panel agrees with the Chicken Board that the letter in and of itself does not contain a decision of the Chicken Board but rather interprets the earlier Chicken Board decisions which resulted in the new policy rules. However, the Panel also agrees with the Appellants that this appeal was not, strictly speaking, necessary. We have already found that the Appellants took issue with Part 43 (New Entrant, Niche Market and Specialty Program) of the new policy rules in a timely manner. The impact of this program on the Appellants' export business was contemplated and put in issue from the outset. This issue was still live in April 2002 when the Appellants wrote to Mr. Beattie; it remains a concern today.

Accordingly, the Respondent's application to dismiss these appeals as being out-of-time is dismissed. The first appeal will proceed to hearing on the following issues:

- a) Did the Chicken Board err in passing policy rules in August 2000 which prohibited the increase of permits through pro-rata industry growth?
- b) Did the Chicken Board err in passing policy rules in August 2000 which prohibited a permit holder's purchase of quota beyond industry growth without a corresponding reduction in the permit level?
- c) Did the Chicken Board err in passing policy rules in August 2000 which limited or prohibited export of permit production?
- d) If the Chicken Board did err on any of the grounds as set out in a) to c) above, what is the appropriate remedy?

Given our decision that the second appeal was not necessary as the first appeal squarely raises the issue of the impact of the August 15 policy rules on the Appellants' export business, the second appeal is dismissed without prejudice to the Appellants to further clarify this issue in the first appeal.

The Panel has attempted to clarify the issues on appeal. However, the parties are directed to participate in a further pre-hearing conference before this matter is set down for hearing. Any issues with respect to the specific wording of the above grounds can be dealt with then. Finally, as mentioned above, the Appellants have a third appeal relating to barn space requirements. The Chicken Board has requested that this appeal be set prior to June 30, 2003. Given the potential for overlap, the Panel directs that the first appeal and third appeal be heard together prior to June 30, 2003.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser
Panel Chair

cc: Jim Beattie
BC Chicken Marketing Board