

August 3, 2018

Kirsten Pedersen  
Executive Director  
BC Farm Industry Review Board

Dear Ms Pedersen:

**ALLOCATION PRIOR APPROVAL REQUEST – BCEMB’S RESPONSE TO BCFIRB’S FOLLOW UP QUESTIONS DATED JULY 6 & JULY 18, 2018**

Please accept this letter as BC Egg Marketing Board’s (BCEMB) response to BCFIRB’S questions regarding our allocation prior approval request. We would like to preface our response by reiterating that we are committed to working collaboratively with BCFIRB to deliver decisions and programs that are administratively fair, comply with legislation/regulations, concur with sound marketing policy, and continue to support the growth and sustainability of the BC egg sector.

We are providing our response in two parts, as follows:

Part 1. BCEMB’s response to BCFIRB’S letter dated July 6, 2018 whereby BCFIRB requested the following:

- (a) BCEMB to confirm understanding of the implications of the Quota Review decision on producers who have transferred or sold quota within the 12 months prior to the allocation;
- (b) BCEMB to provide substantive, objective information with supporting SAFETI analysis should the BCEMB decide there is a sound marketing policy rationale for change to the quota management directions within BCFIRB’S decision.

Part 2. BCEMB’s response to BCFIRB’S letter dated July 18th 2018 whereby BCFIRB requests BCEMB to provide additional information and timelines for the development of policies and programs supporting new entrants, regional development and small farm growth.

**Part 1. (a) Regarding the implications of the Quota Review decision:**

- (a) BCFIRB’s decision direction 179 (c) regarding producers’ ineligibility to receive growth quota for 12 months following a transfer of any quota, in effect as of February 2, 2018 regardless of when a commodity board chooses to amend its Orders to reflect the Quota Review Decision.**

The BCEMB respectfully requests that BCFIRB reconsider the effective date of February 2, 2018 for this directive and allow the BCEMB to implement a forward looking order without retrospective implications.

After considerable deliberation, and further analysis from legal counsel, the BCEMB has determined that we cannot implement BCFIRB's directive effective February 2, 2018. BCFIRB is requesting that the BCEMB amend its orders to include an effective date that precedes the amending order itself. The Natural Products Marketing Act does not authorize a commodity board or BCFIRB to make directions or orders with retroactive or retrospective applications. Please see the attached legal opinion provided by Affleck Hrabinsky Burgoyne LLP in Appendix A.

Further to the legal opinion, it is BCEMB'S position that orders or directives with retroactive or retrospective applications do not support sound marketing policy, SAFETI analysis, nor are in the best interests of the BC egg sector and the public.

The legal opinion provides the following analysis on laws/orders with retroactive applications:

*In Sullivan and Driedger, Construction of Statutes, (Butterworths Canada, 2002), the learned authors state:*

*It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law. As Raz points out, the fundamental principle on which the rule of law is built is advance knowledge of the law. **No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of the law are diminished by the frequent or unwarranted enactment of retroactive legislation.***

The legal opinion provides the following analysis on laws/orders with retrospective applications:

*Similarly, there is a common law presumption against laws having retrospective application. **This presumption is particularly strong where the effect of the law is to take away or diminish a protected expectation or interest.** Thus, if the Egg Board made an amending order on September 1, 2018 (and effective on the same date) providing that "quota holders are not eligible to receive growth quota for 12 months following a transfer of any quota" – the amending order would offend the common law presumption against retrospective application. **For example, a quota holder who transferred quota on August 1, 2017 would be ineligible to receive growth that the producer was reasonably anticipating by reason of an order which did not exist when the quota was transferred. If that producer at least had knowledge of the content of the law, he or she would have been able to make an informed decision about whether to transfer quota.***

In order to amend the BCEMB Consolidated Orders in a manner within our authority, the BCEMB is required to implement it as a forward looking order such that producers who have transferred quota to another producer or sold quota will be ineligible to receive growth

allocations for the 12 months following the transfer or sale. The effective date would be equal to the date the orders are amended and would apply to transfers that occur after that date.

**Part 1. (b) Regarding requested changes to the quota management directives:**

**(b) BCEMB to provide substantive, objective information with supporting SAFETI analysis should the BCEMB decide there is a sound marketing policy rationale for change to the quota management directions within BCFIRB'S decision.**

The BCEMB is respectfully requesting the following two changes to the quota management directions within BCFIRB's decision:

- i. As indicated in Part 1 (a), BCEMB is proposing a forward looking order regarding producers' ineligibility to receive growth quota for 12 months following a transfer of any quota, effective on the date BCEMB's Consolidated Orders are amended. The BCEMB is requesting an effective date of October 1, 2018 – thereby allowing sufficient time for approval of amended orders and dissemination of information to stakeholders to ensure they are fully informed when making quota transfer decisions.
- ii. The BCEMB is requesting that the list of exempt persons for quota transfer assessments be included in the exception (179 (c) i) from the 12 month restriction for allocations as per Part V (5) of the Consolidated Orders.
  - (5) A surrender of Layer Quota pursuant to paragraph 13(1)(a) and 13(1)(b) is not required where:
    - (a) Layer Quota is Transferred, or deemed to have been Transferred, to the Transferor's spouse, child, or child and the child's spouse;
    - (b) Layer Quota is Transferred among Related Corporate Producers;
    - (c) all Layer Quota is Transferred from one Sibling Related Corporate Producer to another, together with the associated Independent Production Unit;
    - (d) Layer Quota is Transferred by way of a Permissible Lease;
    - (e) one or more Producers Transfer Layer Quota to a corporate Producer and the direct or indirect interest of each such Transferor in the corporate Producer is proportionate to the Layer Quota so Transferred by each such Transferor;
    - (f) two or more Producers enter into an agreement of partnership and the partnership interest of each such Producer is proportionate to the Layer Quota registered in that Producer's name;
    - (g) the amount of Layer Quota deemed to have been Issued to a Producer having an interest in a partnership remains registered in that Producer's name upon dissolution of the partnership.

These proposed changes are supported by sound marketing policy rationale and SAFETI analysis, as detailed in the following pages.

Before proceeding further however, we would first like to clarify a point raised during the June 25<sup>th</sup> meeting and mentioned in BCFIRB's July 6<sup>th</sup> letter regarding 179 (d) "Receipt of growth quota cannot be deferred. Offer and acceptance of growth quota is a onetime opportunity". The BCEMB will continue to use its current quota allocation acceptance timeline ensuring that offer and acceptance of growth quota is a onetime opportunity, as outlined in Part III 2 of the BCEMB Consolidated Orders:

- a. Upon notification of a quota increase, Registered Producers are given 30 days to provide the Board of what date they intend to utilize their issuance. Failure to respond within the timeframe will result in forfeiture of the issuance.
- b. A producer has a maximum of three years from the date the first notification was provided to place the hens. This is important to allow a producer to plan for their upcoming flock cycle as the quota is not issued until the hens are placed. In addition, it provides the producer with the opportunity to expand their facilities to increase barn capacity for the issuance.

### **Rationale and SAFETI analysis for BCEMB's Two Proposed Changes**

- (i) **BCEMB's proposed forward looking order stipulating a producer's ineligibility to receive growth quota for 12 months following a transfer of any quota, effective on the date BCEMB's Consolidated Orders are amended (October 1, 2018).**

**Strategic** - *Identifying key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities.*

BCEMB's proposed forward looking order allows all producers to plan strategically for family succession and industry growth, and effectively manage risks with a clear understanding of the regulations impacting quota management going forward.

BCFIRB's retrospective directive, as currently presented, creates instability and distrust in the regulatory system for producers, and hampers commodity boards' abilities to manage and regulate their sectors responsibly and strategically.

**Accountable** - *Accountability is about maintaining legitimacy and integrity through understanding and discharging responsibilities.*

The BCFIRB Quota Assessment Tools Supervisory Review on [February 2, 2018](#) states:

172. While BCFIRB rescinds the above directions, this does not bind the commodity boards to change their quota management rules. Commodity boards can continue to operate under BCFIRB's 2005 directions until such time they decide it is strategic and effective to adopt the following directions.

BCFIRB provided further direction:

182. Mechanisms should be applied in such a manner that they do not unduly advantage or disadvantage a particular producer or specific group of producers.

BCFIRB's clarification on July 6, 2018:

BCFIRB had provided clarification earlier for the Egg Board ([Letter of May 15, 2018](#)) and the BC Chicken Marketing Board ([Letter of April 27, 2018](#)) that this direction applies as of February 2, 2018 regardless of when a commodity board chooses to amend its Orders to reflect the Quota Review decision.

Further to this written clarification, BCFIRB closely questioned the Egg Board and learned that the Egg Board was under the erroneous impression that directive 179(c) would not apply until new consolidated orders were implemented by the Egg Board.

BCEMB is of the opinion that the majority panel direction on July 6, 2018 conflicts with their previous direction provided in paragraph 172 and 182. It is difficult to understand how a retrospective directive that inhibits/destabilizes succession planning and strategic business decisions for sector growth is accountable to the industry.

Further, this directive diminishes the authority of BCEMB to exercise discretion with its Consolidated Orders. As stated in paragraph 172, the BCEMB has the freedom to determine when it is strategic and effective to adopt the directives outlined on February 2, 2018. This freedom was revoked by BCFIRB in the July 6, 2018 clarification. This contradicts the basic understanding of legitimacy and integrity and creates confusion with previous directives.

BCEMB's request to implement this directive in a forward looking manner, so that producers who transfer any quota after October 1, 2018 are not ineligible for growth for the next 12 months, ensures that the BCEMB can maintain integrity with our producers and continue to implement regulations in a stable and predictable manner.

**Fair** - *Ensuring procedural fairness in processes and decision making.*

As stated on the previous page, BCFIRB provided commodity boards with the following direction:

182. Mechanisms should be applied in such a manner that they do not unduly advantage or disadvantage a particular producer or specific group of producers.

At the June 25<sup>th</sup> meeting with BCFIRB, the BCEMB reported that approximately 10-11 transfers that would be impacted by the retrospective implications of BCFIRB's direction (actual as of June 25<sup>th</sup> was 9 transfers).

At the writing of this letter (week of July 30<sup>th</sup>, 2018), there were five producers (one with 2 quota transfer dates) impacted by the retrospective implications of BCFIRB's direction. In order to better understand the reasons for their quota transfers and the effect BCFIRB's retrospective direction may have on them, BCEMB consulted with the impacted producers. All five respondents stated that their quota transfers were part of their strategic succession planning and expansion plans to ensure that they were poised for growth and to meet market demand – not to cash out and exit the industry.

The comments from the producers are provided in Appendix B.

Their quota transfer dates are as follows:

- Week 29, 2017 (no longer impacted)
- Week 31, 2017
- Week 36, 2017
- Week 40, 2017 - Quota sale on the exchange
- Week 41, 2017
- Week 04, 2018
- Week 17, 2018

As indicated in their statements, these producers may have implemented their succession planning or sale of quota differently had they known of the impacts of BCFIRB's retrospective directive on their decisions. This may affect their current options for expanding into different production types (eg. specialty). Further to that point, BCEMB could not have educated the affected producers regarding the new rules as 4 producers who are impacted transferred quota prior to BCFIRB's original directive, and the producer who transferred in week 17 transferred prior to any clarifications of the directive.

The situations presented by these producers are examples of the complexities and challenges involved when planning for succession, expansion, diversification of production types etc within the supply management sector.

**Effective** - *Ensuring clearly defined outcomes with appropriate processes and measures.*

Through BCEMB's proposed forward looking order, the BCEMB and producers will have clearly defined outcomes with appropriate processes and measures, and not be penalized for quota transfer decisions they made in the past which were in compliance with the regulations and directives at that time.

**Transparent** - *Ensuring that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed.*

BCEMB's proposed forward looking order provides full transparency and will ensure that producers clearly understand the implications of quota transfers on their

succession planning and expansion plans going forward -- as compared to the current situation resulting from BCFIRB's retrospective directive.

**Inclusive** - *Ensuring that appropriate interests, including the public interest, are considered.*

BCEMB's proposed forward looking order considers all producers and ensures that everyone will be treated fairly. As well, it is in the public interest that all laws are applied fairly to residents of the province, without any retroactive and retrospective implications.

The SAFETI analysis and information provided by legal counsel on the destabilizing effects of laws/directives with retroactive or retrospective implications clearly indicate that BCFIRB's directive 179 (c) effective February 2, 2018 does not support sound marketing policy. BCEMB's requested forward looking order will ensure that producers are fully informed and can plan appropriately for succession, expansion/diversification to service the marketplace, supported by sound marketing policy within the supply managed sector.

**(ii) The BCEMB is requesting that the exception from the 12 month restriction for growth allocations (i.e. 179 (c) i) include the list of exempt persons for quota transfer assessments.**

The 2005 Specialty Review directives recognized the importance of succession planning by establishing transfer exemptions to promote the family farm, and provide for efficient transfer of the farm within the family business unit when the owner leaves, retires or dies.

The process is usually quite complicated and generally completed over a number of years as experience is gained, responsibilities are added, and the replacement's capability to continue to operate the family farm is confirmed. The policies that govern exemptions have been successful as we now have 3rd generation family farms operating within the system. Throughout time, these exemptions have proven their effectiveness at meeting their Sound Marketing Policy Objectives.

**Strategic**- *Identifying key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities.*

Encouraging producers to continue to responsibly plan for the future of the family farms as well as allow for business restructuring remains strategic. It allows for the successor to learn the industry and innovate by trying new production types as the family business expands. Many succession and expansion plans include the construction of multiple operations, under different business names. This spreads business risk and allows successors to operate separate business units. This strategic succession and expansion planning ensures more stable business units and therefore a more stable industry overall that is better able to meet market demand.

The BCFIRB letter on [February 2, 2018](#) states:

117. Making substantive changes to fundamental quota management directions based on circumstances as they exist at a certain point may not result in sound marketing policy. On the other hand, it is not sound marketing policy for quota management policies and rules to generate undue issues when markets are in different states. From a principles-based regulatory and sound marketing policy basis, quota management policies and rules should endeavor to be effective, strategic and accountable under all market conditions (barring exceptional circumstances)

Excluding producers currently involved in succession planning or business restructuring from growth allocations will stifle succession planning and expansion as the business units involved will receive less growth as a whole than they would have prior to any quota movement. These are the producers who should be encouraged to continue to explore alternate markets, not be punished for developing separate business units for expansion or risk reduction.

Allowing producers to effectively plan for succession, manage business risks and expansion does not interfere with the public interest. In each of these situations, the following objectives as stated in the BCFIRB letter on [February 2, 2018](#) are being met without the need for penalties:

129. a) Quota holders do not receive direct immediate financial benefit by transferring quota received from the board, rather than producing it in the first instance; and,

129. b) Quota issued by the board goes to producers in the first instance who are able and willing to produce it (quota holders have the option of accepting or refusing growth quota).

BCFIRB raised concerns that a quota holder may transfer quota for financial gain, rather than producing. This risk is very real, if we are considering third party transfers. BCEMB's proposed directive to include exempt transfers will be strategic in reducing this risk.

It is necessary for producers to be able to expand their operations and bring family members (child and spouse) into the industry without punitive action. These transfers are not done for financial benefit derived from the sale of quota.

Without the knowledge and insight of the impact on succession planning and business management, the direction falls short of its strategic goals.

Including the assessment exempt transfers as exempt in terms of the 12 month moratorium is strategic as it continues to allow for succession planning and farm expansion without disincentives, and supports sound marketing policy.



**Accountable** - *Accountability is about maintaining legitimacy and integrity through understanding and discharging responsibilities.*

BCEMB is of the opinion that it is not BCFIRB's intent to have commodity boards redefine business units so that only operations structured as corporations with multiple shareholders will be exempt from the 12 month moratorium on quota transfers. The BCEMB's accountability to our stakeholders is not well served by forcing producers to immediately restructure their business units/shareholder arrangements to accommodate a directive that appears to have been developed without a full understanding of family farms and succession planning.

BCEMB's request to include assessment exempt transfers within the exemption list for the 12 month moratorium on growth allocations recognizes the different challenges faced by our producers and provides them with the ability to move forward with their succession and expansion plans without requiring them to form large corporate structures. It maintains the family farm within BC while discouraging transfers for the purpose of financial gain.

**Fair** - *Ensuring procedural fairness in processes and decision making.*

As with any changes to policy, the BCEMB is required to ensure that the interests of all potentially affected parties are considered. In regards to the 12-moratorium for assessment exempt transfers, those producers affected were not provided with the opportunity to represent their interests. Subsequently, the BCEMB has consulted with those producers who are immediately affected. Their comments are attached in Appendix B.

In addition, those producers highlighted were not provided with the opportunity to take the new orders into account when implementing their succession plans. BCFIRB has continually allowed for the exemption of family transfers and corporate transfers, provided the relative quota holdings of each shareholder within the corporation remains consistent. BCFIRB's new directive as currently written represents a significant change.

An unintended side effect of this directive is that those families who do intend to remain in the industry and grow are excluded from allocations due to their proactive and strategic succession planning which ensures that their operation continues to have excellent leadership.

BCEMB's recommendation to include the assessment exempt transfers as exempt from the 12-month moratorium is procedurally fair as it remains consistent with past practices. Any deviation from that would require a fulsome consultation.

**Effective** - *Ensuring clearly defined outcomes with appropriate processes and measures.*

BCEMB's understanding of BC FIRB's new directive is that it is intended to ensure that those producers who are no longer interested in remaining in the industry do not receive growth.

In practice BC FIRB directive 179.(c) i. as currently presented will not differentiate between the sale of quota to a third party and the transfer of quota to an exempt party. There is a clear difference between these types of transfers, as noted below:

- The sale of quota to a third party may occur if a producer is leaving the industry or is interested in "right-sizing" their farm. In these two situations, it is reasonable to assume that the producer is no longer interested in expanding their operation and the 12-month moratorium on future quota transfers may be effective and strategic in accomplishing the goal of ensuring that "quota issued by the board goes to the producers in the first instance who are able and willing to produce it".
- The transfer of quota to an exempt party occurs as a producer redefines their business structure or provides their child with the opportunity to start and/or expand in the industry. In either case, it is not a signal that the producer is interested in retiring or leaving the industry. Quota, in this situation, is not being "treated as a commodity to be traded." Quota holders are not receiving a direct immediate financial benefit when transferring to family members or redefining their business structure.

As a result, a producer who transfers quota to a son/daughter as part of the succession planning process will be treated the same as a producer who transfers to an unrelated third party. In order to highlight how this direction may affect a succession plan, we present the following two examples:

#### Example 1:

Producer A has one child and is succession planning. When the child turns 19 years old Producer A transfers shares and makes the child a part owner in the corporation. Over the next several years, Producer A transfers shares in the farm until they eventually retire and the farm is operated by the Child.

Rule 179. (c) i. If a quota transfer does not result in an overall change in total quota holdings within a business unit (e.g. within a corporation), quota holders within that business unit remain eligible to receive growth.

Every time Producer A transfers shares/quota, the transfer is exempt from assessments. Due to rule 179.(c)i. the business unit (corporation) remains eligible for any growth issuances that may arise.

#### Example 2:

Producer B has twins and is succession planning. When Producer B's twins turns 19 years old, shares are transferred in the following manner: Twin 1 is added as shareholder in Producer B's original corporation (Farm 1), and Twin 2 becomes a

shareholder in a newly established corporation (Farm 2) in which Producer B is also a shareholder. Over the next several years, Producer B transfers shares/quota to each of the twins until Producer B retires and both Farm 1 and Farm 2 are owned separately by each of the Twins.

Rule 179. (c) i. If a quota transfer does not result in an overall change in total quota holdings within a business unit (e.g. within a corporation), quota holders within that business unit remain eligible to receive growth.

In this situation, the total quota holdings within the business unit of Farm 1 (Twin 1) are changed, and Twin 1 remains ineligible for growth quota while Farm 2 (Twin 2) is able to take part in industry growth.

When considered as a familial unit, Farm 1 and Farm 2, combined in example 2, are receiving less growth than would have been received by Producer B prior to the restructuring. Further to that point, the only difference between Example 1 and Example 2 is the number of children involved in succession planning. This situation has created a disparity between the growth opportunities of the successors.

When succession planning, there are a number of considerations that a producer takes into account which may include purchasing additional properties and setting up multiple business units to accommodate more than one successor. In this situation, the 12-month moratorium puts the parent producer at a significant disadvantage as they lose growth they would have been able to obtain had they not helped a child or expanded.

Because of the unintended consequences to succession planning and business expansion, BCFIRB'S directive is not as effective as it could be. With the addition of assessment exempt transfers to the exemption list for this directive, it has the potential to be very effective.

**Transparent** - *Ensuring that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed.*

BCEMB's proposed change to include exempt persons will promote transparency since producers will be able to continue succession planning and strategic farm expansions with full understanding of the implications of quota transfers on future quota allocations, without having to arbitrarily create corporate structures and shareholder agreements to fit Rule 179. (c) i. as currently written.

**Inclusive** - *Ensuring that appropriate interests, including the public interest, are considered.*

BCEMB's proposed change will ensure that all producers, family farms of varying sizes and corporate structures will be treated fairly and allow for strategic succession planning. Arbitrarily creating corporate structures to fit Rule 179. (c) i. as currently

written, is not in the public interest since it may result in the creation of large corporate farms and not preserve the family farms of today.

The SAFETI analysis and information provided by producers implications to their ability to effectively plan for succession and expansion clearly indicate that BCFIRB's directive 179 (c) effective February 2, 2018 does not support sound marketing policy. BCEMB's request to expand the exemptions for the 12 month moratorium will ensure that producers can plan appropriately for succession and expansion/diversification to service the marketplace while maintaining their traditional family farm operations, supported by sound marketing policy within the supply managed sector.

## **Part 2**

**BCEMB's response to BCFIRB'S letter dated July 18th 2018 whereby BCFIRB requests BCEMB to provide additional information and timelines for the development of policies and programs supporting new entrants, regional development and small farm growth.**

As BCFIRB is aware from our growth quota allocation submission and the June 25<sup>th</sup> meeting, BCEMB is undertaking a series of consultations in 2018 to obtain information from stakeholders which, coupled with BCEMB's on-going research on production/markets/future needs, will help guide the development of more robust programs, including policies for quota allocation, that will address regional development, new entrant production needs, and support for small farm growth.

Our proposed timeline is as follows:

- Consultations, research and analyses to be completed by January 2019
- Development of framework of proposed new/updated programs to be completed by May 2019 (note: policy for quota allocations to be completed earlier – Feb/Mar)
- Implementation of new programs or pilot projects to test effectiveness of new programs by September/October 2019
- Assessments and refinements of programs to occur in 2020-2021

## **Conclusion**

The BCEMB is requesting:

- 1) Prior approval for a modified pro-rata allocation where 90% of the 2018 EFC allocation is issued pro-rata to producers in good standing and 10% is held in reserve for the New Producer Program and other market responsive policy objectives. This is outlined in detail in our May 25, 2018 submission.
- 2) Approval of the changes to the quota management directions regarding:

- a. A forward looking 12 moratorium on growth allocations post transfer
  - b. Assessment exempt transfers to be included in the list of exempt transfers for the purpose of the 12 moratorium
- 3) Confirmation that BCEMB's current allocation acceptance model meets BCFIRB's requirements for one time opportunity for acceptance of growth allocations.

Should BCFIRB approve the changes to the quota management directions detailed in this letter, BCEMB will submit its proposed Consolidated Order amendments which will incorporate the directives detailed in the February 2, 2018 [Quota Assessment Tools Supervisory Review](#). The amended Consolidated Orders could be sent to BCFIRB prior to September 1, 2018 with a proposed effective date of October 1, 2018.

Thank you for your consideration. We look forward to constructive dialogue with BCFIRB on the aforementioned issues.

Please let do not hesitate to contact me should you have any questions.

A handwritten signature in black ink that reads "Katie Lowe". The signature is written in a cursive, flowing style.

Katie Lowe P.Ag.  
Executive Director

July 17, 2018

File No.: 8002.001

**VIA EMAIL:** [KatieL@bcegg.com](mailto:KatieL@bcegg.com)

Ms. Katie Lowe  
Executive Director  
B.C. Egg Marketing Board  
Suite 250 - 32160 South Fraser Way  
Abbotsford, B.C. V2T 1W5

**Robert P. Hrabinsky**  
Direct Tel: (604) 800-8026  
Direct Fax: (604) 800-9026  
Email: [rhrabinsky@ahb-law.com](mailto:rhrabinsky@ahb-law.com)

Dear Ms. Lowe:

**Re: Retroactive and Retrospective Application of New Rules Arising from the Quota Assessment Tools Supervisory Review**

Question for Opinion

You asked that I comment on the temporal application of new rules arising from the Quota Assessment Tools Supervisory Review.

Assumptions

I understand that:

1. **On February 2, 2018** the BCFIRB issued the following direction:

179. If boards cease to use LIFO (on all quota held by a producer) and 10/10/10 (on growth quota), these quota management rules are to be replaced with the following:
- a) 10/10 /0 is to be applied to the first transfer of all growth quota issued to date and going forward.
  - b) Quota holders are to have the option to refuse or accept growth quota.

- c) **Quota holders are not eligible to receive growth quota for 12 months following a transfer of any quota**, with one exception as follows:
  - i. If a quota transfer does not result in an overall change in total quota holdings within a business unit (e.g. within a corporation), quota holders within that business unit remain eligible to receive growth.
- d) Receipt of growth quota cannot be deferred. Offer and acceptance of growth quota is a onetime opportunity

2. By letter dated May 15, 2018, the BCFIRB issued the following supplementary direction:

As set out in the majority panel's April 27, 2018 response to the Chicken Board, the majority made a considered decision concerning the eligibility of producers to receive growth quota allocations. **The start date for the direction set out in paragraph 179(c) is February 2, 2018 (the date of the Quota Review decision). A producer who transferred quota in the 12 month period prior to the issuance of growth quota is ineligible to receive growth quota. For example, if there was an issuance of growth quota in May 2018, those growers who transferred quota within the previous 12 months would not be eligible to receive a share of that growth quota.**

If the Egg Board decides to advance a case to change this start date it will need to provide a substantive sound marketing policy rationale as per paragraph 164.

164. If commodity boards decide there is a sound marketing policy rationale for change to these quota management directions, BCFIRB will require substantive, objective information with a supporting SAFETI analysis that includes considerations such as industry competitiveness and public policy objectives

3. The Board has not yet amended its orders to reflect the BCFIRB's directions.

### Analysis

As a starting point, it is useful to articulate the distinction between laws that apply "retroactively" and laws that apply "retrospectively". This distinction in terminology was addressed by the Supreme Court of Canada in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 as follows:

The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections", ...has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past events. A retroactive statute *operates backwards*. A retrospective statutes *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statue changes the law from what it was a retrospective statue changes the law from what it otherwise would be with respect to a prior event.

The BCFIRB's direction, which was made on February 2, 2018 and is to be effective on February 2, 2018, does not have "retroactive" application (as would be the case if the direction was to be effective on January 1, 2018). However, the direction clearly has "retrospective" application, insofar as it would apply new consequences to past actions that preceded the date of the direction. For example, the BCFIRB notes that if a producer transferred quota in June, 2017, that producer would be ineligible to receive growth in May, 2018, as a result of the direction made on February 2, 2018.

I pause here to note that I do not think that the BCFIRB's direction can be regarded as an order of the Egg Board. In other words, I understand that on February 2, 2018, the BCFIRB had directed the Egg Board to implement new orders on some date following February 2, 2018. It is not clear whether the BCFIRB's expectation is that the Egg Board's order should be made effective February 2, 2018. However, any such order made by the Egg Board would clearly exemplify a "retroactive" application.

The question arises as to whether the Egg Board can properly make orders with either retroactive or retrospective application. In my view, the answer to both questions is clearly "no".

First, it is well established that no law may be interpreted as having retroactive application unless that intention is made express in the parent legislation. In Sullivan and Driedger, *Construction of Statutes*, (Butterworths Canada, 2002), the learned authors state:

It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law. As Raz points out, the fundamental principle on which the rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of the law are diminished by the frequent or unwarranted enactment of retroactive legislation.

There is nothing in the *Natural Products Marketing (BC) Act* that authorizes the BCFIRB or a commodity board to make directions or orders with retroactive application. As a general rule, express authority to make laws with retroactive application would be required to rebut the presumption. Consequently, the



BCFIRB could not make a direction on February 2, 2018 that is effective on January 1, 2018 (and it did not do so). More to the point, when the Egg Board amends its orders, it cannot make the amendment "effective" on a date that precedes the amending order itself.

Similarly, there is a common law presumption against laws having retrospective application. This presumption is particularly strong where the effect of the law is to take away or diminish a protected expectation or interest. Thus, if the Egg Board made an amending order on September 1, 2018 (and effective on the same date) providing that "quota holders are not eligible to receive growth quota for 12 months following a transfer of any quota" – the amending order would offend the common law presumption against retrospective application. For example, a quota holder who transferred quota on August 1, 2017 would be ineligible to receive growth that the producer was reasonably anticipating by reason of an order which did not exist when the quota was transferred. If that producer at least had knowledge of the content of the law, he or she would have been able to make an informed decision about whether to transfer quota.

In short, it is my view that the Egg Board is not authorized to make the kind of order proposed with either retroactive or retrospective application. If permitted by the BCFIRB, however, the Egg Board could make an order on September 1, 2018 (for example) as follows: "Effective September 1, 2018, a producer who transfers quota is ineligible to receive growth quota for a period of 12 months from the date of the last transfer of quota." Formulated in this way, the order has neither retroactive nor retrospective application.

Please let me know if you have any questions or comments concerning the above.

Yours truly,

**AFFLECK HRABINSKY BURGOWNE LLP**

Per:

  
**ROBERT P. HRABINSKY**

RPH/

**Producer One**

Delivered by Email July 24, 2018

Good Afternoon Joey,

We would first like to state that if this directive came into effect on February 2, 2018, then it does not affect our transfer of quota in week 41 of 2017. Meaning we are eligible for quota allocation. Rules or directives of this nature cannot be back dated, as that leaves us without the ability to plan for the future and tries to change history.

The quota that we transferred in 2017 is all part of our secession planning and to comply with and manage CRA tax rules for farms. We are currently starting into our 3<sup>rd</sup> generation of farming and plan to continue as a family run business for all of the foreseeable future. We intend to grow our operation and continue to expand by purchasing land, upgrading our grading facility and building new barns.

Referring to your paragraph 2 and with our stated intentions we feel that we are entitled to quota allocation as it comes available.

We cannot make future business decisions if the rules are going to be changed and backdated.

Thank you

[REDACTED]

## Producer Two

Delivered by email July 24, 2018

Katie and Joey

I'm not 100% clear on the new transfer rules. But I know the need to change the system to make it more fair for all involved in the industry.

But it is your legal responsibility to notify producers of these changes ahead of time or at the time you make them. We, as, producer can only make decisions from the Standing orders that are present at the time of the that day. So to my experience you can not go back to change the Standing orders in the past and enforce them to that date. So I would like to see you do this legally and place the change for any new Standing orders for a date that we as producer can make sound decisions for our future plans for our farms.

I know that [REDACTED] is only one of the producers that is affected by this change. So if the others that I know of, get any new quota issuance and [REDACTED] or [REDACTED] don't. I will look at seriously taking legal action against the BCEMB.

If BCFIRB is not going to allow the approval of this new issuance without these new standing orders in place. Then the board has no option but to wait another year to issue it.

So this is how I stand on these changes.

I will try and work with the staff on this matter to be able to have this issuance insured as soon as possible and in a way that I will not be penalized.

To answer your questions.

1) That is a long winded question for me. But I will try to keep it short, [REDACTED] (purchased from [REDACTED] in 2004, 11,122 birds quota) and [REDACTED] have worked out of one site on '0' Ave. And the long term plan has always been the same, too have two separate farm locations. We have three sons and all have showed interest in farming. So as the new issuances that where issued in 2009 and the barn that I build in 2005 which was filling up. So in 2014 we made as a family decision to build two farms. But at that time, the industry was pushed to make bird house standards changes. So United Agri and Ritchie Smith Feeds sent out a invitation to the egg producers to go to Amsterdam to see the industry in Europe. The two younger sons R [REDACTED] 25 and S [REDACTED] 23 where happy to learn and attend.

Decision made, property purchase Sept 2015, three new barns built (1pullet barn 12,000 birds, two free run lay barns 12,000 birds each) and finished Sept 2017.

[REDACTED] only had quota for 7600 bird because of barn size at '0' Ave.,(did quota lease agreements, then quota transfer, as Standing orders changed)

The March 2017 quota transfer was to change back the quota holding of [REDACTED] farms to its original quota holdings at purchase in 2004.

The Jan 22, 2018 quota transfer was to get a building permit from the city of Abbotsford for a second resident on [REDACTED] location on [REDACTED] Bradner Rd. (THE CITY DECIDED TO CHANGE THEIR BYLAWS FOR HAVING A SECOND RESIDENT ON A PROPERTY and that was a layer farm has to have 20,000 layer on it. [REDACTED] had the birds at the location at the time, but was using 6400 birds on quota credits) The city needed a copy of the farm production license.

2) Our son Steven manages [REDACTED] and eventually will be take over the company. [REDACTED] has a empty barn (from March 2017) build 1996 (still in new concussion) with the capacity to house another 7600 layers, after that we will need to build another barn. But the bigger question is what type of produce will the market need and will there be quota available to purchase or farms (the Egg Grader encourages us to have share holders in the different types of production so that when the time comes that the demand changes occur, we could change production to that type of egg.)

3) I myself am slowly easing out of farming and our son S [REDACTED] is already taking over most of the operation of [REDACTED]. R [REDACTED] is doing the same for [REDACTED].

4) I think that you already know the answer to this question. I never build a barn to just fill the farm needs. I always build for future expansion.

I would like to sit down and discuss this with you both, tomorrow or Thursday, after that I'm not sure, for we are busy with the blueberry harvest.

[REDACTED]

## Producer Three

Delivered by Email July 25, 2018

██████████ is owned by ██████████ and ██████████. Several years ago the company owned an outdated production facility on ██████████. This property was sold and ██████████ constructed production facilities at ██████████ and ██████████ at ██████████, knowing that the long-run plan was for each family to own their 50% of the quota. Due to intermingled financing, the quota was leased for several years to ██████████ and facilities rented from ██████████. With the quota leasing rules disappearing, and finally getting bank approval to do a split, the majority of the quota was transferred in an equal amounts to each of these companies. After an initial transfer and with density rule changes and additional allocations, it was discovered that ██████████ did not have enough space to house all the birds so another transfer of 1,500 birds was done, some to ██████████ and ██████████.

All selling companies and receiving companies were owned and continue to be owned by the same individuals, such that no change in industry quota holdings took place. 50% of the quota transferred (50% of ██████████) was transferred to companies owned 50% by ██████████.

Another consideration, is that now that the quota is held by a family farm, the shares of the company can be transferred to a child tax free, while held in a company (50% unrelated to each other) is not eligible for the family farm rollover rules.

For the foreseeable future the company plans to farm the quota at its ██████████ location, but long-term plans are for the ██████████ and the ██████████ to each build new facilities to house the quota.

The plan is for the ██████████ and the receiving farms to be farmed by ██████████ until their retirement. Both families have children involved in the day to day operations and the plan to pass these farms on to the next generation.

As producers we still plan on expanding with new allocations and bids on quota exchange.

## Producer Four

Received by Email July 25, 2018

Hi Joey,

As discussed on the phone, below are responses for the questions provided in order to give you information of our situation. The questions provided to us for response were:

- 1) Why did you transfer the quota?
- 2) What is your history of expansion of your facility?
- 3) What are your plans for the future of your facility?
- 4) How long are you planning on remaining involved in the industry?
- 5) Are you still planning on growing as a producer?

First a bit of history. While still dairy farming we purchased our first layer farm in 1994 ([REDACTED]). For four years we farmed both dairy and poultry. Following the sale of our dairy farm in 1997 we purchased our second layer farm ([REDACTED]). In 2010 we began the building process on our third layer facility ([REDACTED]). This is when we began producing organic eggs. In the following 3 years we built 4 organic egg layer barns on that property. In 2014 we purchased another parcel of land (also part of [REDACTED]) and at the end of that year began building 2 more organic egg layer barns there, in addition to retrofitting an existing broiler barn to become our pullet raising facility. The plan for this latest property is to expand with another possible 6 layer barns in the near future.

[REDACTED] and [REDACTED] are owned by [REDACTED]  
[REDACTED] is owned by [REDACTED]

In response to the questions given:

- 1) Why did you transfer the quota?

In the past we have been able to lease quota between the farms in order to accommodate the grader's demand for a specific commodity. In the past few years the practice of leasing quota was no longer allowed. At that time we were told by the BCEMB that we would be allowed to transfer quota between farms without penalty. The latest transfer of quota happened on April 23, 2018. It was a transfer of only 2000 birds from [REDACTED] to [REDACTED] (same owner). Again, there was no mention of a penalty for this action. The only reason for this transfer was to continue producing as many organic eggs as possible in order to meet market demand for this commodity. This also allowed us to decrease bird numbers at [REDACTED] our oldest facility, in order to better position us for possible rebuilding on that property in the near future.

- 2) What is your history of expansion of your facility?

As mentioned above, we have nearly constantly been in a period of expanding our farms. Our latest building project shows our desire to expand in the area of organic egg production.

- 3) What are your plans for the future of your facility?

In terms of the facility at [REDACTED] our plans are to build another two organic egg layer barns within the next 3 years. Following that there is room and plans for another 4 barns. At [REDACTED], our oldest facility, our plan is to convert to a cage-free farm through rebuilding. Throughout this expansion time we plan to acquire more quota. Recently we have applied to purchase more quota through the quota exchange program but were unsuccessful. We plan to continue to bid on future quota offered on the exchange.

4) How long are you planning on remaining involved in the industry?

As mentioned above our family has been involved in the egg-layer industry for 24 years. During this time our children have grown up and are very involved in operating all of the farms. They have also shown an interest in continuing their involvement in farming as their long-term plans. Even our grandchildren are beginning to get involved and show interest in helping on the farms.

5) Are you still planning on growing as a producer?

As mentioned above, our plans are to continue growing our farms, both in terms of quota and buildings. During this growth time we are also committed to further our efforts in producing less conventional eggs and more cage-free and organic eggs to meet market demand.

Throughout our years of farming we have always strived to do what is best for our industry. We feel that to penalize us for our desire to produce more organic eggs for the market through a small quota transfer is quite harsh and unfair. If you need any other information, please do not hesitate to contact us.

Thank you!

[REDACTED]

## **Producer Five**

Delivered by Email July 26, 2018

Dear BCEMB:

July 26th, 2018

Thank-you for the opportunity to provide input and to have a dialogue in what we find an astonishing direction by FIRB, which by appearance would be in breach of their own SAFETI principals as well raise many more legal questions therein. Simply put, we are quiet shocked by the short sightedness and lack of understanding of the current state of our Egg Industry and the transitions we face and how the Industry is attempting to respond to the Markets in general.

In response to your query:

BCFIRB has provided the Boards with additional clarification regarding their quota assessment tools directive that may affect your farm. The directive is that: Quota holders are not eligible to receive growth quota for 12 months following a transfer of quota with one exception as follows: if a quota transfer does not result in an overall change in total quota holdings within a business unit, quota holders within that business unit remain eligible to receive growth.

Our response begins with..."if only life were that simple"....

First and foremost....the Direction given is seemingly targeted to persons selling, reducing or exiting the business. All be it, FIRB is giving an exit strategy to "deemed" sellers by permitting or eliminating the 5% clawback. They are not however, by given this Direction without "exemption to family" ...a way to expand, update and modernize; adapt in meeting new markets and allowing expansion without realizing the effects and stifling progress. This ruling will cause and inflict pain, disparity and unequal opportunity amongst discrimination to the fullest degree to those it affects and as a result would be collateral damage at best.



## Background:

Our family has been involved in the Egg Industry since 1984; undergone quota cutbacks after cutbacks which had to be repurchased in order to keep the barns full and warm. In the early 2000 era, we began to convert a small portion of our caged production into cage free production as the market was expanding. As it was a new unknown venture; there were a lot of variables and many unknowns, and thus a lot of “dart throwing” in respects to what type of equipment would work and provide the “best in class” or stellar results. We did however make best efforts in doing the right things for the market and as a result, lost capacity in doing so and thus created a much necessary expansion mode of our farm and as a result needed to lease space on an interim basis. In 2014 this became very clear as the Industry deliberated the issue of phasing out of the conventional housing systems. As we had reached capacity and our cage systems moved from 60 square inches to 64”...then 67” we were by default forced to house one less bird a cage which due to our configuration, brought us to 80” per bird. With a period of growth upon us....as well as the demand for more free run and other cage free production...we acknowledged the fact that we were land locked and in desperate need of additional barn capacity. In 2014 we began planning to build a new farm, with 100% freerun (caged free production ) on our second title. This was necessary due to the increased footprint required with allowing for range access if the market conditions required more of that production type. (This was not achievable on our other site).

Our building program began in the fall of 2014 with a new pullet barn which was required to enable the best and newest equipment specializing in raising freerun chicks in the environment necessary to provide pullets to the layer barn which had complimenting equipment for the layer environment. Chicks were placed in late winter as we began construction of the new layer barn in March of 2015 and housed our first flock in the summer of 2015 just as the EFC along with the Provinces banned any further new conventional housing.

Markets continued to change and further demand on free range and organic was urgently needed. As a result, once again we were land locked (via new setbacks etc.) and realized that we would need to purchase yet another parcel of land in order to accommodate the growth and space requirements of the organic market. I did not have adequate land so i needed to purchase yet another title, which we did in 2016 adjacent to our farm. As i was farming with my wife, I decided to put her on title and being a new production unit, which made more sense than trying to get her involved and many costly changes to share structures on my current production unit. Seeing as the rules of the day did not have any constraints or penalties, we chose to begin a new unit and we purchased the title next door. There were some old facilities on that title which we utilized immediately upon its first quota purchase.

In short, we planned to tear down and rebuild that farm completely. My wife purchased quota for that farm on the quota exchange in 2015, but did not have enough quota to fill a barn. As a result, I... the spouse transferred some quota to at least fill the barn that we were using as there were no dire consequences in doing so within the Boards Consolidated Orders. We began demolition in the summer of 2016 while we leased some facilities to house the layers along the while construction commenced of the new farm (in my spouse's name) in the fall of 2016. This farm was built to house organic production standards ...as well as free range and thus required a large land base for the outside access field requirements. The second phase/half of the barn was completed in July of 2017 at which point I again transferred quota to my Spouse in order to fill the barn and meet the market. (August of '17). Both new farms are at a reasonable capacity with room for growth which we planned for, built for and were financed for on that same premise.

As a result of the transfer, I had to shut down production of one of my conventional layer barns on the homestead that is now vacant at our location, as we continue to focus on the specialty markets. We are in the planning stages to use that barn and am in the process of gutting the barn for further cage free production as the markets permits.

The Problem:

Here in lies the problem and greatest concern...

We have expanded to meet new markets, built up two new farms in order to meet these markets and are not the least bit interested in selling any quota. We have however each invested heavily within the Industry over the last 3-4 years and plan on continuing to do so for the foreseeable future. No quota was sold at arms length, no profit was made on any sale of quota. In fact the banks are very concerned that we would be ineligible for growth as we financed "based" on the growth that was coming. As it was a new title, it made sense to make my spouse an owner as she was not yet on title on my farm and i had intentions to bring her in regardless. Our decision was made on the rules of the day. Which in fact did not punish either of us, nor benefited us. As a result the new farm acquired quota along with transfers from myself totalling 3 times since inception over a period of 2 -2.5 years. To now be penalized on a retroactive basis is extremely biased and truly unfair.

Had one had a crystal ball and know of this potential change...i would have simply kept the farm name in my name, acquired the land and build the barns and simply add her name as a Shareholder. All the actions, growth, expenditures, financing, meeting the markets would remain the same. All roads lead to the same result till "retroactivity" comes into play.

So my question is: Why am I being punished for bringing my Spouse along in the growth of our farm? I am just trying to bring notice to having more women involved in the Industry... (She owned a Broiler farm previously and subsequently sold) and now feel it has come to bite me in the rear end. As a result, barn space will be under utilized, the free range markets we committed to fill will have unplanned shortfalls. Financing pressure will rise as the banks re evaluate cash flow projections.

Proposed solution:

As no arms length selling occurred and indeed proof is shown that we are both actively farming with no intentions to sell...be it that an exemption be granted or extended to us to avoid such rampant discrimination and prevent collateral damage which could have easily been avoided had the rules been upfront, transparent and in a timely fashion. The legality of this retroactivity need to be further investigated as it is unprecedented in both the Federal and Provincial laws.

Another simply solution ...if one believes in legal“retroactivity” ...we would request to “retroactively” change our 2nd transfer amount date to the first transfer amount date and a simple quota lease permitted between parties (permitted while building )would have prevented such an atrocity and unfairness.

Clearly we need to educate what all types of aspects are involved in meeting today's Market in an every changing world, with such a heavy demand on land, resources and space requirements which will truly lead our Industry as compared to the rest of the Country.

Respectfully,

[REDACTED]

[REDACTED]

Footnote : Factoid

BTW. ..did you know that we could have simple housed all of our combined Production quota that we both have to date in one new conventional barn on our original homestead property??? That gives a small glimpse into what it takes and to the extent investments are required in order to “meet the specialty Market”!