



April 23, 2014

File: 44200-50/File:#14-03

DELIVERED BY E-MAIL

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Dear Sirs:

RE: Eggstraordinary Poultry Ltd. v BC Egg Marketing Board

1. On February 18, 2014, the BC Farm Industry Review Board (BCFIRB) received an appeal filed by the appellant, Eggstraordinary Poultry Ltd., as represented by Art Friesen. The appellant is appealing a decision made by the Egg Board on November 19, 2013.
2. The November 19, 2013 decision mandated that from and after December 31, 2013, no new cage system may be installed, and no unused cage system may be commissioned, unless it is an enriched cage system, free-run, free-range or aviary system and that any farms not already at the present minimum standard of 67 inches will need to reach that density within two full lay cycles.
3. On March 7, 2014, BCFIRB informed Eggstraordinary that as the appeal was not filed within the 30 days required under section 24(1) of the *Administrative Tribunals Act (ATA)*, the appellant would need to satisfy BCFIRB that special circumstances exist that would warrant extending the time to file an appeal. The appellant and the Egg Board were given an opportunity to make submissions on this issue.
4. In making this decision, I have reviewed the following documents received from the parties:
 - a. March 14, 2014 submission from Mr. Friesen on behalf of the appellant; and
 - b. March 27, 2014 response submission from Robert Hrabinsky, counsel for the Egg Board.
5. The appellant declined the opportunity to provide a reply submission.

Background

6. On July 9, 2013, Egg Farmers of Canada (EFC) passed a motion that “the Canadian egg industry will move to phase out conventional cage use as existing facilities are either rebuilt or retooled in favour of furnished housing at 116 ¼ sq. in. (750 sq. cm.) per bird such that no new conventional cage systems will be installed in Canada after December 31, 2014”. Implementation of EFC’s policy was a decision to be made by each provincial and territorial egg board within its respective jurisdiction.
6. On July 25, 2013, the Egg Board circulated a memo to all registered producers which advised producers of EFC’s motion and invited producers to submit comments and concerns to be discussed at the Egg Board meeting scheduled for September, 2013.
7. A “read receipt” was generated by the Egg Board’s e-mail system which indicated that the appellant received the July 25th memo on the day it was sent.
8. On November 19, 2013, the Egg Board made the decision which is the subject of this appeal. The Egg Board’s decision was communicated to producers by way of an announcement entitled “New Hen Housing Policy Adopted” which was published on the Egg Board’s producer-only website on November 25, 2013.
9. Although the Egg Board’s new policy advanced the effective date of the change in cage system requirements from that set out in the EFC motion to December 31, 2013, the policy brings British Columbia in line with EFC’s motion and is consistent with the trend in other provinces.

Appellant’s Out of Time Submission

10. The appellant submits that, on December 16, 2013, various e-mails were received which indicated that the BC Egg Producers Association (BCEPA) was asking for clarification with respect to the November 19, 2013 Egg Board decision. The appellant claims that it felt that it would be appropriate to let the Egg Board respond to the BCEPA’s questions before filing a formal appeal.
11. On December 19, 2013, the appellant received a copy of an e-mail from Richard King, Chair of the Egg Board, which stated that issues raised by the BCEPA on the new cage policy would be discussed at the Egg Board meetings taking place the next two days. The appellant claims that, as a result of this e-mail, it believed that the producers’ issues would be discussed and further communication would follow.
12. According to the appellant, the Egg Board was unwilling to post the producer issues on the Producer Only website. The Egg Board organized a producer information meeting for January 22, 2014 to discuss, among other things, the Hen Housing Policy.

13. At the January 22, 2014 meeting, producers put forward a motion to rescind the enriched cage system order on the basis that there was inadequate consultation with producers. The vote on the motion ended in a 50/50 stalemate. According to the appellant, the Egg Board indicated that it would take the motion under advisement.
14. When no further correspondence was received, the appellant filed its appeal on February 18, 2014, which the appellant says is within 30 days of the Board affirming its position.

Egg Board Response

15. The Egg Board points out that the appeal of the appellant was filed 91 days after the date of the decision which is the subject matter of the appeal.
16. The Egg Board acknowledges that the BCEPA presented a number of questions concerning the implementation of the November 19, 2013 Egg Board decision so producers could start planning for the future. The respondent alleges that there was nothing in the e-mail communications between the Egg Board and the BCEPA which might reasonably cause any person to think that the Board's decision was not a decision or that it was otherwise tentative or contingent upon some other event.
17. The Egg Board points to *Dwayne Schwaerzle v. BC Milk Marketing Board*, March 24, 2009 where BCFIRB indicated that "special circumstances" must be of a kind that "would have precluded the appellant from filing an appeal within the applicable time limit or which warrant extending the time for filing the appeal".
18. The Egg Board contends that the appellant does not present any circumstances that precluded it from filing an appeal. It further submits that the appellant has not demonstrated the existence of any special circumstances which would warrant extending the time for filing the appeal.
19. The Egg Board maintains that the appellant's argument that it filed the appeal within 30 days of the Board affirming its position is essentially the same unsuccessful argument advanced by the appellant in the *Schwaerzle* case:

However, we find that it is the Milk Board's November 7, 2008 letter to the appellant that contains the decision of the Milk Board as to the appellant's eligibility as a GEP applicant and therefore his eligibility to remain on the GEP wait list that is the subject of this appeal. The Milk Board's letter of December 2008 is on a plain reading only a reminder of its previous November 7, 2008 decision respecting the appellant's GEP eligibility. Thus, the notice of Appeal was clearly not filed within the applicable time limit of 30 days from the November 7, 2008 decision.

The appellant in his submission indicates that he met with and continued to have discussions with the Milk Board in November and December but was told there was nothing more they could do. While the appellant may have pursued discussion, we note that in the November 7, 2008 letter the Milk Board clearly advised the appellant that if he disagreed with the decision to remove his name from the GEP wait list he had 30 days to appeal the decision to BCFIRB. We find that the appellant's submissions fall short of establishing special circumstances that would have precluded

the appellant from filing an appeal within the applicable time limit or which warrant extending the time for filing the appeal.

We find the appeal was not filed within the applicable time limit and allow the application pursuant to section 31(1)(b) of the *ATA*.

20. The Egg Board maintains that, in addition to considering whether special circumstance exist which would warrant extending the time for filing an appeal, BCFIRB should also consider whether there are any negative consequences that might follow from a decision to extend the time to file a notice of appeal. It says that in this case, there are compelling reasons why BCFIRB should not depart from the statutorily prescribed limitation period.
21. The first reason the Egg Board gives for not extending the time for filing the appeal is that the hen housing policy has dramatic implications for the stability of the industry in the province. The public, retailers and wholesalers are becoming increasingly vigilant with respect to hen housing practices. A decision to allow this appeal to proceed would send an unwelcome signal to the market and would indicate that British Columbia is not serious about the trend towards enriched cage systems.
22. The second reason provided is that the limitation period exists, in part, to provide certainty and predictability. Stakeholders are entitled to make business decisions with confidence in the certainty of the law. It claims that to permit an appeal to proceed well after the expiry of the limitation period could negatively affect producers who have made decisions on the strength of the Board's November 19, 2013 decision.

Appellant's Reply

23. The appellant chose not to provide a reply.

Decision

24. I have carefully reviewed the submissions of the appellant and the Egg Board.
25. 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.
26. The appellant submits that the appeal was made within 30 days of the Egg Board affirming its position. There is no evidence to support the contention that the Egg Board made another decision in late January which could be the subject of an appeal. The appellant in its submission says that the appeal was filed because no further correspondence was received. However, the fact that there was no further correspondence cannot be construed as a decision affirming the Egg Board's position. The decision by the Egg Board to adopt a new housing

policy was made November 19, 2013, following extensive consultation at the federal and provincial levels and in recognition of concerns from the public, retailers and wholesalers on the size of hen housing. I agree with the Egg Board that there was nothing to suggest that the November 19, 2013 decision was not a decision or that it was tentative or contingent on some other event. I, therefore, find that the appeal was not filed within 30 days of the date of the November 19th decision by the Egg Board. Nor is there a later decision of the Egg Board changing or refining its policy direction on hen housing which could properly be the subject of an “in time appeal”.

27. The appellant claims that it received various e-mails which indicated that the BCEPA was requesting clarification of the Egg Board’s November 19th decision. The e-mails were received on December 16, 2013, a few days before the 30 day limit for filing an appeal was to expire. The appellant claims it thought that the answers to the questions would provide clarity but it is not explained how this would have prevented the appellant from filing an appeal to preserve the right of appeal. The appellant does not claim that it was unaware of the 30-day time limit, just that it thought it appropriate to let the Egg Board respond prior to filing a formal appeal. When answers were not forthcoming, the appellant filed the appeal on February 18, 2014.
28. I cannot accept that the BCEPA’s request for clarification of the November 19, 2013 decision creates a special circumstance sufficient to relieve the appellant from filing an in time appeal. There was nothing which would have led the appellant to think that the Egg Board would rescind or vary its November 19, 2013 decision. The decision was consistent with the motion of EFC and with what other provinces are doing. If the appellant had issues with the order itself, clarification of issues arising from the order would not have changed the order.
29. I note in the appellant’s notice of appeal, it raised concerns that the implementation of the Egg Board policy could have an impact on its operations given certain business decisions that had already been made. Concerns regarding the impact of implementation on specific operations are issues that can be raised with the Egg Board for it to determine whether any special transitional circumstances exist. Those determinations by the Egg Board could be appealable decisions.
30. After fully considering the appellant’s submission, I find it fails to establish any special circumstances which would have prevented the appellant from filing an appeal within the 30-day time limit or which warrant extending the time for filing an appeal.

ORDER

31. In view of the above and in accordance with section 24(2) of the ATA, I find that no special circumstances exist for extending the time limit for filing an appeal.
32. The appeal is summarily dismissed pursuant to section 31(1)(b) of the ATA.

33. In accordance with s. 57 of the ATA, “an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued”.

Dated at Victoria, British Columbia this 23rd day of April, 2014

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in cursive script that reads "Diane Fillmore".

Diane Fillmore, Presiding Member