



BC Farm Industry Review Board

March 17, 2020

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DELIVERED BY EMAIL

Jim Collins, Chair
BC Broiler Hatching Egg Commission
180 – 32160 South Fraser Way
Abbotsford BC V2T 1W5

Harvey Sasaki, Chair
BC Chicken Marketing Board
101 – 32450 Simon Av
Abbotsford BC V2T 4J2

Dear Sirs:

PRICE LINKAGE SUPERVISORY REVIEW

In the attached January 27, 2020 letter to the BC Farm Industry Review Board (BCFIRB), the BC Broiler Hatching Egg Commission (Commission) announced its intention to exit the price linkage agreement with the BC Chicken Marketing Board (Chicken Board). In the Commission's view, the price linkage is no longer sound marketing policy. Pursuant to BCFIRB's July 31, 2019 supervisory instructions, the Commission also stated in its letter that it will provide a submission, including an evidence-based SAFETI¹ rationale, to BCFIRB.

In the same letter, the Commission requested that the linkage-related appeals filed by the Primary Poultry Processors Association of BC (PPPABC) and the BC Chicken Growers Association (BCCGA) on December 23 and 27, 2019 respectively, be deferred until BCFIRB's supervisory consideration of the Commission's submission on exiting the linkage agreement. On February 25, 2020, a BCFIRB appeal panel decided, after reviewing the parties' written submissions, that the appeals would be deferred under section 8(8) of the *Natural Products Marketing (BC) Act* until a supervisory process was completed.

A BCFIRB supervisory panel composed of Peter Donkers (Chair), Al Sakalauskas and Harveen Thauli has now been assigned to consider the Commission's submission and address any related supervisory matters, as the panel may deem necessary.

¹ Strategic Accountable Fair Effective Transparent Inclusive

Immediate Considerations

Starting in period A-160 (November 24, 2019 – January 18, 2020), and continuing until any changes that may be made, the Commission removed revenues earned from the sale of spent fowl and salvage eggs from its Cost of Production (COP) calculations used in the price linkage formula, and reduced the kill age of breeding stock. These changes may increase the price hatching egg producers receive.

Concurrently, starting in period A-161 (January 19, 2020 – March 14, 2020), the Chicken Board approved a temporary adjustment to its interim pricing formula as it works with a Price Working Group to finalize a long-term pricing formula at BCFIRB's direction. The Chicken Board has until the start of period A-163 (May 10, 2020 – July 4, 2020), to reach a final long-term pricing formula pursuant to BCFIRB's January 21, 2020 decision extending its deadline². Chicken price is a component of the price linkage formula and hence influences the price received by broiler hatching egg producers. BCFIRB expects the Chicken Board to provide a timely update in March or early April on whether the May 10 (A-163) deadline will be met.

In the supervisory panel's view, the current situation creates significant uncertainty with pricing throughout the chicken supply chain (chicken growers, hatching egg producers, processors, and hatcheries). This uncertainty will continue until the Commission and Chicken Board find long-term solutions on pricing. Pricing uncertainty for an indefinite period of time is not sound marketing policy nor is it sustainable.

One of the immediate questions facing the panel is whether there are interim measures which ought to be put in place pending resolution of the hatching egg linkage exit decision and a long-term live chicken pricing formula.

Next Steps

The supervisory panel's view is there needs to be consistent, transparent processes used by both the Chicken Board and the Commission to manage any future changes to the respective pricing tools until such time that the outstanding linkage exit question and chicken pricing formula questions are resolved.

To that end, the supervisory panel will be scheduling meetings with the Commission and the Chicken Board for early April 2020. Given the current recommendation for social distancing, it is likely that these initial meetings will be conducted through teleconference.

The purpose of these meetings will be to explore possible interim measures to promote greater pricing certainty until longer-term solutions can be reached. While additional meetings and information may be needed, the supervisory panel will initially focus on assisting the Chicken Board and the Commission in establishing interim measures as soon as possible.

² 2020 January 21. BCFIRB. Amended Order – Long-Term Chicken Pricing Formula.

The supervisory panel will also be seeking further information on the Commission's process and timeline for receipt of its exit submission, and an update from the Chicken Board on establishing its long-term pricing formula as part of the discussion.

At this time, the panel anticipates meeting separately with the Commission and the Chicken Board, followed by a joint meeting. BCFIRB staff will be in touch shortly to start scheduling the meetings. The supervisory panels' expectation is that the Chicken Board and Commission will accommodate the meetings within the first two weeks of April.

Thank you for your assistance with this process.

Best Regards,

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is written in a cursive style with a large, sweeping initial "P".

Peter Donkers
Panel Chair

Attachment: January 27, 2020 Letter from BC Broiler Hatching Egg Commission to BCFIRB, Request for Deferral BCBHEC ats. PPPABC & BCCGA (N1911 and N1912)

Copies:

BC Chicken Growers' Association
BC Egg Hatchery Association
BC Broiler Hatching Egg Producers' Association
Primary Poultry Processors' Association of BC
BCFIRB web site

January 27, 2020

File No.: 8001-012

VIA EMAIL: Gloria.Chojnacki@gov.bc.ca

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Dear Ms. Chojnacki:

Re: BCBHEC ats. PPPABC & BCCGA (N1911 and N1912)

In anticipation of the forthcoming Pre-Hearing Conference, I am writing to express the position of the British Columbia Broiler Hatching Egg Commission (the "BCBHEC") with respect to the above-captioned appeals.

Please note that the BCBHEC is hereby requesting that the appeals be deferred pursuant to subsection 8(8) of the *Natural Products Marketing (BC) Act*, pending the BCFIRB's supervisory consideration of a forthcoming "evidence-based SAFETI rationale setting out why [an exit from the linkage] would be in the best interest of the hatching egg sector and the overall chicken supply chain". This request is more fully described at the end of this letter.

With the exception of the BCBHEC's request for deferral, the position expressed in this letter is anticipatory, and may change depending upon the course of events at the Pre-Hearing Conference.

The BCBHEC's position may be summarized as follows:

Background

Conditions Which Led to the Linkage

1. In a report dated February 15, 1995 (which preceded, and led up to, the current linkage agreement between the BCBHEC and the BCCMB) the BCFIRB noted that "pricing decisions have clearly underscored the present ability of the chicken sector to undermine, intentionally or not,

Commission pricing decisions". This observation was repeated in the BCFIRB's "Final Report" dated July 8, 1995, as follows:

The current B.C. pricing structure allows chicken growers, in collaboration with the integrated processors and hatcheries, to put downward pressure on hatching egg prices. If the market price for chicken declines, the full effect of the price decline on margins can be carried through to chicks; placing pressure on the BHEC to accommodate. That the CMB and hatcheries (processors) will work together, including via formal appeal, to put downward pressure on hatching egg prices is well known. (emphasis added)

2. The BCFIRB's 1995 pricing review led to the development of the current linkage agreement, but the BCFIRB expressly noted that the linkage:

...does not remove the requirement for industry pricing negotiations on an ongoing basis. Markets and relationships change over time.

Elimination of Assurance of Supply and the Return of Premiums (Lack of Pricing Transparency)

3. In a supervisory decision dated June 9, 2010, the BCFIRB directed the BCCMB to adopt a live price model based off of Ontario pricing, and accepted the BCCMB's recommendations concerning the elimination of assurance of supply for chicken processors in favour of an open contracting system where growers have the freedom to deal with the processor of their choice. In that supervisory review, the processors opposed an open contracting system on the basis that it would lead to "premium wars". Ultimately, the BCFIRB accepted the BCCMB's recommendation to move to an open contracting system, stating "[a]fter considering all the submissions, we find that the risk of nonvalue premiums is overstated." It is notable that the BCFIRB also said:

We do agree that premiums that are not associated with value and/or an incentive to meet market demands undermine the principle of supply management. Growers exist in a protected world where they are guaranteed a reasonable return for their product in a market where they control the amount of supply available. To expect to wring more out of the system in the form of premiums not tied to value creates a lack of transparency within the pricing system that is unconscionable and completely inconsistent with a value chain approach.

.....

There are two additional points we wish to highlight. The first is that the Chicken Board must act (and be seen to act) in the interests of the industry as a whole.

4. Following the elimination of assurance of supply, processors did indeed begin to pay non-value premiums to growers in order to secure supplies of chicken. In its May 16, 2019 decision in the matter of PPPABC and BCCGA v. BCCMB, the BCFIRB said this about the payment of premiums:

Finally, the panel cannot leave this discussion without commenting on loyalty premiums. We heard much about these premiums during the hearing and what we should take from the fact these premiums are paid. The history of payment of loyalty premiums by processors to growers is well understood by the panel. Processors adopted the practice of payment of a loyalty premium to growers after the Chicken Board's elimination of assurance of supply for processors, shortly after the release of the 2010 supervisory decision. The purpose of the payment is to encourage growers to continue supplying chicken to one particular processor and remain loyal to that processor. Processors report that the certainty of supply enables them to better manage their business. The actual amount of the premium is not incorporated into the live price and the amount each processor pays to each grower is not transparent. Based on the evidence of both the Chicken Board, as acknowledged by the Processors, the premium had been set at 2 cents per kg and has recently risen to 3 cents. It is not clear if the smaller processors not represented in the appeal have also increased the premium. The panel accepts that including the value of these premium payments in the pricing formula could not only prove to complicate the formula, especially because Ontario does not include premium payments in its pricing formula, but it could distort the formula for some growers who do not receive the reported premium. Despite these complications it is important that the payment of premiums be documented and disclosed. The Chicken Board may consider reporting premium payments as a note to its pricing orders.

The BCCMB's Unwillingness to Reflect Non-Value Premiums in the Linkage

5. After processors began to pay loyalty premiums to growers, the BCCMB has at all times failed or refused to reflect the actual price paid to growers in the linkage calculation. This decision by the BCCMB:
- (a) Distorts the linkage calculation to the advantage of growers, and to the disadvantage of hatching egg producers;
 - (b) Constitutes a fundamental breach of the linkage agreement;
 - (c) Continues to be made by the BCCMB, despite opposition from the BCBHEC.

Removal of Revenues from Spent Fowl and Salvage Eggs

6. In an effort to respond to this unilateral breach of the linkage agreement by the BCCMB, and thereby return to an approximation of the original intent of the linkage agreement, the BCBHEC proposed that revenues from spent fowl and salvage eggs be removed from the linkage calculation. In contrast to the unilateral action of the BCCMB in failing or refusing to reflect the actual price paid to growers in the linkage calculation, the BCBHEC has conducted a SAFETI analysis, and has engaged in extensive consultation with stakeholders, concerning the removal of revenues from spent fowl and salvage eggs from the linkage calculation.
7. The BCCMB has failed to engage in consultations with its stakeholders in a timely manner. In particular, while the BCCMB has repeatedly expressed its support for the removal of revenues for spent fowl and salvage eggs, it has at all times failed or refused to conduct the requisite consultations that it claims are necessary before expressing its “formal” support. At no time has the BCCMB, the BCCGA or the PPPABC ever articulated any substantive basis upon which the removal of revenues for spent fowl and salvage eggs could be opposed. Instead, it appears that the BCCGA and the PPPABC are relying on the BCCMB’s delay as a basis for opposition.
8. On October 15, 2019, the BCBHEC wrote to the BCCMB as follows:

...if the BCCMB chooses to oppose this interim adjustment, the Commission has asked that the BCCMB fully articulate the reasons for its opposition. In that event, the Commission would examine its options.

To date, no substantive reasons to oppose the removal of revenues for spent fowl and salvage eggs (as a mechanism to counter-balance the BCCMB’s failure or refusal to reflect non-value premiums in the linkage calculation) has been put forth by the BCCMB, the BCCGA or the PPPABC.

9. On January 7, 2020, the BCBHEC received a letter from Pollon Express Ltd. as follows:

Please be advised that effective Monday February 10, 2020 we will be changing our pricing for picking up spent fowl from the breeders. The new pricing will be .20 / kg.

These changes have been made as international fowl pricing remains very soft. In addition, our survey of other Canadian markets shows that we have been paying significantly more for fowl than what is paid in other Canadian Provinces.

This letter reflects a transparent effort by a processor to subvert the Commission’s decision to remove revenues for spent fowl and salvage eggs (as a mechanism to counter-balance the BCCMB’s failure or refusal to reflect non-value premiums in the linkage calculation). It is to be noted that Pollon Express Ltd. provided no supporting information or documentation as might justify its proposed reduction to the price paid for spent fowl. Perhaps more importantly, the price

to be paid for spent fowl (a regulated product) is fixed by order of the BCBHEC (at \$0.40 per kilogram) and cannot be unilaterally ignored at the whim of a processor.

Kill Age

10. On July 15, 2015, the then Chair of the BCCMB expressly confirmed in writing to the BCBHEC that the BCCMB had agreed to the inclusion of kill age as a factor in the linkage calculation. The BCCMB has since expressly repudiated this aspect of the linkage agreement. To date, the BCCMB has been unable to present any documentation to support its refusal to abide by its previous, written commitment.
11. At a monthly BCBHEC meeting with hatcheries on Wednesday, November 6, 2019, the hatcheries advised that "the potential cutback in placements by chicken growers in response - to avoid overproduction penalties - necessitated moving the kill age to 55 weeks."
12. In response to the hatcheries' request, the BCBHEC consulted with its PPAC on November 8, 2019, and thereafter reduced the kill age to 56 weeks. This reduction to the kill age was reflected in the linkage calculation in accordance with the express, written agreement of the BCCMB set out in its letter dated July 15, 2015.
13. On December 20, 2019, the BCBHEC received a letter from the BC Egg Hatchery Association, as follows:

As you are aware 2019 has been an expensive year in dealing with excess domestic eggs, which effect's the entire industry.

One major factor at play here is the allocation being set at 106%. The other being improved flock performance, which this issue should be close to revenue neutral.

The Association members would like to request the 2019 egg flow based on a 58 week flock life for each hatchery based on 100% allocation being placed as we would like to measure the effect of the additional 6% being placed for our individual hatcheries. The association maintains as stated throughout the year that we did not support allocation being set at 106% and now other industry stakeholders are being asked to pay for this decision.

The BC Egg Hatchery Association was made aware of the BCCMB's express, written agreement that kill age would be reflected in the linkage calculation in 2015. Despite this, after requesting that the kill age be reduced to 55 weeks, the hatcheries made an abrupt "about face" when they seemingly realized that the reduced kill age would be reflected in the linkage calculation. The BC Egg Hatchery Association's subsequent request for a reduction of utilization instead of a reduction to the kill age is a transparent effort to subvert the application of the linkage calculation as agreed between the BCBHEC and the BCCMB.

General

14. Removal of revenues from spent fowl and salvage eggs from the linkage calculation is consistent with sound marketing policy, especially in light of the background as described above. Removal of these items will help to restore balance given the BCCMB's unilateral decision to fail or refuse to reflect non-value premiums contrary to the linkage agreement.
15. Insofar as Amending Order 26 removes revenues for spent fowl and salvage eggs, the Amending Order was:
 - (a) made following extensive consultation with the BCCMB;
 - (b) made in a manner consistent with the BCCMB's repeated expressions of support;
 - (c) accompanied by a comprehensive SAFETI analysis.
16. Insofar as Amending Order 26 reduced the kill age of breeding stock from 58 weeks to 56 weeks in the price linkage, the Amending Order:
 - (a) is consistent with sound marketing policy; and
 - (b) was made by the Commission consistent with the express written agreement of the BCCMB that kill age is to be included as a factor in the linkage calculation. No ex post facto SAFETI analysis is required to support the execution of the linkage calculation in a manner consistent with the BCCMB's existing agreement.
17. The primary responsibility to consult with chicken processors lies with the BCCMB. To the extent that "discussions [between the BCBHEC and the BCCMB] have largely excluded the PPPABC", this results from the BCCMB's failure to engage in consultations with its stakeholders in a timely manner.

Request for Deferral

18. In a letter dated July 31, 2019 addressed to the BCBHEC, the BCFIRB said:

As reflected in BCFIRB's June 28, 2019 letter, the price linkage agreement has played an important role in the stability of BC's chicken supply chain, and that any questions as to whether the linkage remains sound marketing policy are a significant policy consideration that requires more than a two period exit notice to answer. The July 11 letter from the Commission and Chicken Board reflects a common position that there are a number of significant outstanding pricing-related matters throughout the supply chain, including the linkage, that need to be addressed; and, that a more fulsome review under BCFIRB's supervisory authorities is proposed, with the goal of having recommendations to BCFIRB no

later than November 4, 2019. In their The July 11 letter the Commission and Chicken Board also committed to the continued pricing through the price linkage formula as BCFIRB prior approval had not been received. The proposed broader supervisory pricing review was addressed in BCFIRB's July 29, 2019 letter.

Should the Commission pursue exiting the price linkage agreement, BCFIRB would expect to receive a submission from the Commission with an evidence-based SAFETI rationale setting out why the exit would be in the best interest of the hatching egg sector and the overall chicken supply chain (sound marketing policy). For transparency, BCFIRB asks that any potential submission from the Commission to BCFIRB be shared with the chicken supply chain stakeholders, including the Chicken Board.

I would like to clarify that BCFIRB is not bound to prior approve the Commission or the Chicken Board exiting the price linkage agreement as the prior approval is not a regulatory requirement. That said, BCFIRB remains responsible for ensuring sound marketing policy, including orderly marketing, under the Natural Products Marketing (BC) Act. With this in mind, BCFIRB asks that the Commission remain engaged with the price linkage agreement following any future exit submission to BCFIRB until such time as BCFIRB assesses the submission and provides its response.

19. For reasons that will not be fully articulated here, the BCBHEC believes that an “exit” from the linkage, towards a COP-based pricing system, is indeed in the best interest of the hatching egg sector and the overall chicken supply chain. The rationale for this position rests on a number of factors. However, for present purposes, it may be said that one factor warranting a movement away from the linkage concerns a pattern of conduct by the BCCMB and by other stakeholders that appears to be designed to frustrate and subvert the integrity, purpose and intent of the linkage agreement. These include, for example:
- (a) The BCCMB’s exclusion of non-value loyalty premiums from the linkage calculation, despite opposition from the BCBHEC, which has distorted the linkage calculation to the advantage of growers, and to the disadvantage of hatching egg producers;
 - (b) The BCCMB’s repudiation of its express, written commitment of July 15, 2015, that kill age shall be included as a factor in the linkage calculation.
 - (c) The BCCMB’s failure to engage in consultations with its stakeholders in a timely manner with respect to the removal of revenues for spent fowl and salvage eggs. As noted, while the BCCMB has informally expressed its support for these measures, and has never articulated a substantive basis upon which these measures could be opposed, the BCCMB appears to rely on its own delay as a basis for opposition. The effect of this delay is to maintain the long-standing distortion of the linkage calculation resulting from the BCCMB’s unilateral decision to exclude non-value loyalty premiums.

- (d) The January 7, 2020 announcement by Pollon Express Ltd. that it would reduce by half the amount paid for spent fowl (a regulated product). As noted, this announcement reflects a transparent effort to subvert the Commission's decision to remove revenues for spent fowl and salvage eggs (as a mechanism to counter-balance the BCCMB's failure or refusal to reflect non-value premiums in the linkage calculation). Pollon Express Ltd. provided no supporting information or documentation as might justify its proposed reduction to the price paid for spent fowl. Notably, the price to be paid for spent fowl is fixed by order of the BCBHEC (at \$0.40 per kilogram) and cannot be unilaterally ignored at the whim of a processor.
 - (e) The December 20, 2019 letter from the BC Egg Hatchery Association expressing an "about face" from its earlier request that the kill age be reduced to 55 weeks. As noted, upon learning that the reduced kill age would be reflected in the linkage calculation in accordance with the express, written agreement of the BCCMB, the Association sought to reverse its position in an effort to subvert the application of the linkage calculation as agreed between the BCBHEC and the BCCMB.
20. These issues speak to the futility of a linkage agreement in circumstances where the BCCMB and other stakeholders engage in conduct that has the effect of frustrating and subverting the agreement's original intent and purpose. Though these issues will arise in the appeals, the BCBHEC respectfully submits that they are more properly addressed in the context of the BCFIRB's supervisory consideration of a forthcoming "evidence-based SAFETI rationale setting out why [an exit from the linkage] would be in the best interest of the hatching egg sector and the overall chicken supply chain". As noted by the BCFIRB, "questions as to whether the linkage remains sound marketing policy are a significant policy consideration". The BCBHEC submits that these issue are too important to address within the narrow confines of the adversarial appeal process.
21. Legislative authority for the deferral is found in subsection 8(8) of the *Natural Products Marketing (BC) Act*, which provides as follows:
- If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.
22. The BCBHEC anticipates that it will be in a position to deliver its submission "with an evidence-based SAFETI rationale setting out why the exit would be in the best interest of the hatching egg sector and the overall chicken supply chain (sound marketing policy)" in a timely manner.

Thank you for your attention to this matter.

Yours truly,

AFFLECK HRABINSKY BURGOYNE LLP

Per:


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