



October 17, 2008

File: 44200-50/CMB #08-09

DELIVERED BY E-MAIL

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RE: AN APPEAL BY VANMAR POULTRY LTD AGAINST A DECISION OF THE BC CHICKEN MARKETING BOARD REGARDING ALLOTMENT REDUCTION

Dear Sir/Madame:

This decision addresses an application by the British Columbia Chicken Marketing Board (Chicken Board) for an order summarily dismissing the appeal of Vanmar Poultry Ltd. (Vanmar).

BACKGROUND

Vanmar commenced an appeal on August 5, 2008 against a July 10, 2008 order of the Chicken Board regarding a ten percent reduction in Vanmar's allotment for the eight week growing periods A- 83, A-84, and A-85 and A-87 due to a late payment of an over marketing levy of \$612.56.

In the pre-hearing conference held on August 26, 2008, the appellant sought the following remedies:

1. a reversal of the allotment reduction of 10% for the periods of A-83, A-84, A-85, and A-87;
2. to have the opportunity to re-grow the lost production;
3. to be eligible for payouts which were distributed during the disputed process; and
4. to be put in good standing.

On October 2, 2008, the Chicken Board wrote to the appellant agreeing to the four remedies identified by the appellant in the pre-hearing conference report. On the same date, the Chicken Board wrote to the British Columbia Farm Industry Review Board (BCFIRB) advising of its agreement and requesting that the appeal be dismissed as there were no live issues to proceed to hearing.

British Columbia
Farm Industry Review Board

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In its letter dated October 7, 2008, Vanmar agreed that the Chicken Board has now conceded all the issues raised in its appeal. However, Vanmar states that it was forced to spend time and resources prosecuting this appeal, including the time and effort spent at a full day mediation, all without compensation. Vanmar argues that these costs could have been avoided if the Chicken Board had not taken the decisions which it now concedes it ought not to have taken. Therefore, Vanmar argues, it is entitled to its costs. Vanmar argues that BCFIRB can not properly dismiss the appeal pursuant to s. 31(1)(g) of the *Administrative Tribunals Act (ATA)* as that suggests that the appeal did not raise viable issues. Further, s. 31(1)(g) does not apply as these issues were not resolved in another proceeding; rather, the Chicken Board has simply conceded its position in this proceeding.

Vanmar submits that the appropriate resolution is either a consent order, specifying the appeal has been resolved in favour of Vanmar and including an order for costs, or the withdrawal of the appeal by Vanmar which Vanmar will only undertake on the condition that its costs be paid by the Chicken Board.

In response, the Chicken Board argues that BCFIRB should summarily dismiss the appeal under either s. 31(1)(g) or 31(1)(f) of the *ATA*. It argues that there is no prospect of Vanmar succeeding in the appeal since it has become moot. The Chicken Board further argues that it is not BCFIRB's general practice to award costs in appeals and this is not an appropriate case to do so. Further, it states that the rules regarding costs which apply in court proceedings do not apply to administrative tribunals and as such are not helpful. The Chicken Board does not agree to a consent order in the terms proposed by Vanmar. There are no live issues between the parties and as such, the expense of a hearing is unnecessary. It argues that the appeal process has been short and has chiefly involved a mediation between the parties so no costs should be granted.

DECISION

I have reviewed the submissions of the parties. There is no dispute that the Chicken Board, in its letter of October 2, 2008, has agreed to grant the appellant all the remedies it was seeking in its appeal. The only issue remaining is costs.

Vanmar seeks to dispense with this appeal with a consent order embodying the Chicken Board's October 2 agreement but adding costs. As the Chicken Board does not agree to pay costs, a consent order is not possible. The appellant argues in the alternative, it will withdraw its appeal but only if it receives an order for costs. The Chicken Board argues that the matter should be summarily dismissed.

In my view, the preferred approach is found in s. 17(1) of the *ATA* which provides:

s. 17(1) If an applicant withdraws all or part of an application or *the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.*[emphasis added]

The parties are in agreement that the October 2, 2008 letter from the Chicken Board embodies a settlement of all the issues on the appeal. There is no suggestion that the Chicken Board is giving the appellant anything less than it sought by way of remedies in the pre-hearing conference. As I

find that the parties have reached a settlement of the substance of the appeal, I must order that the appeal is dismissed.

I turn to consider the issue of whether, in the circumstances, the appellant should receive its costs. While I understand Vanmar's view that it has incurred direct costs in prosecuting this appeal and that every hour spent on the appeal was an hour not spent working on its business, I do not agree that on this basis Vanmar deserves an award of costs. The appellant is in no worse position than if it had prosecuted this appeal before BCFIRB and been successful. Even after a full hearing on the merits, it would be highly unlikely that BCFIRB would have made an award of costs. The Chicken Board is a regulatory board with a mandate to maintain orderly marketing of chicken in British Columbia pursuant to the *British Columbia Chicken Marketing Scheme* and General Orders. In carrying out their regulatory functions, commodity boards must frequently make difficult judgment calls in a complex area, often on short notice. In this case, after the Chicken Board made the impugned administrative decision, it showed a willingness to mediate this appeal in a timely fashion and ultimately came up with a resolution agreeable to the appellant. Costs were incurred on both sides.

While BCFIRB is given a broad discretion to award costs under s. 47(1) of the *ATA*, in practice, it rarely does so and only in exceptional circumstances often where the conduct of the parties warrants some form of reprobation. In its further reply, Vanmar cited *BC Vegetable Greenhouse v. BC Vegetable Commission*, May 20, 2005 in support of its application for costs¹. While I do not accept Vanmar's argument that the Chicken Board's conduct in this appeal is in any way analogous to the conduct of the appellant in the *BC Vegetable Greenhouse* decision, I do find the following passage to be of assistance:

As a matter of discretion under the *NPMA*, the Provincial board has been inclined to avoid a policy of automatically awarding costs to the "winner". Instead, our approach has been to award costs only in special circumstances. The enactment of s. 47 has not changed the way in which we would exercise our discretion. Today, where the conduct of a party has been improper, vexatious, frivolous or abusive, we are able not only to award costs as between the parties, but also the actual costs of the Provincial board. In this case, we must look at the conduct of BC Vegetable [Greenhouse] throughout this appeal and determine whether an award of costs is warranted and if so, at what level.

The appellant's submission does not set out special circumstances warranting an award of costs. There is no allegation of misconduct or heavy handedness on the part of the Chicken Board rather the appellant says the Chicken Board should have made the right decision in the first instance or very soon after and not forced the appellant to appeal, attend a pre-hearing conference and mediation. It suggests the Chicken Board "should be encouraged to resolve issues with growers early".

I disagree with the appellant. In a relatively quick time frame, the Chicken Board worked with Vanmar to resolve the issues on appeal. In short, the appeal process worked. To adopt the appellant's argument would be to impose a rule that "costs follow the event". Historically, BCFIRB has been very reluctant to adopt this approach as to do so would deter aggrieved parties from exercising their appeal rights.

¹ Despite the process set for dealing with this summary dismissal application, the appellant filed a further reply on October 16, 2008. I have read this submission and considered it but in doing so I do not want to encourage the parties to step outside the established process for receiving written submissions.

Accordingly, I order that this appeal be dismissed under s. 17(1) of the *ATA*. There will be no order as to costs.

Dated at Victoria, British Columbia, this 17th day of October 2008.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

per:

original signed by:

Sandra Ulmi, Vice Chair