



May 21, 2013

BC Farm Industry Review Board

Attention: Ron Kilmury

Dear Mr. Kilmury,

As you know, the Commission intends to use funds in the so-called "Restricted Fund" (i.e. proceeds from the disposition of a portion of British Columbia's provincial allocation to Ontario) to facilitate an insurance scheme.

The BCFIRB has indicated that it is reluctant to authorize the Commission to use these funds for that (or any?) purpose, because doing so might impair the BCFIRB's ability to hear an appeal arising from the Commission's decision.

We have directed our minds to this impasse. In our respectful view, the impasse may be the result of a lack of clarity concerning the nature and scope of the BCFIRB's supervisory oversight of the "Restricted Fund".

There can be no question that the Commission is obliged to make decisions as the regulator of first instance, subject of course to any applicable supervisory directions made by the BCFIRB. However, the exercise of the BCFIRB's supervisory jurisdiction should not (and cannot) be equated with the kind of decisions made by the Commission as the regulator of first instance.

As you know, the relationship between BCFIRB's appellate jurisdiction and prior supervisory direction has previously been considered in its decisions in *Salmon Arm Poultry Farm Ltd. v. British Columbia Egg Marketing Board*, May 16, 2001, and *MJ Farm Ltd. v. British Columbia Chicken Marketing Board*, March 1, 2007.

Salmon Arm Poultry and *MJ Farm* hold that while parties cannot appeal a "rule" made by a commodity board at the direction of the BCFIRB, the parties may appeal to BCFIRB from any independent judgment that the commodity board was allowed to make or should have made under those rules.

In *Salmon Arm Poultry*, *supra*, the BCFIRB stated:

33. For a matter to be the proper subject of an appeal under s. 8(1) of the *Act*, it is necessary for there to be an "order, determination or decision of a marketing board...."

35. What does the legislation mean when it uses this language? Can an appeal be filed simply by a person showing, as the Appellants seek to do here, that there exists a commodity board order they disagree with? Alternatively, does the legislation's reference to an order, determination or decision "of" a commodity board require that the order, determination or decision in question actually be attributed to choices made by the commodity board, rather than imposed upon it by the BCMB? In our opinion, the latter interpretation is correct. The reference to decisions "of" the commodity board necessarily implies the exercise of judgment by the commodity board, rather than the issuance of such orders resulting from required adherence to specific directions from above.

36. The proposition that a commodity board must have a degree of independent ownership over an order, determination or decision before it can be appealed to the BCMB is not a technical or legalistic requirement. The fundamental purpose of a right of appeal to the BCMB is to ensure that commodity boards remain accountable to the independent and specialized BCMB for *their* exercises of judgment. Where action taken by a commodity board is not "their" decision, but is rather an administrative action taken pursuant to a specific BCMB direction imposed upon them and which allows for no discretion on their part, the purpose of the appeal power is absent. It would be absurd and contrary to the legislation if the BCMB, in its appellate capacity, was effectively required to hear an appeal from its own supervisory decision. The absurdity is even more pronounced when one considers that, if the BCMB was required to hear such an appeal, the commodity board which is supposed to appear to defend "its" decisions on BCMB appeals would simultaneously have a right to seek judicial review of the very same BCMB substantive supervisory direction at issue on the appeal. This is not what the legislation intended.

37. The *Act* confers both a supervisory and appellate jurisdiction on the BCMB. The sections conferring these powers must be read so as to allow the BCMB the fullest exercise of both powers, in harmony with one another. Where the BCMB has, as here, exercised its uncontested supervisory authority to issue specific directions to a commodity board to issue orders, the appropriate remedy is to challenge the BCMB by way of judicial review. It is not to appeal those very same decisions to the BCMB under the fiction that they are decisions "of" the commodity board merely because that board has carried out that which the BCMB, after due supervisory deliberation, required it to do.

50. It is clear, in summary, that the Appellants' objections are directed fundamentally against specific directions given by the BCMB to the Egg Board after a detailed supervisory review. In this review the very matters under appeal were considered by the BCMB and gave rise to specific directions to the Egg Board, in a

direction quite different from that the Egg Board itself had proposed. While administratively reduced to Egg Board "orders" upon BCMB direction, they were in all relevant respects decisions "of" the BCMB, not the Egg Board. On these unique facts, therefore, we conclude that the appeals are not properly before the BCMB.

In light of this, we write to request that the BCFIRB clarify the precise nature and scope of the supervisory directions issued with respect to the "Restricted Fund". When we have clarity on the nature and scope of those supervisory directions, the Commission would propose to make a decision with respect to the use of the funds (which, of course, would be consistent with any broad supervisory directions issued by the BCFIRB). If we proceed in that manner, there ought to be no issue with respect to the BCFIRB's appellate jurisdiction. While no appeal could be taken from the broad supervisory directions, the administrative decisions made by the Commission would continue to be subject to appeal consistent with the dicta in *Salmon Arm Poultry, supra*.

We look forward to hearing from you with respect to the precise nature and scope of the supervisory directions issued by the BCFIRB with respect to the "Restricted Fund".

Yours truly,

A handwritten signature in black ink, appearing to be 'Casey Langbroek', written in a cursive style.

Casey Langbroek, Chair