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Claire Hunter
Hunter Litigation Chambers
2100 – 1040 West Georgia St
Vancouver BC V6E 4H1

Robert P. Hrabinsky
Affleck Hrabinsky Burgoyne LLP
700 – 570 Granville St
Vancouver BC V6C 3P1

Christopher Harvey, QC
MacKenzie Fujisawa LLP
Barristers & Solicitors
1600 – 1095 West Pender St
Vancouver BC V6E 2M6

Dear Sirs/Mesdames:

RE: W. Friesen, Skye Hi Farms Inc.,Casey Van Ginkel dba V3 Farms, Coastline & Bradner Farms v British Columbia Broiler Hatching Egg Commission

Introduction

On July 29, 2016, BCIFRB wrote to the parties requesting submissions regarding "whether the June 24, 2016 Recommendation report [of the British Columbia Broiler Hatching Egg Commission] is a 'decision' of the Commission which gives rise to a right of appeal", and attached a submissions schedule.

The background is that on March 29, 2016, BCFIRB issued an appeal decision in *Skye Hi Farms Ltd. et al v. British Columbia Broiler Hatching Egg Commission*.[1] The appeal panel held that the

Commission made procedural and substantive errors in an order regulating the price and production of the breeders of a variety of chicken known as "Silkie" and Taiwanese chicks".

A key issue for the appeal panel was what remedy it ought to grant. At paragraphs 134-137 of its decision, the panel required the Commission to "decide if further regulation is needed to achieve sound marketing policy objectives including industry stability, innovation and diversification

[1] 16_mar_29_skye_hi_farms_inc__casey_van_ginkel_-_decision

based on the application of the outcome based principles of a SAFETI decision": para. 135. If the Commission's decision was to exempt the production of Silkie and Taiwanese chicks from all price and production controls, "the report must include draft changes to the existing regulatory scheme to support the exemption": para. 136.

On June 24, 2016, the Commission issued a report entitled "Commission Recommendation Report on Asian Breeder Producers". The recommendation submitted to stakeholders for review and comment is to exempt the production from price and production controls.

On July 22, 2016, the subject appeals were received.

Section 8(1) of the *Natural Products Marketing (BC) Act* provides as follows:

> 8(1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial board.

Positions of the parties

The Commission's position is that there is no decision before BCFIRB that is properly subject to appeal. It argues that the *Recommendation Report* is just that, a recommendation formulated by the Commission after conducting a preliminary analysis. The Commission points out that the Recommendation Report itself states that the Commission does not intend to make its decision until after it consults with stakeholders as per BCFIRB's appeal decision in *Skye Hi Farms Ltd. et al v. British Columbia Broiler Hatching Egg Commission*. The Commission submits:

> The *Report*, of course, is the very means by which meaningful consultation can occur. If the Commission were to solicit feedback in a vacuum (i.e., without setting forth the recommendation with respect of which feedback is sought), stakeholders would rightfully complain that no meaningful feedback could be given. The *Report* clearly (and properly) articulates the Commission's recommendation, and invites stakeholder feedback with respect to those recommendations. Furthermore, the *Report* clearly states that "the Commission will consider the submitted views of the stakeholders on the recommendation report as well as the draft Amending Order at their next scheduled meeting ***at which time the Commission expects to make a decision***". [all emphasis in original]

Counsel for Skye Hi Farms Inc, Casey van Ginkel dba V3 Farms and W. Friesen Enterprises (whose submissions are adopted by counsel for Unger's Chick Sales (1974) Ltd. dba Coastline Chicks and Robert and Patricia Donaldson dba Bradner Farms) emphasizes the broad right of appeal set out in s. 8(1) of the *NPMA*, and argues that the Recommendation Report does itself give rise a valid appeal.

Counsel argues that since BCFIRB's March 29, 2016 appeal decision required the Commission's decision by June 27, 2016, the Report must be taken as constituting that decision. Counsel also states that "the documents delivered to the parties by the Commission both prior to and with its report appear to support the view that the Commission has made a decision to exempt this production from regulation, albeit that they have expressed an intention to proceed based on the

consultation process they have now initiated." Counsel states that they received a communication from the Commission on June 10, 2016 indicating that it had on May 27, 2016 made a preliminary decision, the Minutes of which also suggest that the report will reflect the Commission's "decision", which "decision" would be delivered to stakeholders in the form of a report by FIRB's June 29, 2016 deadline. Counsel emphasizes the Commission set out its SAFETI analysis in the Report itself, which analysis would in the ordinary course only be done after consultations were complete. Counsel argues that the Commission "should not be permitted now to avoid an appeal by denying that it has made the decision within the time it was required to do so". Counsel submits that if the *Report* later gives rise to a further Commission decision as it contemplates, any appeal from that decision can be consolidated with this one. Finally, counsel argues in the alternative that if its primary position is rejected, this panel should direct the Commission to make the decision referred to at paragraph 136 of the appeal panel's decision no later than its August 18, 2016 meeting.

Decision

In my view, the submissions before me raise two conceptually distinct issues. One is whether the Commission has issued an "order, decision or determination" within the meaning of s. 8(1) of the *NPMA*. The other is whether the Commission has complied with the direction issued by the appeal panel in section 136 of its March 29, 2016 Decision:

> 136. No later than 90 calendar days from the date of this decision, the Commission is to provide a report to its stakeholders and BCFIRB with its recommendation(s) with respect to paragraphs 134 and 135 above, fully supported by a process consistent with SAFETI principles. This report will determine whether or not the Commission intends to exempt persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks, from regulation except with respect to any provisions regarding biosecurity, including identification and registration of premises, and food safety referred to in paragraph 133 above. If the Commission's choice is for exemption, the report must include draft changes to the existing regulatory scheme to support the exemption.

On the first issue, and based on the material before me, I am not satisfied that the Commission has made a "decision, order or determination" within the meaning of s. 8(1) of the *NPMA*. While I agree that those terms must be interpreted liberally, the right of appeal is not unlimited. One of those limits must surely arise where a commodity board or commission is engaged in a decision-making policy process, and as part of that process, before issuing its final decision, it has issued recommendations or made provisional findings that are circulated subject to stakeholder review, comment and final consideration by the board or commission. The legislature cannot in the language of s. 8(1) have intended to create the cost and complexity of requiring BCFIRB consider serial appeals from every interim step in a regulatory process leading to a final decision. Where, as here, the Commission has not yet issued its final decision, any appeal is premature. Once a final decision is made, it will be open to any party dissatisfied with that decision to file an appeal in which it may advance all of its grounds in opposition to the decision and underlying process.

I might well have decided this matter differently if I were satisfied on the material submitted before me that the stakeholder review process is a sham, and that the Commission has no intention of considering those submissions seriously with a view as to what its final decision ought to be, including what, if any, changes ought to be made to the SAFETI analysis set out in the Report. Such an approach would obviously be contrary to one of the key principles of the SAFETI analysis, namely, whether the stakeholder review process was genuinely "inclusive", as described by the appeal panel at paragraph 127 of its appeal decision:

> Inclusive: Inclusivity denotes an obligation to consider all individuals who could potentially be impacted by a decision. Based on early feedback and interests demonstrated, the consultation can be refined to include all known stakeholders in the decision-making process. All relevant interests and input must be carefully balanced. The inescapable conclusion here is that the Commission started from a narrow perspective and gave disproportionate weight to the views of the two largest producers, to the detriment of the overall interests of the industry.

I appreciate counsel's concern that the "SAFETI" analysis set out in the Report seems to put the cart before the horse in circumstances where stakeholder consultation has not yet taken place, but I accept the Commission's submission based on the material before me that the Commission's purpose in drafting the Report as it did was to provide a meaningful proposal and set of considerations for stakeholders to comment upon. In other words, the analysis is provisional, not final. Based on the information placed before me, I am satisfied that the Commission intends to proceed exactly as contemplated in the *Recommendation Report*, which is to "invite feedback" on its Report and draft Amendment, and then make its decision as stated in the *Recommendation Report* (p. 6):

> As per BC FIRB's instruction this recommendation report was to be circulated to the Industry stakeholders by June 27, 2016.
>
> In accordance with those instructions, the Commission is circulating both the recommendation report and the drafted Amending Order that will be required for the addition to the Consolidated Orders. The Commission welcomes the feedback of the stakeholders in writing via email by July 24, 2016. The Commission will consider the submitted views of the stakeholders on the recommendation report as well as the draft Amending Order at their next Scheduled meeting at which time the Commission expects to make a decision as to whether Asian Breeder Producers will be exempted from regulation except for Food safety, Biosecurity and Premise ID. Once the Commission has made its decision it may seek BC FIRB prior approval as was done for the other supply managed commodity boards as required by the 2005 Special Review.

I also appreciate counsel's concern that it seems reasonably clear from paragraph 136 of the appeal panel's Decision that it intended the Commission's decision to be concluded within 90 days, i.e., by July 29, 2016.

There being no evidence that the Commission sought and received an extension of time to complete its process beyond the 90 day period, and the Commission having declined to file a

reply to counsel's submission highlighting this deadline, the concern about potential Commission non-compliance with BCFIRB's deadline is troubling. Perhaps there is an explanation which is not apparent on the record - alternatively, it may be that the implications of an alleged breach will have to be considered by BCFIRB separately either in its supervisory capacity or by way of an application for costs if an appeal arises after the Commission makes its final decision. Be that as it may, I do not think it would be conceptually correct to ground a right of appeal for one party on whether another has breached a deadline in a previous BCFIRB order. If the Commission had issued the identical *Recommendations Report* at 45 days, and had an appeal had been filed, there would be no question that the appeal would be premature. Neither the passage of time,nor the reference to the Commission's meeting minutes, satisfies me that the *Recommendations Report* is the Commission's decision or that stakeholder consultations will not be meaningfully considered before the Commission makes its decision.

Conclusion

For the reasons set out above, I find that appeals are not properly before BCFIRB because they do not arise from a "decision, order or determination" of the Commission as defined by s. 8(1) of the *NPMA*. The appeals are dismissed as premature.

Alternative relief

Finally, I turn to counsel's alternative request that I direct the Commission to make the decision referred to at paragraph 136 of the appeal panel's decision no later than its August 18, 2016 meeting. As I do not have a proper appeal before me, and I have not been assigned to exercise BCFIRB's supervisory authority with regard to the issue of compliance with the appeal panel's order, I have no jurisdiction to issue the direction sought.

If, as Ms. Hunter has stated, the Commission's next meeting is August 18, 2016 (later this week) one can only assume, as stated in the *Recommendations Report*, that the Commission will issue its decision at that meeting. If Ms. Hunter's clients conclude on or after August 18 that there is cause to obtain a supervisory direction arising from alleged non-compliance with the appeal decision, the appropriate process would be to write to the Chair seeking a supervisory direction.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Chris Wendell, Presiding Member