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Dan Wiebe, President
Rosstown Farms Ltd.
4184 Ross Road
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Dear Sirs/Mesdames:

AN APPEAL BY THE PRIMARY POULTRY PROCESSORS ASSOCIATION OF BC FROM A DECISION, AS COMMUNICATED IN A LETTER DATED MARCH 12, 2003, OF THE BC CHICKEN MARKETING BOARD CONCERNING CUSTOM KILLING OF PRODUCT BY ROSSTOWN FARMS LTD.

On April 28, 2003, the British Columbia Marketing Board (the “BCMB”) conducted a telephone conference call to hear a preliminary application by the Primary Poultry Processors Association of BC (the “Processors”) for a stay of a March 12, 2003 decision of the British Columbia Chicken Marketing Board (the “Chicken Board”) approving a custom kill arrangement for Rosstown Farms Ltd. (“Rosstown”). Rosstown was granted Intervenor status in the appeal and its president, Dan Wiebe, made submissions on the stay application. At the same time, the BCMB also heard an application by Mr. Wiebe for a reconsideration of the BCMB’s January 17, 2003 supervisory decision confirming one home week for Rosstown. That decision is dealt with under separate cover.

This decision relates to the Processors’ stay application. There is a lengthy history to this matter and in the interests of time, it is not the Panel’s intention to review all the events over the past year. However some background is necessary to put this decision into context.

**British Columbia
Marketing Board**

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BACKGROUND

For the past several months, Rosstown and the Processors have been engaged in significant economic conflict flowing from Rosstown's decision to move towards a vertically integrated breeder/hatchery/broiler operation. There have been several recent BCMB decisions issued under both our supervisory and appellate jurisdiction.

The BCMB's December 13, 2002 appeal decision confirmed that the Chicken Board has the ability to direct product but that Rosstown's hatchery needs do not, as a matter of sound marketing policy, justify a regulatory order directing Processors to pick up Rosstown's production over multiple home weeks. The fundamental regulatory responsibility of the Chicken Board is to ensure that all quota production for a period, including the production of Rosstown as a chicken producer, finds a home.

In our further supervisory decision of January 17, 2003, the BCMB directed that in the absence of an agreement with a processor, Rosstown's home week would be home week 5. The BCMB also recognised Rosstown would require a transition period to bring all its production into one home week. In a subsequent supervisory decision dated January 31, 2003, the BCMB declined the Processors' request to reconsider the choice of home week 5 for Rosstown for period A-51 and beyond.

Things have not gone smoothly for Rosstown in the interim. It has had problems getting its birds picked up at the scheduled times by Processors. It has also had difficulty obtaining the contracted price for its birds from all the Processors. As a result of these and other problems, Rosstown has taken a different approach. It has decided to move toward becoming its own processor. On March 12, 2003, the Chicken Board approved Rosstown's plan for a "gradual devolution of its production towards its own processing facility". The plan, as approved, provides for custom killing of a specified volume of production from A-53 to A-59. The details of this plan are largely unknown to the BCMB at this time.

The Processors have appealed this decision and also seek a stay. To this point no appeal date has been confirmed. Time is of the essence as eggs have already begun to be placed in the incubators for A-53.

DECISION

In coming to this decision, in addition to oral submissions, the Panel has had the benefit of written submissions from the parties as well as the affidavit evidence of Mr. Peter Shoore, owner of Sunrise Poultry Processors Ltd. and Mr. Hakon Komm, Chief Financial Officer of Hallmark Poultry Processors Ltd. We have reviewed these submissions and affidavits, however time constraints do not allow us to review the arguments in any great detail.

The *Natural Products Marketing (BC) Act*, c. 330 was amended in 1999 to make it clear that the BCMB has the jurisdiction 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] 1SCR 311:

- 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. In its written submissions the Chicken Board concedes that the appeal raises a serious issue. In oral submissions, the Chicken Board argued while it was not in fact prepared to concede there was a “serious issue”, it agreed that the appeal was not frivolous. The Processors submit that a prolonged examination of the merits is not necessary to demonstrate that there is a serious issue to be tried. They argue that this low threshold is met in these circumstances as the March 12 order contravenes the Chicken Board’s own “Regulations” and represents the unlawful expropriation, without compensation, of the business of the Processors (which the Processors characterise as an entitlement).

The Panel agrees with the Processors that it is not necessary for an extensive review of the merits of the appeal. We are satisfied that the appeal does raise serious policy issues about the circumstances under which a new processor enters the market place and whether in fact Rosstown is a processor.

Irreparable Harm. As to the second branch of the *RJR-MacDonald* test, the Panel must consider whether the Processors have satisfied the burden of proving that its members would suffer “irreparable harm” if the Chicken Board’s March 12, 2003 decision is not stayed pending appeal.

The Processors argue that if the March 12 decision is not stayed, they will suffer irreparable harm. The effect of the Chicken Board’s decision is that it pulls product away from the Processors in period A-53, a time of peak demand. Any loss of allocation in A-53 will have the further compounding effect of decreases in their individual allocation next year, once again in the highest demand period. Further, allowing the March 12 order to stand places the Processors in risk of not meeting their contractual obligations for A-53 and beyond. Even a 1% loss of production impacts the Processors’ ability to meet commitments and raises the real possibility of contract penalties and administrative charges. National and regional contracts will be placed in jeopardy.

In order to avoid these risks, the Processors will have to incur substantial costs to import production from the US and other parts of Canada to meet contractual demands. However, the Processors have had considerable difficulty sourcing additional product. It is Mr. Shoore's evidence that Sunrise has already used up its import quota for the second quarter of 2003 and it will not be able to access any further import quota for A-53. The shortage of production is compounded by the fact that in the most recent national allocation, the Chicken Farmers of Canada ("CFC") allocated BC 4.2% less than what the Processors requested.

In response, the Chicken Board argues that there is no irreparable harm to the Processors if the March 12, 2003 order is not stayed. First of all, the only aspect of the order with any immediacy is the approval of Rosstown's custom killing of 199,000 kgs. of production in A-53. The Panel must ask whether the impact of staying this decision is greater on the Processors or Rosstown. The Chicken Board submits that it is Rosstown that will suffer the greatest harm. Rosstown's custom killing arrangement for A-53 is less than 1% of the total chicken production for A-53, while it amounts to 40% of Rosstown's total production. The Processors have not led any evidence to demonstrate that the loss of 1% of their collective production will have any significant impact at all. While there were many vague references to risks and the potential to lose contracts, the Processors did not particularise their claims in any significant way.

Mr. Wiebe of Rosstown supports the submissions of the Chicken Board. He argues that the Processors' position is really summed up in the affidavit of Peter Shoore at paragraph 17, where he states:

The production being directed to Rosstown represents volume which Sunrise absolutely requires to meet its pre-existing commitments. While I would be happy to take this volume *from any producer other than Rosstown*, the fact of the matter is that there is only a set amount of production permitted to be grown in this province, and as long as Rosstown as a grower represents a portion of that allocated production, the existing processors who created the market and the market share entitlement in the first place must be satisfied before any allocation can be transferred to new entrants. [emphasis added]

The Processors have made it clear they do not want Rosstown's chicken so as a result Mr. Wiebe has opted to find another way. He received permission from the Chicken Board, has gone out and entered into new contractual arrangements and begun setting eggs to meet those requirements. If the March 12 order is stayed Rosstown, and the processors it has contracted with, will all suffer irreparable harm.

The Panel has considered the submissions of the parties. Based on the evidence heard, we are not convinced that the Processors will suffer irreparable harm if this order is not set aside. As the Processors have 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 Processors argue that the balance of convenience favours them. They have worked hard to develop markets in a highly competitive and dynamic market. To allow a new entrant into the processing market and effectively transfer a portion of the Processors' market to that new entrant, without consultation, compensation or recognition of the impact of this decision on the Processors' markets is unfair and prejudicial. On the other hand, Rosstown, as a producer, is unaffected by a stay as it is guaranteed to receive the Chicken Board's live price for its chicken.

The Chicken Board argues that, on a purely common-sense level, it is Rosstown that has the most to lose if the March 12 order is stayed. Since starting up its own hatchery, Rosstown has suffered at the hands of the Processors, paying higher catching costs and seeing higher condemnments and mortalities. It has been held out longer and been left with chicken in its barns. Rosstown had to do something to salvage the situation and as a result it has called the Processors' "bluff". In past appeals, the Processors were adamant that Rosstown should not be allowed to cherry pick the lucrative hatchery business; if it wanted to be vertically integrated, it too should become a processor. That is precisely what Rosstown is attempting to do.

Rosstown agrees with the submissions of the Chicken Board and argues that the balance of convenience favours rejecting a stay and allowing it to meet its contractual obligations.

The Panel agrees with the Chicken Board and Rosstown and has decided that the balance of convenience rests with Rosstown. The Chicken Board issued its order on March 12, 2003. The Processors did not appeal this decision until April 3, 2003. In that time, Rosstown acted on that order and entered into contracts with two processors to supply chicken. If a stay is granted now, those contractual relationships will be frustrated. Accordingly, the Panel rules in favour of maintaining the status quo pending the hearing of the appeal.

In this stay application, the Processors challenged the March 12 order as standing in contravention of the Chicken Board's existing policy rules and raised issues of inadequate consultation. Given the summary nature of the preliminary hearing, the Panel has chosen not to deal with these issues in the context of the stay. No doubt they will be canvassed fully at the hearing of this appeal on its merits.

Further the Processors also argued that the Chicken Board's March 12 order represents a significant change in the way business has been done in the chicken industry and as such if the whole order was not stayed, it would be more difficult to challenge on appeal. The Panel does not agree with this suggestion. Rosstown will be allowed to custom kill 199,000 kgs of chicken in A-53, as set out in its business plan approved in the March 12 order. The decision about whether Rosstown will continue its custom killing on the schedule approved by the Chicken Board, or at all, will be determined follow the hearing of this appeal.

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BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser
Panel Chair

cc: Jim Beattie, General Manager
BC Chicken Marketing Board