

**IN THE MATTER OF** the  
*Natural Products Marketing Act*  
and an appeal pursuant to Section 19 thereof from  
the March 4<sup>th</sup>, 2010 Decision of the  
Prince Edward Island Potato Board

BETWEEN:

**CAVENDISH FARMS CORPORATION**

APPELLANT

AND:

**PRINCE EDWARD ISLAND POTATO BOARD**

RESPONDENT

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**DECISION**

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Appearances:

For the Appellant:  
For the Respondent:

Paul D. Michael, Q.C.  
M. Lynn Murray, Q.C.

Dates of Hearing:

June 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and  
July 15, 2010

Place of Hearing:

Charlottetown, Prince Edward Island

## **I. INTRODUCTION**

### **This Appeal**

1. By Notice of Appeal dated the 31<sup>st</sup> day of March, 2010, Cavendish Farms Corporation (“Cavendish”) appealed to the Natural Products Appeal Tribunal (the “Tribunal”) the March 4<sup>th</sup>, 2010 decision made by the Prince Edward Island Potato Board (the “Board”) dismissing Cavendish’s February 26<sup>th</sup>, 2010 appeal of Board Order PD09-5. The appeal to the Board was made pursuant to section 19(1) of the *Natural Products Marketing Act*, S.P.E.I. Cap. N-3, (the “Act”).

### **The Board**

2. The Board is a commodity board established pursuant to section 4 of the *Act*, and section 4 of the *Potato Marketing Plan Regulations* (the “*Regulations*”) of the *Act*. The Board is comprised of twelve (12) members, four (4) seed producers, four (4) table stock producers and four (4) processing producers. The Board also has regional requirements. The province is divided into four (4) districts. Three (3) of the twelve (12) members of the board are elected from each district, with each district having a processing representative, a seed representative and a table stock representative.

3. “Processing producer”, “seed producer” and “table stock producer” are defined in Section 1 of the *Regulations*.

4. To be a “processing producer” representative, the member, in the previous year, must have held a valid processing contract for a minimum of thirty percent (30%) of his/her potato production unit’s production.

5. In order for a member to be a “seed producer” representative, in the previous year the member must have operated a potato production unit with at least thirty percent (30%) of the potato acreage grown by his/her production unit pass the Seed Certification Standards applied by the Canadian Food Inspection Agency.

6. In order for a member to be a “table stock producer” representative, the member, in the previous year, must have marketed as table stock a minimum of thirty percent (30%) of his/her potato production unit’s production.

7. The powers of the Board are set out in section 45 of the *Regulations*. The specific powers of the Board have been raised as one of the grounds of this appeal and will be discussed in detail later.

## **Cavendish Farms Corporation**

8. Cavendish is a processor of potatoes with plants in New Annan, Prince Edward Island. Although Cavendish is a major player and employer in the Prince Edward Island economy, in the North American market for french fries and related processed products it holds one of the smallest market shares of approximately nine percent (9%).

## **Potato Board Order PD09-5**

9. Potato Board Order PD09-5 (the "Order"), titled "Potato Processing Contract Negotiation Order" came into force on December 4<sup>th</sup>, 2009. It was published in the Royal Gazette on December 19<sup>th</sup>, 2009. The Order sets out a process for the establishment of the terms and conditions of the contract on which an individual processor can purchase potatoes and producers can sell potatoes to that individual processor prior to September 1<sup>st</sup> for that specific crop year, and, if agreed upon, additional crop years.

10. The Order, among other things:

(i) requires the creation of a Negotiating Committee, consisting of a maximum of six representatives of the Board and a maximum of six representatives of the processor, for each processor by January 1<sup>st</sup> of each year;

(ii) provides for a period of time for the Negotiating Committee to negotiate the terms and conditions of the contract, if which results in an agreement on the terms and conditions of the contract, has to be ratified by a vote of the producers that held contracts with the processor in the previous crop year;

(iii) if the negotiation period does not result in an agreement on the terms and conditions of the contract ratified by a vote of the producers that held contracts with the processor in the previous crop year, requires the mediation of the outstanding issues after the negotiation period; and

(iv) ) if the mediation period does not result in an agreement on the terms and conditions of the contract ratified by a vote of the producers that held contracts with the processor in the previous crop year, imposes binding arbitration on the parties.

11. Paragraph 14 of the Order prohibits, prior to September 1<sup>st</sup> of that crop year, the sale or purchase of potatoes for processing unless the sale or purchase is made pursuant to the terms and conditions and form of the contract for the processor established by the process created by the Order.

### **Appeal to the Potato Board**

12. Pursuant to Section 19(1) of the *Act*, on January 4<sup>th</sup>, 2010, Cavendish appealed the Order to the Board on the grounds the Order was *ultra vires* of the powers of the Board. Cavendish's position was that the Board did not have the legal authority to impose mediation and binding arbitration. Cavendish also took issue with the appropriateness of mediation, arbitration and the prohibition of the purchase of potatoes for processing on the open market prior to September 1<sup>st</sup>.

13. Cavendish raised the preliminary matter of the appropriateness of Board members with processing contracts hearing the appeal as these Board members receive a direct personal benefit from the Order being appealed.

14. The hearing on the preliminary matter was heard on February 11<sup>th</sup>, 2010. The Board issued its decision on the preliminary matter on February 16<sup>th</sup>, 2010. The Board decided the members in question did not have to recuse themselves for two reasons, one, the upholding or revoking of the Order did not create a certain pecuniary benefit for any of the members in question and, two, out of necessity, as a quorum of the Board, which could not be obtained without the members with processing contracts, was required to hear the appeal.

15. The hearing of the appeal was conducted on February 26<sup>th</sup>, 2010. The Board issued its written decision on March 4<sup>th</sup>, 2010. The Board dismissed Cavendish's appeal and upheld the Order.

## **II. APPEAL TO THE TRIBUNAL**

16. In the Notice of Appeal, the relief sought by the Appellant is stated as follows:

The Appellant respectfully requests that the Order be set aside. In the alternative, the Appellant respectfully requests that the Order be amended to address the concerns raised by this appeal.

17. The grounds upon which the Appellant appeals the decision of the Board, as set out in the Notice of Appeal, are as follows:
- (a) Some members of the board had a direct interest in the outcome of the appeal. Therefore, in deciding the appeal, those members had a conflict of interest that raises a reasonable apprehension of bias.
  - (b) Imposing binding arbitration to compel a contract is *ultra vires* the Board.
  - (c) The Order is unreasonable and inappropriate for the following reasons:
    - (i) Processors are effectively prevented from purchasing products on the open market prior to September 1 in any crop year.
    - (ii) The Order provides for contract ratification by growers that may not have contracts in the current crop year.
    - (iii) Contracts arbitrated under section 8 of the Order are invalid for lack of *consensus ad idem*.
    - (iv) There are better and less intrusive alternatives available to the Board to address the concerns raised by the Order.
  - (d) Such further and other grounds as may appear.

### **III. APPEAL HEARING BEFORE THE TRIBUNAL**

18. The appeal was heard over five (5) days, being June 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and July 15<sup>th</sup>, 2010. Numerous documents were filed with the Tribunal prior to and during the hearing.

19. Cavendish called one (1) witness, Blaine MacPherson, Vice President of Agricultural Affairs, Cavendish Farms Corporation. The Board called three (3) witnesses: Boyd Rose, Chair of the Board; Greg Donald, General Manager of the Board; and, Scott Howatt, Processing Co-Ordinator with the Board.

20. Each of the witnesses was sworn and was subject to direct examination, cross-examination and redirect examination. The witnesses were also asked questions by the Tribunal and the parties were given an opportunity to examine the witnesses on matters arising from the Tribunal's questions. The *Rules of Evidence* were followed throughout. Before the parties opened their cases, counsel for each party gave an opening statement. At the conclusion of the evidence, each counsel presented a comprehensive summation.

#### **IV. EVIDENCE AT THE HEARING BEFORE THE TRIBUNAL**

##### **Negotiations Prior to the Order**

21. Both the Appellant and the Respondent gave evidence as to how contracts were negotiated prior to the Order.

22. The planting of potatoes in Prince Edward Island, unless delayed by the weather conditions, normally begins in early May and is finished by approximately June 10.

23. Prior to the Order, in each year individual processors would negotiate with the Potato Processing Committee of the Board (the "PPC") the terms and conditions of the contract on which the individual processor would buy processing potatoes for the year. An agreement between the PPC and the individual processor had to be ratified by a vote of the producers that held contracts with the processor in the previous year. If the agreement was rejected by the producers, the negotiations between the processor and the PPC would continue until an agreement was approved by the producers. After the terms and conditions of the contract were settled, the master contract had to be signed by the Board. After the master contract had been signed by the Board, the individual contracts between the processor and individual producers had to be signed. It could take at a couple of weeks to get all of the individual contracts signed. Typically, the individual producer would find out the volume the processor would be purchasing from producer at the time of the signing of his/her individual contract.

24. Prior to the Order, the parties always negotiated a contract without using mediation or arbitration.

25. Generally, in the past, contracts between producers and processors were not settled until after planting had commenced. In some years, contracts were not settled until after planting had finished. The evidence before this Tribunal indicates, not so much in regards to contracts with Cavendish but with contracts involving other processors, a recent trend of contracts being settled after planting had finished.

## **Changes in the Processing Sector**

26. There is no dispute that the potato industry has grown on Prince Edward Island in the past thirty (30) years, particularly the processing sector.

27. Mr. MacPherson testified as to the growth of Cavendish during this time. Cavendish has grown from 50 million pounds of raw product processed annually to 1.1 billion pounds of raw product being produced annually of which 725 million pounds are processed at Cavendish's plants in Prince Edward Island.

28. Both Mr. Rose and Mr. Howatt gave evidence as to how the potato industry has changed from the perspective of the potato producer or farmer. Both Mr. Rose and Mr. Howatt farmed with their fathers. Mr. Rose eventually took over his father's farm. Mr. Howatt has recently taken his position with the Board and is no longer farming with his father. Both Mr. Rose and Mr. Howatt testified that their fathers operated their farms without borrowing money or borrowing little money. Mr. Rose testified that his father never would have financed the planting of a crop, but Mr. Rose now does it on an annual basis. Mr. Rose and Mr. Howatt also testified as to the increase in production costs to the producer over the past thirty (30) years, including debt payments, fertilizer costs, crop protectants, machinery costs and oil, to list a few.

29. The Board provided reports prepared by BFM Accountants as to the average cost of producing an acre of processing potatoes. The reports indicate that the average cost of production for an acre of processing potatoes was \$2,461.00 in 2005, \$2,711.00 in 2007 and \$2,902.00 in 2009.

## **2008 Contract Negotiations**

30. The Tribunal heard extensive evidence from both parties as to the 2008 Cavendish contract negotiations. The 2008 negotiations were protracted. At the commencement of negotiations, the parties were significantly far apart on the issue of price. Cavendish, knowing how far apart the parties were on the issue of price and knowing that the negotiations were likely to be lengthy, advised its producers of their individual volumes and varieties prior to planting.

31. During negotiations, the producers rejected three (3) offers put before them by Cavendish. The votes on the rejected offers were held on May 7<sup>th</sup>, 2008, May 23<sup>rd</sup>, 2008 and July 2<sup>nd</sup>, 2008. The terms and conditions of the contract were settled on July 23<sup>rd</sup>, 2008 when producers accepted Cavendish's fourth offer. The master contract was

signed by the PPC on July 24<sup>th</sup>, 2010 and the Board on July 28<sup>th</sup>, 2008. All of the individual contracts with the producers were signed by approximately July 30<sup>th</sup>, 2008.

32. In 2008 the contract growers for McCain Foods ("McCain") did not approve the terms and conditions of their contract until July 31, 2008. The master contract was signed by the Board on August 6, 2008, and all of the McCain individual contracts were signed by approximately August 19, 2008.

### **2009 Contract Negotiations**

33. Prior to planting in 2009, the Board requested processors advise as to how much, if any, they would be cutting volume.

34. McCain advised the Board that it would be cutting volume at its plant in Prince Edward Island by 15%. McCain advised its individual contract growers of their individual volumes prior to planting.

35. The terms and conditions of the 2009 McCain contract were approved by producers on June 8<sup>th</sup>, 2009. The master contract was signed by the Board June 12<sup>th</sup>, 2009, and all individual contracts were signed by approximately June 17<sup>th</sup>, 2009.

36. Cavendish advised the Board that it would be cutting volume at its plants in Prince Edward Island up to 15%. Cavendish did not advise its contract growers of their individual volumes prior to planting. The Cavendish contract growers were advised of their volumes when they signed their individual contracts.

37. The terms and conditions of the 2009 Cavendish contract were approved by the producers on May 26<sup>th</sup>, 2009. The master contract was signed by the Board on June 5<sup>th</sup>, 2009, and all individual contracts were signed by approximately June 10<sup>th</sup>, 2009. Most of the potatoes were planted by the time the individual producers signed their contracts and were advised of their individual volumes.

38. Cavendish cut the volume of some growers in excess of 15%. Some growers were not cut at all. Cavendish decided what growers were going to be cut and by how much based upon its grower matrix.



## **Consultations and Drafting of the Order**

39. At a July 8<sup>th</sup>, 2009 general processing grower meeting, the growers discussed the mediation and arbitration of processing contracts to ensure that the terms and conditions of the contracts would be determined prior to planting. The Board began work to explore or revisit the issue of mediation and arbitration. The Board had looked at mediation and arbitration previously.

40. The Board requested input from processors about the early settlement of contracts, mediation and arbitration. The various meetings and consultations leading up to the Order are outlined in the March 4<sup>th</sup>, 2010 Decision of the Board at paragraph 17.

41. The Board compiled a working copy of the Order. It provided the working copy of the Order to the processors and producers and requested their further input.

42. The processors had the following three (3) primary concerns with the working copy:

- (i) did not want mediation and arbitration;
- (ii) did not like the timelines and deadlines for negotiation, mediation and arbitration; and
- (iii) did not like the requirement for processors to contract for 85% of the previous year's contracted volume unless the processor can clearly demonstrate to the mediator/arbitrator that it has lost 15% or more of its sales from a year ago.

43. Despite not wanting mediation or arbitration, the processors did not offer any alternatives to mediation and arbitration.

44. In the final Order, the Board revised the working copy of the Order. The Board removed the 85% volume requirement and extended the deadlines for negotiation, mediation and arbitration.

## **V. POSITION OF THE PARTIES**

45. The Potato Board takes the position that the Order is necessary to have the terms and conditions of the contract established prior to planting or shortly thereafter.

46. Cavendish takes the position that the Order is unnecessary because the parties have always been able to negotiate a contract and there are less intrusive alternatives

to achieve the early settlement of processing contracts. Cavendish also takes the position that the Order is *ultra vires* of the powers given to the Board by the legislation.

## VI. APPREHENSION OF BIAS

47. At its appeal to the Board, Cavendish asked for the appeal not to be heard by the members of the Board with processing contracts because the members with processing contracts receive a personal benefit from the Order. The Board decided there was no bias on the part of the members of the Board with processing contracts and they could hear the appeal.

48. The legislature, in Section 19 of the *Act*, has established an appeal process for orders and decisions of the Board.

49. The first level of appeal is to the Board itself. The Board is entrusted with the marketing and promotion of potatoes in Prince Edward Island. The Board is comprised of potato producers. Presumably, every order the Board makes is for the benefit of the industry and potato producers. Therefore, any decisions or orders that are appealed to the Board, some, if not all, of its members will benefit either directly or indirectly from the decision or order. Members of the Board are to carry out all of their duties as members of the Board, including the hearing of appeals, with no regard to the impact the Board's decisions or orders will have on them personally.

50. The second level of appeal of a decision or order of the Board is to this Tribunal. In creating an appeal process in which a regulatory body, the Board, hears an appeal of its own decision and the members of the regulatory body are involved in the industry, the legislature must have been aware of the risk of bias or the appearance of bias in such a situation and for this reason created the second level of appeal.

51. The hearing before this Tribunal is a trial *de novo*. This Tribunal is independent of the Board and reviews the Board's decisions and orders on the basis of what is best for the industry.

52. This Tribunal serves as a check to make sure the Board made its decision or order on the basis of what is best for the industry and without consideration to the benefits to the members of the Board. Any bias on the part of the Board in hearing the earlier appeal in this matter is cured or alleviated by the appeal to this Tribunal. Therefore, we do not believe it is necessary to determine whether or not any bias was created by the members of the Board with processing contracts hearing the appeal to the Board.

## VII. ORDER ULTRA VIRES OF THE BOARD

53. The Board is given its authority or powers by the *Act* and the *Regulations*. The Board is a statutory body and only has the powers given to it by the legislation.

54. Neither the *Act* nor the *Regulations* specifically gives the Board the power to impose mediation and binding arbitration on processors and producers.

55. Ontario and New Brunswick both have a negotiation, mediation and arbitration process for the settlement of potato processing contracts. The mediation and arbitration of the contracts are specifically authorized by the legislation in both jurisdictions.

56. Cavendish's position is the Board does not have the power to impose mediation and arbitration because the legislation does not specifically give it to the Board.

57. The position of the Board is that it has been given very broad powers by the legislation and while not specifically mention it does have the power to impose mediation and binding arbitration on processors and producers.

58. The powers the Board does have are contained in Section 45 of the *Regulations*. The beginning of section 45 states:

45. The Lieutenant Governor in Council hereby vests in the Prince Edward Island Potato Board **all powers necessary to enable it effectively to promote, control and regulate the marketing or potatoes within the province** including the power to prohibit any aspect of the marketing of potatoes, and **without limiting the generality of the foregoing or any other provisions of these regulations it has the following additional powers:**

(Emphasis Added)

Section 45 goes on to specifically list a number of powers, (a) through (y), that the Board has. Subsection (o) gives the Board the power to fix prices. Subsection (t) gives the Board the ability to delegate its powers, other than those related to licensing, to an agent. Subsection (w) gives the Board the ability to investigate and arbitrate disputes between producers, shippers, transporters and distributors arising from the sale of any

potatoes, but it does not give the Board the power to investigate and arbitrate disputes between producers and processors.

59. It is evident that in using the words “and without limiting the generality of the foregoing or any other provisions of these regulations” that the Lieutenant Governor in Council did not intend subsections 45(a) through (y) to be an exhaustive list of the powers of the Potato Board.

60. The question is whether the power to require processors and producers to mediate and arbitrate the terms of the contract is a power necessary “to effectively promote, control and regulate the marketing of potatoes” and authorized by section 45 of the *Regulations*.

61. To determine if the power to impose mediation and arbitration on processors and producers is necessary “to effectively promote, control and regulate the marketing of potatoes” it is necessary to look at the purpose of the *Act* and the *Regulations*. Very similar language is used to describe the purpose of the *Act* and the purpose of the *Regulations* with the main difference being the purpose of the *Regulations* is limited to potatoes.

62. The purpose of the Act is set out in Section 3 of the Act, which states;

3. The purpose and intent of this Act is to provide for the promotion, research, contract and regulation of the **marketing** of the natural products within the province, including the prohibition of any aspect of marketing.

(Emphasis Added)

63. Section 3 of the Regulations states the purpose of the plan. Section 3(a) of the Regulations states:

3. The purpose and intent of this plan is to provide the Prince Edward Island Potato Board with all the necessary powers and authority to:

(a) provide for the promotion, control and regulation in any or all respects of the production and **marketing** within Prince Edward Island of potatoes, including the

prohibition of production and marketing of potatoes, in whole or in part;

(Emphasis Added)

64. “Marketing” is defined in Section 1 of the *Act* to include “buying” “selling”, “processing” and “offering for sale”. Marketing is defined as follows:

“marketing” includes **buying, selling**, packing, grading, storing, **processing**, shipping for sale or storage, promoting, researching and **offering for sale**, in respect of a natural product and includes its production and its transportation in any manner by any person.

(Emphasis Added)

65. Section 2(6)(a) of the *Act* gives the Marketing Council the ability to:

investigate, arbitrate, adjudicate upon, adjust or otherwise settle any dispute between producers, processors, distributors or transporters of natural products or between any two or more of such classes of persons, or between a producer and a commodity board, marketing commissions.

66. The Legislature determined in order for the Marketing Council to carry out the purpose of the *Act* to “effectively promote, control and regulate the marketing of natural products” it was necessary for the Marketing Council to have the power to “investigate, arbitrate, adjudicate upon, adjust or otherwise settle any dispute between producers, processors, distributors or transporters”.

67. Given,

- (i) the similarities between the purposes of the *Act* and the *Regulations*;
- (ii) the definition of marketing includes buying, selling, processing and offering for sale;
- (iii) the *Act* giving the Marketing Council the powers to arbitrate and “otherwise settle”, which includes mediate, disputes between producers and processors;

- (iv) both the New Brunswick and Ontario legislature have determined Boards need the power to mediate and arbitrate disputes for the effective marketing of natural products and potatoes and have specifically included them in their legislation; and
- (v) the Board having the more intrusive power to fix prices;

we find that the power to require processors and producers to mediate and arbitrate the terms and conditions of a contract is a power necessary to effectively promote, control and regulate the marketing of potatoes and a power of the Board authorized by section 45 of the *Regulations*.

68. We also find that subsection 45(t) authorizes the Board to delegate its powers of mediation and arbitration to an agent.

69. Therefore, we find that the Board had the power to make the Order, and it is not *ultra vires*.

### **VIII. APPROPRIATENESS OF THE ORDER**

70. Having found the Board had the power to make the Order, it is necessary to review the appropriateness of the Order, including the mediation and arbitration provisions.

#### **Mediation and Arbitration**

71. The Order is the result of many meetings and consultations by the Board with producers and processors.

72. The members of the PPC, at their April 28<sup>th</sup>, 2009 meeting, requested that the Board design a mediation/arbitration process that would settle the terms of the contract prior to planting.

73. The Board, which had looked into the issue of mediation and arbitration previously, began a consultation process with the producers and the processors about mediation and arbitration and possible alternatives to mediation and arbitration.

74. A general processing grower meeting was held on July 8<sup>th</sup>, 2009, and the growers in attendance supported the mediation/arbitration process.

75. The processors, including Cavendish, indicated to the Board that they were not in favour of the mediation and arbitration process, but did not provide any alternatives prior to the making of the Order.

76. The Board completed a working paper on the mediation and arbitration process. The working paper was distributed to the producers and the processors.

77. The processors identified a number of issues with the working paper. The working paper required a processor to contract for at least 85% of the previous year's contracted volume unless it could establish that it lost more than 15% of its sales in the previous year. The timelines for negotiations, mediation and arbitration were also a concern.

78. In response to the processors concerns, the volume requirement was not included in the Order and the timelines for negotiations, mediation and arbitration were extended.

79. On December 1<sup>st</sup>, 2009, the processing growers voted by secret ballot in support of the Order and the implementation of the mediation and arbitration process.

80. At the hearing of this appeal, there was much discussion and questions regarding the legitimacy of this vote because of the low voter turnout. The testimony before this Tribunal is that a majority of the votes cast were in support of the Order and the implementation of mediation and arbitration. This vote was not binding on the Board. Regardless of the outcome of the vote, the Board had the power to make the Order. It did not need the approval of the processing producers to make the Order. Nonetheless, the evidence is that a majority of votes cast were in support of the Order.

81. The Order was made on December 4<sup>th</sup>, 2009.

82. At the appeal before the Board, Cavendish presented an alternative to mediation and arbitration. The alternative was also presented to this Tribunal at the hearing of this appeal. The alternative is that Cavendish will commit to advising individual producers of their volume reduction before March 15<sup>th</sup> of each year.

83. Cavendish does not wish to have this commitment placed in a Board Order, but is willing to give the Board a letter from the "owner" of Cavendish, Robert Irving, committing to this alternative.

84. Mr. MacPherson's testimony was that this should satisfy producers, and, based upon polls he has conducted, producers are more concerned about knowing their individual volume prior to planting and less concerned about the price because the parties have always been able to negotiate a price.

85. As pointed out by Cavendish, an arbitrated settlement, in all likelihood, will result in producers not knowing the terms of the contract or their individual volumes prior to planting. An arbitrator's decision could be as late as May 7<sup>th</sup> and individual contracts could be signed as late as May 17<sup>th</sup>. Although an arbitrated settlement may be reached after producers have already started planting, it will allow the producers to know the terms of the contract shortly after planting has started and more importantly before planting has finished.

86. The working copy of the Order called for the arbitration process to be completed and individual contracts signed by April 15<sup>th</sup> of each year. The timelines were pushed back in the Order at the request of processors.

87. The alternative approach proposed by Cavendish does have merit. It is not fully developed at this point in time. Any such commitment to advising of volume reductions by March 15<sup>th</sup> would have to be in the form of a Board Order. The Order is applicable to the entire processing sector and not just limited to Cavendish. There is no evidence that other processors would be able to make the same commitment or be able to comply with a Board order requiring this commitment.

88. At this point in time, further consultation with other processors and the producers is required before this commitment can be an alternative to the mediation and arbitration process. Upon further development, it may be a preferable alternative to mediation and arbitration, but, at this time, we find that it is not a preferable or an adequate alternative to mediation and arbitration. It does not address the key concerns of the early settlement of the terms and conditions of the contract. It also does not advise the producer of the price, a key element in making the decision of whether or not to plant the contract volume. It also does not address the issue of increases in volume.

89. This Tribunal has not been presented with an alternative to the mediation and arbitration process in the Order that will provide for the earlier settlement of the terms and conditions of the contract. Therefore, we hereby confirm the negotiation, mediation and arbitration provisions of the Order.



90. We encourage the parties to explore the proposed alternative further, adopt a more collaborative approach in their dealings with each other and monitor the success of the mediation and arbitration process for both the processors and the producers.

### **Producers Vote**

91. Section 6(2) of the Order requires a negotiated agreement on the terms and conditions of the contract be approved at a vote of the producers who held processing contracts with the processor in the previous crop year.

92. Section 7(4) of the Order requires a mediated agreement on the terms and conditions of the contract be approved at a vote of the producers who held processing contracts with the processor in the previous crop year.

93. Each year the processors, including Cavendish, supply the board with a list of producers that held contracts with the processor in the previous crop year and entitled to vote on the terms and conditions of the contract.

94. Cavendish questions the appropriateness of having the producers from the previous crop year vote on the terms and conditions of the contract because there will be some producers from the previous crop year that will not have contacts in the current crop year.

95. Cavendish believes only those producers that will have a contract in the current crop year should be able to vote on the terms and conditions of the contract.

96. Cavendish proposes, in each year, each processor provide the Board with a list of producers the processor intends to contract with for the upcoming crop year and only those producers be entitled to vote on the terms and conditions of the contract.

97. We reject this approach for a lack of certainty. Cavendish's suggestion does not ensure all producers that will have a contract with a processor in the upcoming crop year will be able to vote on the terms and conditions of the contract. The list proposed by Cavendish is only those producers the processor intends to contact with for the upcoming crop year. The processor may end up contracting with additional producers not on the list. The suggestion by Cavendish does not address the concerns raised by Cavendish. A processor may not contract with every producer on the list of "intended producers". In such a situation producers that do not end up with a contract will have been able to vote on the terms and conditions of the contract.

98. Having the producers, who held contracts in the previous year, vote on the approval of the terms and conditions of the contract is the preferable option because of the certainty it provides. The producers with contracts from the previous year is a fact and not open to manipulation or suspicions of manipulation. A list of producers the processor intends to contract with is open to manipulation by the processor or accusations from producers of manipulation. In hearing this appeal, it became clear there is a level of distrust between producers and processors, which is not good for the industry. As a Tribunal, we are not going to implement a voting system that has the ability to further this distrust.

99. We confirm the provisions of the Order, sections 6(2) and section 7(4), requiring the negotiated or mediated terms of a contract be submitted to a vote of producers that held contracts for processing potatoes with the processor in the prior crop year.

### **No Open Market Purchases Prior To September 1**

100. Section 10 of the Order deals with the entering into contracts and the purchase of potatoes for processing.

101. Section 10(1) of the Order states:

- (1) The final terms and conditions as negotiated by the Negotiating Committee and approved by a vote of Producers, are determined by the arbitrator, as the case may be, shall be binding upon the Board, the Processor and all Persons selling potatoes for processing to the Processor, and shall apply to all contracts entered into by that Processor prior to September 1<sup>st</sup> of that crop year for the purchase of Processing Potatoes for that crop year.

102. Section 10(1) requires all contracts for the purchase of potatoes for processing made prior to September 1<sup>st</sup> of that crop year to be on the terms and conditions established by the negotiation, mediation or arbitration process.

103. Section 10(1) does not prevent the sale or purchase of potatoes for processing prior to September 1<sup>st</sup>. It does prevent the purchase of processing potatoes on the open market prior to September 1<sup>st</sup>. All contracts or purchases of potatoes prior to September 1<sup>st</sup> must be on the terms and conditions established by the negotiation, mediation or arbitration process. After September 1<sup>st</sup> of each year, purchases of potatoes no longer have to be on the terms and conditions established by the negotiation, mediation or arbitration process.

104. Cavendish does not believe the closure of the open market is necessary. Mr. MacPherson testified that in order to be able to enter into contracts with Quick Service Restaurants (“QSRs”) Cavendish needs to have a secured supply of raw product. If it did not, the QSRs would not contract with Cavendish. Mr. MacPherson also testified that Cavendish normally contracts for approximately 95% of its raw product.

105. The contracts with the QSRs are normally negotiated in September and October.

106. Cavendish acknowledges that technically the Order does not require it to enter into contracts with producers and it only establishes the terms of a contract should Cavendish enter into a contract with a producer, but Cavendish also states that, in practice, the effect of the Order is that Cavendish is required to contract with producers prior to September 1<sup>st</sup> in order for Cavendish to go into negotiations with the QSRs with a secured supply of raw product.

107. Cavendish argues that as a result of its need to have a secured supply of raw product for QSR contracts, it is going to continue to contract for its traditional amount of raw product and all Section 10(1) does is prevent it from purchasing additional product prior to September 1<sup>st</sup>.

108. Normally, processors are processing last year’s crop into September, but Mr. MacPherson testified that there have been occasions in which Cavendish has had to purchase potatoes in mid-August because of a shortage of supply. Cavendish is concerned that if there is a shortage in supply that the open market price will be higher than the “contract price”, and it will not be able to find a producer in Prince Edward Island that is willing to sell it potatoes at the lower “contract price” because the producer could get more on the open market. In such a case, Cavendish would have to obtain potatoes from another jurisdiction and get approval from the Canadian Food Inspection Agency to bring the potatoes to Prince Edward Island.

109. To better understand section 10(1) of the Order, it is necessary to review Potato Board Order 91-4, which brought in the annual closure of the open market to processing potatoes until a specific date. This order required the purchase of potatoes for processing to be on the terms of a settled contract until August 15<sup>th</sup>. Mr. Rose and Mr. Howatt both testified that the August 15<sup>th</sup> opening of the market was included in the Order to set a deadline for the negotiation of a processing contract. Potato Board Order 91-4 did not contain any mediation or arbitration provisions and if an agreement was not reached a date was necessary to allow for the purchase and sale of processing potatoes on the open market.

110. When asked as to why the change in the date of August 15<sup>th</sup> in Potato Board Order 91-4 to September 1<sup>st</sup> in the Order, Mr. Rose could not provide a reason. Mr. Howatt advised that the change was to reflect that processors were now processing last year's crop longer because of the advances in refrigeration and storage since 1991.

111. We do believe that there needs to be a period of time in which the sale of potatoes has to be on the terms and conditions established by the negotiation, mediation and arbitration process in the Order. Otherwise, the door remains open for all purchases of processing potatoes to occur on the open market.

112. Cavendish does have a legitimate concern about needing potatoes, in exceptional circumstances, prior to September 1<sup>st</sup>. The Board indicates that if such a need arises, Cavendish could apply to the Board for an exemption which would allow Cavendish to purchase potatoes above the contract price. The Order does not contemplate nor allow for exemptions.

113. The August 15<sup>th</sup> date has been in place for 19 years. The evidence from both parties is that prohibiting the sale/purchase of potatoes for processing on the open market until August 15<sup>th</sup> has never been an issue. We did not hear any evidence that Cavendish or any other producer was in need of potatoes and unable to obtain them prior to this date. The only explanation we were given for the change in the date was that advances in storage and refrigeration now allows processors to process last year's crop until the end of August and beyond. We do not believe this a sufficient reason to extend the closure of the open market. Mr. Howatt's testimony was that the August 15<sup>th</sup> closure was originally put in place as a deadline to settle contracts before allowing sales on the open market. The terms and the conditions of the contract will now be determined by early May and individual contracts signed by the middle of May at the latest. While we do believe there is a need for a period of time in which the terms of the contract as determined by the process set out in the Order, shall apply to all contracts entered into for the purchase of processing potatoes, we have not been supplied with a sufficient reason to extend the date beyond August 15<sup>th</sup>. For these reasons, we vary the Order and change the date in sections 10(1) and 10(2) from September 1<sup>st</sup> to August 15<sup>th</sup>.

## **IX. CONCLUSION**

114. The Board does have the power to make the Order and require the parties to mediate and arbitrate the terms of the contract.


115. An adequate alternative to the mediation and arbitration process in the Order has not been provided, and we hereby confirm the mediation and arbitration provisions of the Order.

116. The provisions of the Order requiring the producers who held processing contracts with a processor in the prior crop year approve the negotiated or mediated terms and conditions of a contract with such processor for the current crop year are hereby confirmed.


117. The dates in sections 10(1) and 10(2) of the Order are hereby varied from September 1<sup>st</sup> to August 15<sup>th</sup>. In all other respects the Order is confirmed.

Dated at Charlottetown this sixth day of August, 2010.

**NATURAL PRODUCTS APPEAL TRIBUNAL**

Per:   
Nelson MacKinnon

Per:   
Ernie Mutch

Per:   
Brian Morrison