



## **KIWIFRUIT EXPORT REGULATIONS 1999**

**IN THE MATTER OF** an Appeal By **Southern Fresh Fruits Exports Limited** ("SFFE") relating to the Decision of **Kiwifruit New Zealand's USA Collaborative Marketing Committee** ("KNZ") dated the 1<sup>st</sup> February 2007, in respect to the SFFE application to export kiwifruit to Sobeys Inc., ("Sobeys") in Canada in collaboration with Zespri Group Ltd ("Zespri").

**APPEAL COMMITTEE:** Sir Brian Elwood (Chairman)  
Ruth Lee  
Mark Bayly

**DECISION:** 10 April 2007

### **Status of Appeal**

1. The Board of Kiwifruit New Zealand ("the Board") constituted pursuant to the provisions of the Kiwifruit Export Regulations 1999 ("the Regulations") established committees to consider collaborative marketing applications for the 2007 kiwifruit season. A committee was so established (KNZ) comprising Ian Greaves (Chair) and Hendrik Pieters to consider the application of SFFE to export New Zealand grown kiwifruit to Canada through distributor Dominion Citrus Ltd to Sobeys Supermarkets ("the Canada Programme").
2. KNZ declined the application of SFFE for the Canada Programme and advised its reasons by a written decision dated 1 February 2007.
3. By letter dated 9 March 2007 SFFE advised the reasons for its appeal of the decision and other decisions of collaborative marketing committees of the Board relating to separate collaborative marketing applications. The Appeal

Committee established for the purpose of considering the SFFE Appeal is that set out on page 1 of this determination.

4. The Appeal Committee met on 13 March 2007. SFFE and Zespri were invited to meet with the Appeal Committee. SFFE was represented by John Thompson. Zespri was represented by Warren Young.
5. The letter dated 9 March 2007 referred to in paragraph 3 detailed submissions which were in part relevant to all the SFFE collaborative marketing applications to the Board and in part relevant to country specific applications.
6. The Appeal Committee is aware of the responses given by another Appeal Committee of the Board comprising Sir Brian Elwood, Hendrik Pieters and Ian Greaves in respect to the Oman Programme of SFFE. In so far as the views of that Appeal Committee in its decision on the Oman Programme addressed common submissions by SFFE in respect to its four appeals, are also relevant to the Canada Programme, they are adopted and incorporated into this decision. In particular paragraphs 1 to 11.8.6 are so incorporated with the exceptions of paragraph 6, 7 and 11.2.
7. SFFE submitted that KNZ took into account irrelevant considerations by considering a lack of Zespri support for the SFFE application as relevant.

#### **Appeal Committee Response**

- See the general comments in paragraph 11.1 of the Oman Programme Appeal Decision.
- KNZ's decision was not made for the reason that Zespri did not support the SFFE application. The application was declined because of:
  1. A lack of collaboration by both SFFE and Zespri.

2. After the SFFE application was amended from Class 2 kiwifruit to Class 1 kiwifruit, KNZ could not see any advantage to Sobeys from sourcing its supply of New Zealand grown kiwifruit through both Zespri and SFFE. While superficially it appeared there was some advantage of diversification of risk of supply, the fact that the kiwifruit from SFFE's alternative programme would be sourced from the same suppliers as Zespri, the advantages of supply diversification seemed more apparent than real.
3. It was not a matter of Sobeys being unable to source an increased supply of New Zealand grown kiwifruit as Zespri could supply any unsatisfied demand through its agent Oppenheimer. Although SFFE presence and size was suggested as a logistic advantage, Zespri's agent Oppenheimer was a substantial operation with local presence. There was no reason to expect the quality of service and product would be different and there was no evidence of price advantage. To deliver the same value to growers, the price to Sobeys would need to be no less than Zespri would charge.
4. Although Zespri did not currently supply to Sobeys Ontario Distribution Centre, they could do so as they supply Sobeys elsewhere in Canada. The SFFE proposed programme would therefore be in direct substitution for Zespri's current Canadian programme with the likely outcome being that Sobeys would seek to purchase New Zealand grown kiwifruit at the best possible price which could see Zespri and SFFE competing with each other. In the circumstances that could only result in reduced return to the New Zealand grower.
5. SFFE did not make a case to KNZ's satisfaction for its proposed programme to run alongside Zespri's existing programme or to substitute fully with the consequence that the SFFE proposed programme did not offer any enhancements for greater wealth creating opportunities other than Zespri could provide. KNZ was not satisfied that the proposal would operate to increase the overall wealth of New Zealand kiwifruit suppliers.

### **The Canada Decision**

8. The SFPE submission in support of the appeal contained five elements.

8.1 Zespri had not confirmed to KNZ that it will enter Ontario.

### **Appeal Committee Response**

- KNZ was aware that Zespri had a substantial distributor in Canada, that distributor supplied New Zealand grown kiwifruit to Sobeys in Canada and although Sobeys in Ontario was currently not seeking New Zealand grown kiwifruit for its Ontario operation, it could do so through an existing established supplier.

8.2 Canada is a disperse (sic) country comprising several distinct geographic markets. The absence of Zespri from Ontario itself will ensure that SFPE kiwifruit does not compete with Zespri and is adequately ring fenced.

### **Appeal Committee Response**

- Canada is a large geographic country. New Zealand grown kiwifruit under the Zespri brand is available in Canada, including Ontario, through its Canadian distributor Oppenheimer with whom Sobeys has a commercial relationship. SFPE has not demonstrated how any ringfencing within Ontario of kiwifruit supplied through it would be achieved or effective.

8.3 The KNZ concern regarding substitution and its downward effect on price, is more apparent than real. SFPE has no intention of charging less for the kiwifruit it supplies to Sobeys.

### **Appeal Committee Response**

- If that be so then the information should have been conveyed by SFFE to Zespri as part of the communication between them to develop a collaborative marketing arrangement which could be seen to be consistent with or complementary to Zespri's Canadian marketing strategy.
- The provision of that information to KNZ or the Appeal Committee in the context of a marketing strategy for Ontario may have demonstrated that the overall wealth of New Zealand kiwifruit suppliers would be or would likely be increased and not diminished. The information was not so provided. There was insufficient information provided to the Appeal Committee to enable it to come to the view that the overall wealth of New Zealand kiwifruit growers would be increased should SFFE receive approval of its application.

8.4 There is nothing in the collaborative marketing regime to say that Zespri has a right of first refusal, or should be the primary supplier. Collaboration could have SFFE as Ontario's lead supplier with the collaboration consisting of SFFE pricing so as not to weaken price expectations elsewhere, and Zespri agreeing to abide by the constraints of SFFE's strategies if Zespri decided to enter Ontario.

### **Appeal Committee Response**

- The matters raised in this submission are matters appropriate to discussions between an applicant for a collaborative marketing approval and Zespri. Indeed the matters can be seen as fundamental to the development of a collaborative marketing arrangement which is consistent with Zespri's global and in country market strategies to sell the substantial New Zealand crop of premium export quality kiwifruit under the Zespri brand at premium prices.

- Zespri has no need for or right of first refusal. It does have an existing authority to export NZ grown kiwifruit to Canada including Ontario.

8.5 Sobeys favours SFFE as it provides continuity of supply and a broad range of produce. It is essentially competing on non-price aspects and broadening market opportunities in ways Zespri could not.

### **Appeal Committee Response**

- SFFE might well be right in claiming that non-price aspects and broadening market opportunities could be achieved by it in ways that Zespri could not. These are matters that SFFE should have pursued in discussions with Zespri. There was insufficient information made available to KNZ or to the Appeal Committee which enabled either to come to that conclusion. During discussion with the Appeal Committee Mr Thompson developed his thoughts on how this could be achieved but developing ideas verbally in the course of an appeal process is not a proper basis for establishing the substance of a collaborative marketing proposal. Especially is this so in a situation where the same kiwifruit that SFFE sought to provide was available to the proposed retailer who was already doing business with Zespri's Canadian agent.

### **Outcome of the Appeal**

The Appeal Committee is not persuaded that SFFE has established at this late stage in the collaborative marketing application process sufficient grounds to justify the Appeal Committee referring the Canadian programme back to KNZ for further consideration. The application has some ingredients which could make it a suitable subject for consultation between SFFE and Zespri over the best manner of increasing the volume of New Zealand grown kiwifruit entering the Ontario province of the Canadian market in a planned and organised manner and involving SFFE with the aim of increasing the overall wealth of New Zealand kiwifruit suppliers. The Appeal Committee is of the view that what SFFE appears to have in mind needs to be approached differently with the objective of developing a collaborative

marketing programme with Zespri aimed at increasing the overall wealth of New Zealand kiwifruit suppliers.

The Appeal is not upheld.

For and on behalf of the Appeal Committee

Sir Brian Elwood  
**Chairman**