



March 18, 2008

File: 44200-50/CMB #07-19

DELIVERED BY E-MAIL

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Ken Falk
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4540 Simmons Rd
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Dear Sirs:

RE: FRASER VALLEY DUCK AND GOOSE LTD. V BRITISH COLUMBIA CHICKEN MARKETING BOARD APPEAL # 07-19, DOCUMENT DISCLOSURE DECISION

On March 5, 2008, the Appellant applied to the British Columbia Farm Industry Review Board (“BCFIRB”) for production of certain documents from the British Columbia Chicken Marketing Board (“Chicken Board”). In particular, the Appellant sought disclosure of the following documents:

- a Chicken Board briefing note dated August 21, 2007 referred to in minutes dated August 29, 2007
- Item 1 - the email from R. Kilmury dated July 22 and an email from D. Janzen referred to in the July 25, 2007 minutes and a revised briefing note marked “FINAL”
- Item 2 - any other internal emails, memos, or other documents that should be disclosed under the requirements of the *Natural Products Marketing (BC) Act* (“NPMA”)
- Item 3 - Legal opinion noted on the November 2, 2007 minutes
- Item 4 - Recent Board meeting minutes and SMAC minutes with respect to the allocation and SMAC representation issues
- Item 5 - Any / all information with respect to deals or arrangements made by the Board with chicken processors previous to this appeal
- Item 6 - Documents addressing the addition (history, rationale, etc.) of Parts 8.8, 8.9, 8.10 to the General Orders – when they were added, and the impacts to existing processors as a result.

A pre-hearing conference was conducted on March 11, 2008 to deal with the document disclosure issue. As a result of that conference, the following items were agreed to:

British Columbia
Farm Industry Review 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 BC V8V 3K5
Email: firb@gov.bc.ca
Website: www.firb.gov.bc.ca

Disclosure of:

- Item 4 - recent Board meeting minutes and SMAC minutes re: allocation and SMAC representation issues
- Item 6 - background information re: Parts 8.8, 8.9, 8.10 of the General Orders.

Non-disclosure of:

- Item 3 – legal opinion due to solicitor client privilege.

The Chicken Board objected to the disclosure of the emails in Item 1 and the documents in Item 2 on the basis that these are internal documents relating to the Chicken Board's deliberative process and as such subject to deliberative privilege. At the conclusion of the conference call, counsel for the Chicken Board agreed to provide written submissions on the deliberative privilege issue by March 11, 2008. Mr. Falk provided his written response on March 14, 2008. These submissions have been carefully reviewed, although it is not the Panel's intention to refer to the submissions in great detail.

As an aside, it is unclear from a review of the notes of the Pre-Hearing Conference, the documents disclosed and the submissions reviewed whether the Chicken Board's briefing note of August 21, 2007 referred to in the minutes dated August 29, 2007 has in fact been disclosed. Certainly no arguments were made with respect to its disclosure. If it has not been disclosed to date, the Panel directs its production forthwith. Similarly, it appears that the revised briefing note marked "FINAL" referred to in Item 1 has been disclosed in the redacted minutes of July 25, 2007. However, if the Panel is incorrect in this conclusion, the revised briefing note marked "FINAL" should be disclosed forthwith.

DECISION

The Chicken Board is asserting deliberative privilege over the emails in Item 1 and the documents in Item 2 above. These documents are described as emails sent to other Chicken Board members and staff commenting on revisions to the specialty quota briefing note. The Chicken Board argues that these documents are part of the deliberative process of the Chicken Board and are not relevant to the issue of the reasonableness of the Chicken Board's disposition of the Appellant's request for an assured allocation of chicken for processing at the expense of other specific processors. The Chicken Board argues that where the statutory decision-maker is a multi-person board, notes exchanged between the decision-makers are part of the deliberative process and should be protected from disclosure.

The Appellant, rejects the deliberative privilege argument and argues that the obligation imposed on the Chicken Board in s. 8(4) of the *NPMA* is to disclose "every ...other document touching on the matter under appeal". He argues that the Chicken Board must disclose "every document" not "quite a bit of documents" with the only criterion being that they touch on the matter under appeal. He also argues that the disclosure requirement is broad. Records, minutes of meetings and written recommendation that are also part of the deliberative process have rightly been disclosed. Likewise he asserts that email communications that record electronic "meetings" should also be disclosed.

Document disclosure is governed by s. 8(4) and (5) of the *NPMA*:

8 (4) The marketing board or commission from which an appeal is made must promptly provide the Provincial board with every bylaw, order, rule and other document touching on the matter under appeal.

8 (5) On its own motion or, on the written request of a party to an appeal under subsection (1), the Provincial board may direct that a party to the appeal provide the Provincial board and other parties to the appeal with a copy of each document the Provincial board specifies in its direction.

However, disclosure under these sections is limited by what has been termed deliberative privilege - the privilege which attaches to the compelling public interest in the confidentiality of deliberations of a statutory authority acting in a legislative capacity. The Panel understands deliberative privilege to extend to discussions and documents between board members while carrying out a legislative process. What this means is that there is often a give and take between members of a board as issues of policy are developed. To breach this confidence as between either board members or members and staff would cripple the ability of the board's decision making. Commodity board member deliberations are not, in the usual course, subject to cross examination. Nor is it appropriate that documents reflecting individual board member's private deliberations regarding each submission in a legislative process be disclosed. The reason for this is that the commodity board's final decision, the end product of the collaborative process, speaks for itself.

As for the Appellant's arguments with respect to the broad disclosure of documents "touching on appeal" required by s. 8(5), the Panel finds where, as here, an appeal challenges policy judgments of a commodity board, documents "touching on the matter under appeal" include any documents from the Chicken Board or staff to outside entities. They also include documents received by the Chicken Board from outside entities and persons. However, the Panel is mindful of the limits to this disclosure. An earlier decision of a panel of our predecessor, the British Columbia Marketing Board, in *Hallmark Poultry Processors Ltd. et al v. British Columbia Marketing Board*, October 23, 2000 is helpful on this issue:

27. The phrase "touching on the appeal" is ambiguous in some of its applications. As recognized in *Broda v. Edmonton (City)*, [1989] A.J. No. 952 (Q.B.) [Q.L.] – relied on by counsel for Sunrise – it cannot be taken to extremes. It would go too far to impose an obligation to produce every piece of reading material a board or staff member may have privately researched, for example in a library, in informing their thinking prior to deliberations. *It would also go too far to include written correspondence between Chicken Board members, and between them and staff. As the Chicken Board points out, it is the collective consensus that is relevant, not the individual members' considerations beforehand. In our view, these are proper limitations....*
[emphasis added]

Accordingly, the Panel dismisses the Appellant's application for disclosure of the emails in Item 1 and the documents in Item 2. These documents fall within the category of emails from board members or staff commenting on draft policy statements and earlier draft policies, and as such are subject to deliberative privilege.

With respect to Item 5, the Chicken Board has advised that it has a number of documents in respect of one particular specialty processor which it objects to producing on the grounds they are not relevant to the issue on appeal (whether the Chicken Board erred in its treatment of the Appellant *not* its treatment of other processors). Further, the Chicken Board argues that the documents contain potentially private or confidential information and as such, the Chicken Board maintains its obligation to resist production of these documents to the Appellant. The Appellant disagrees that these documents are not relevant. He argues that part of the issue on appeal is the Appellant's allegation that his processing plant has not been treated in the same fashion as other processors or in accordance with the General Orders.

The Panel does not accept the Appellant's arguments. Documents relating to the Chicken Board's treatment of another processor do not appear relevant to this appeal as they do little to advance the Appellant's arguments of failure by the Chicken Board to follow its processes in allocating chicken to the Appellant's processing plant or failure by the Chicken Board to take into account the Appellant's specific circumstances in making its allocation decisions. The Chicken Board's disclosure has included the allocations granted under Part 8 of the General Orders to new entrant processors. This coupled with the broad disclosure of documents made to date would appear to inform the Appellant sufficiently so that he can advance his appeal.

Finally, there is the outstanding issue of disclosure of documents to the Interveners. As a result of earlier concerns regarding confidentiality raised by the Appellant, a direction was issued suspending disclosure of documents to the Interveners pending further order of the BCFIRB. The Panel notes that the Appellant has elected not to apply for a non-disclosure order pursuant to section 10 of the *Rules of Practice and Procedure*. Instead the Appellant is content to rely on an informal position statement with respect to confidentiality and the use of these documents by the Interveners. The Appellant has been advised that the enforcement of any such position statement is beyond the scope of the BCFIRB.

Accordingly, and pursuant to section 10 of the BCFIRB's *Rules of Practice and Procedure*:

1. The Appellant is ordered to provide the Interveners with all the documents that he intends to rely upon at the hearing forthwith;
2. The Respondent is ordered to provide the Interveners with its Book of Documents forthwith.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

A handwritten signature in black ink, appearing to read 'SK Wiltshire', is written over a light blue rectangular background.

SK Wiltshire
Presiding Member

Copy: David Leung, Fairline Development Canada (1992) Ltd.
Scott Cummings, Primary Poultry Processors Association of BC
S.L. Eddy Ng, Wingtat Game Bird Packers Ltd.
Dion Wiebe, Rosstown Natural Foods Ltd.
Ken Huttema, K&R Poultry Ltd.