



February 8, 2011

File: 44200-50/CMB #11-01

DELIVERED BY E-MAIL

Mel Washtock

Claire E. Hunter, Counsel
Hunter Litigation Chambers

Re: Mel Washtock v. BC Chicken Marketing Board – Special Circumstances

On December 30, 2010, the BC Farm Industry Review Board (BCFIRB) received an appeal filed by the appellant, Mel Washtock. He is appealing a decision made by the BC Chicken Marketing Board (BCCMB) on December 3, 2009. This decision denied the appellant a further extension of time to begin production under the New Entrant Program (NEP).

On January 14, 2011, BCFIRB informed Mr. Washtock that as his appeal was not filed within the 30 days required under section 24(1) of the *Administrative Tribunals Act (ATA)*, he would need to satisfy BCFIRB that special circumstances exist that would warrant extending the time to file an appeal. The appellant and BCCMB were given an opportunity to make submissions on this issue.

In making this decision, I have reviewed the following documents received from the parties:

- January 19, 2011 letter from the appellant;
- January 25, 2011 response from the BCCMB including the affidavit of Christine Rickson; and
- January 28, 2011 reply from the appellant.

Background

In October 2007, the appellant was selected through a lottery of the BCCMB to be put on the waiting list for NEP quota of 7716 kg/cycle. He was advised at that time of the documents to be submitted to the BCCMB to establish that he met the eligibility criteria. He was also sent a copy of the BCCMB General Orders.

On December 13, 2007, the appellant submitted the required eligibility documents, which were approved by the BCCMB in its December 2007 board meeting.

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In April 2008, the BCCMB notified the appellant that quota was available for him and requested a \$5000 deposit to hold his position. The deposit would “be refundable upon successful completion of facilities and actual chick placement”. The appellant provided the deposit and was notified that he had 12 months from the date the deposit was received by the BCCMB to complete his facilities and be in production with chick placement (May 2009).

In February 2009, the appellant requested an extension of time to get into production, as he had been unable to get financing. The BCCMB granted an extension until December 31, 2009. On December 2, 2009, the appellant advised the BCCMB that his financing had fallen through and he could not afford to begin production unless he was granted more quota than the 7716 kg/cycle granted under the NEP. He also requested the return of his \$5000 deposit. The BCCMB determined it was not appropriate in the circumstances to refund the \$5000 and on December 3, 2009, the BCCMB notified the appellant that he had been stricken from the Interior Region Waiting List for Primary Quota effective that day.

In July 2010, the BCCMB offered 3473 kg/cycle additional incentive quota to existing NEP growers in the Interior of BC and on Vancouver Island. This incentive quota was not offered to NEP growers not yet in production.

On December 7, 2010, the appellant wrote to the BCCMB advising, “I would like to appeal the decision to cancel my position from the new entrant program”. The BCCMB provided the appellant with the information regarding how to contact BCFIRB about appealing the decision. His Notice of Appeal was received by BCFIRB on December 30, 2010.

Special Circumstances

The appellant listed nine special circumstances, which in his view warrant an extension in the time to file an appeal. The appellant says his marriage was “in crisis” in the relevant time and that he did not know how to appeal. He also points to the conduct of the BCCMB and states that he felt BCCMB staff pressured him into resigning his NEP position. He was advised that there would not be any additional NEP quota allocated and that as he has a young family and earns modest wages it was important that the NEP cash flow. Shortly after his removal, there was a further allocation of NEP quota. He says he now has the financing and can implement his NEP business plan within 90 days. Finally, he says that his request of a refund of his \$5000 deposit was in effect an appeal to the BCCMB decision to remove him from the NEP. More harm than good would be done if he was not allowed to appeal and the 30-day time limit is not reasonable.

In response, the Chicken Board argues that none of the special circumstances listed by the appellant precluded him from filing his appeal on time. It argues in response to the appellant’s argument that he did not know how or when to appeal, that he had been provided with the BCCMB General Orders in October 2007 and asked to familiarize himself with them. The procedure for appeal is clearly contained within the General Orders. Further, the BCCMB states that the appellant has not provided significant new evidence that was not available at the time of the decision. It states that the additional 3473 kgs of NEP quota that was issued in July 2010 would not have been available to the appellant as he was not yet in production, and in addition,

this offer was made five months prior to this appeal being filed. The BCCMB also submits that the appellant did not take all reasonable steps to ensure a timely appeal. He had previously requested extensions of time for entering production by telephone and in writing and could have made a similar effort after the denial of his \$5000 deposit to preserve his right of appeal. In response to the argument that the 30 day time limit is not reasonable “in the interests of fairness”, the BCCMB points out that the appellant missed the time of appeal by over a year and there are no indications that he took any steps to appeal the decision before December 2010 at which time the appeal was already eleven months overdue. Lastly, to allow this appeal to proceed would result in significant prejudice to the BCCMB as there is no NEP quota left from the 2010 allocation and as such if the appellant was to be reinstated as a NEP grower, his quota would have to be taken out of quota that has already been allocated to other growers or created through some other mechanism. If the appellant had appealed in a timely manner, his interests could have been taken into account in July of 2010 when the additional quota was allocated.

In a reply, the appellant says the BCCMB did not address the special circumstances around his marital problems, the fact that the General Orders were meaningless to him due to their length of 119 pages that he was unable to decipher, that he did not know how to appeal, that the extra allocation of quota would have allowed him to obtain financing, that he assumed that his request for the \$5000 deposit constituted a valid appeal, and that his allocation of quota could come from the pool of quota created whenever an existing farmer sells to an outside party. Further, he argues that it is “essential that new entrants who have legitimately been selected by the lottery process be given the benefit of doubt and be given an opportunity to pursue a broiler operation”.

Decision

The time limit for appeals is set out in section 24 of the *ATA*:

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

After fully considering the appellant's submissions, I find they fall short of establishing special circumstances that either would have prevented him from filing an appeal within the applicable time limit or which warrant extending the time for filing the appeal. The Notice of Appeal was filed one full year after the decision that is the subject of the appeal. The summary of the background to this appeal indicates that the BCCMB gave the appellant significant leeway in the timeline to begin production under the NEP and granted him an eight-month extension. He was unable to complete his obligations under the NEP within that time, and subsequently was removed from the program. One year later, he has decided to appeal the decision. I do not find any of the circumstances he has put forward to be compelling reasons to excuse his delay in appealing the BCCMB's decision.

I do not accept that the appellant's marriage problems or his lack of understanding of the appeal process can be seen as special circumstances. Life does not stop because of marital difficulties. Further, if the appellant did not understand the BCCMB General Orders, he should have found someone to explain them to him. Not understanding the rules does not constitute a special circumstance nor does it excuse such a lengthy delay. The appeal process is clearly laid out in Schedule 18 of the General Orders. If the appellant had been seriously interested in filing an appeal at the time of the decision, he could have demonstrated his due diligence by inquiring about the process at the BCCMB or the BCFIRB. Further, I do not accept that requesting the return of the \$5000 deposit from the BCCMB can be construed as an appeal of the decision to strike the appellant from the NEP. I see this as a normal reaction from someone retiring from the program and hoping to get his money back. In my view, seeking a refund of the deposit is more consistent with accepting the BCCMB's decision to remove the appellant from the NEP rather than taking issue with it. Further, given that an appeal is filed with the BCFIRB, it is difficult to see how this correspondence between the appellant and the BCCMB could be seen as creating a valid appeal.

The appellant makes much of his request for additional NEP quota to make the program more viable for him and the subsequent allocation of 3473 kgs of NEP quota "shortly after" his removal from the NEP. This allocation was offered by the BCCMB seven months after the decision under appeal. Further, the BCCMB states that the appellant would not have been eligible for this additional quota because under his business plan he would not have been in production when this offer was made. I agree with the BCCMB that discovering seven months after the decision affecting him that more quota was allocated to other growers does not constitute a special circumstance justifying the appellant's failure to file a timely appeal. While this subsequent allocation of quota may in part explain why the appellant finally filed an appeal, it does not create a special circumstance that excuses or justifies the lengthy delay in filing this appeal.

Limitation periods cannot be lightly set aside. The Legislature felt it was appropriate to impose certain deadlines in the *Act* on the time for filing an appeal. Effective regulation requires some certainty in commodity board decision-making. The appellant's Notice of Appeal received on December 30, 2010 is clearly far beyond the 30-day time limit that allows for timely appeals and preserves regulatory certainty. To allow an appeal more than one year after the decision was made, when no special circumstances have been demonstrated would, in my opinion, be unfair and cause serious prejudice to the BCCMB.

Section 31 of the *ATA* deals with summary dismissal. Section 31(1)(b) provides:

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(b) the application was not filed within the applicable time limit;

Conclusion

In view of the above and in accordance with s. 24(2) of the *Administrative Tribunals Act*, I find that no special circumstances exist for extending the time limit for filing an appeal.

The appeal is summarily dismissed pursuant to section 31(1)(b) of the *ATA*.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in cursive script, appearing to read "Sul", is written in black ink on a light-colored background.

Sandi Ulmi, Vice Chair

Cc: Murray Rossworn