



Request for Prior Approval for the Exclusion Permit Program of the Asian Breeder Producers

To: BC Farm Industry Review Board

From: BC Hatching Egg Commission

Date: August 19, 2016

Request: To receive prior approval to exempt Asian Breeder Producers, Taiwanese and Silkie from regulation, with the exception of Biosecurity, Food Safety and Premise Identification programs, as per the BC Hatching Egg Commission's Recommendation Report dated June 27, 2016

1. History:

The Commission attempted in 2015 to regularize the Asian Breeder Producers with a "chick based" system. This system was driven by the Chicken Farmers of Canada allocation which further drives the Canadian Hatching Egg Allocation system. Chicks placed within a 4 year time frame were calculated using a third party based on each Producer's records of both hatches and placements. It was the Commission's position that the only reliable information available was that of the hatch and placement of chicks.

Two applicants appealed.

The main focus of the appeal was the inherent limitations to production under a quota system, including the "cut-off" date which would award quota based on existing production levels, thereby negatively affecting those who had just started producing or who might wish to gain greater market share through competitive pricing or chick differentiation.

The Commission's chick-based quota system was resoundingly rejected by the BCFIRB, which agreed with the Appellant's position concerning the negative impact of a quota system on those who are not yet engaged in production, and those who wish to further develop market share beyond current levels of production:

Moving on to the Regularization Program itself, we find that the Commission failed to take into account the impact that the level of quota allotments issued under the

Program would have on the appellants' hatching egg production operations. While the Commission would not be bound by this factor alone, some serious consideration must be given to the reality that Skye Hi and V3's hatching egg businesses would be destroyed as a consequence of the amending order, as the quota allotted is not enough to supply their own farms let alone their third party customers. As well, W. Friesen will not receive enough quota to meet its current market needs. The Commission points to flexibility in its allotment process but we observe that it rejected out of hand the appellants' applications for further allotments as a result of exceptional circumstances, finding that their circumstances were related to acquiring more base as opposed to specific and unique production needs. (BCFIRB Decision, par. 112)

...there is no recognition in the Reasons for Decision, the meeting minutes, or the Commission members' testimony that suggests that the Commission gave any meaningful consideration to the negative impact its decision would have on the appellants. The Commission's justification for its choice of historical production period was its desire to avoid "a race for base" and the associated market disruption and instability. While this was expressed as a concern, neither the Commission nor Bradner and Coastline brought any evidence to show that the entry of two new producers in the sector had in fact caused disruption or instability. (BCFIRB Decision, par. 115)

....the entry of Skye Hi and V3 into an unregulated (or not actively regulated) hatching egg industry in 2010. In the view of the panel, this is part of the industry's overall success story and is an indication of the growing strength of this small but important sector. It is not, as depicted by the Commission, Bradner and Coastline, a story of self-interest, market chaos and something to be condemned. (BCFIRB Decision, par. 116)

The panel finds that regulating a return to fewer producers of Asian chicks than now exist is not consistent with sound marketing policy. In the current market, chicken growers have more choice of chick producers and there is increased opportunity for the development of variety within hatching egg breeds. We heard compelling arguments that diversity of producers in the Asian hatching egg sector provides for a more resilient marketplace, increased production efficiencies within the sector overall and protection in the event of outbreaks of disease or other disasters. In our view, the Commission's orders fail to give sufficient weight to the importance of diversity amongst producers in the further development of this sector. (BCFIRB Decision, par. 117)

In light of the decision, the Commission began to review ways to allow for that innovation and diversity and the way to achieve that was through exemption permitting. This would allow the Asian Breeder Producers the flexibility to achieve market demands, the ability to scale down should their requirement stagnate at certain times of the year and relieve them the burden of the obligations of regulation.

It is to be noted that the "exemption option" was recognized by the BCFIRB as early as 2005, when it released its Specialty Review Report:

5.10. Exemptions

Exemptions provide a tool by which Boards may authorize individuals, or groups of individuals, to produce and/or market outside certain of the Boards' Orders. Exemption does not necessarily (or even usually) mean exemption from all regulation. Section 11 (1)(e) of the Act provides a Board with the power "to exempt from a determination or order a person or class of persons engaged in the production, packing, transporting, storing or marketing of a regulated product or a class, variety or grade of it." It is important that any exemptions provided be clear regarding which parts of the Orders are included in the exemption.

As the markets for supply managed products have evolved, average farm sizes have increased and the number of producers representing a significant majority of the production has decreased. Smaller production units can experience greater difficulty remaining viable as market pricing established by the Boards recognizes scale efficiencies through productivity variables in cost of production models. Smaller and mid-sized producers may exit the industry, generally by selling their quota to larger producers seeking to expand and having greater financial capacity by virtue of higher productivity and therefore higher margins under a fixed price scheme.

Many specialty producers are smaller producers serving local or regional markets, often by direct marketing efforts. For them, regulation – particularly regulation that is not calibrated to the realities of the class of production being regulated – can constrain their ability to produce and market their products. The administrative burden imposed by the regulation may tempt small producers to operate illegally outside the system or to simply quit. In the first case, illegal operation threatens the integrity of the regulated system while enforcement of the regulations can subject the Boards to unconstructive criticism. In the second case, withdrawing from operation may result in local direct market segments not being served, innovation being constrained and regional economic activity being curtailed. Sound marketing policy as articulated by FIRB and the Ministry is clear that markets must be served and innovation must be fostered.

The Commission may wish to provide, if it has not already done so, a specific exemption for Asian specialty breeders. This exemption could take the form of an annually renewable license to produce Asian specialty breeders in any amount subject only to certain requirements such as humane production practices and marketing only for Asian specialty production.

2. Post Appeal Work Action Plan and Framework:

A Work Action Plan was developed to ensure that the BCFIRB's instructions were followed and that there were clear parameters put in place to ensure the SAFETI principals were followed as transparently as possible.

The Commission circulated the minutes from its special meeting on June 10, 2016 the intention of this was to ensure that the stakeholders were all aware of the Commission's meeting and that the intention

to regulate had changed to the intention to provide a niche market for the 6 producers to thrive in. An Appeal was filed on June 20, 2016 that appeal was considered pre-emptive by the BC FIRB. Following the circulation of the minutes a Recommendation report was sent to stakeholders. Stakeholders were given 30 days to provide comment via email. Another appeal was filed.

The Commission believes that this matter must come to a final conclusion. In the appeal one of the appellants claims that attaining quota is not the goal, based on all the appeals files thus far attaining quota seems to be the only goal regardless of the impact to the orderly marketing of the broiler specialty market place.

One producer has been trying to sell the business for several years and has attempted to gain assurances that certain rules will not apply, for example the 10/10/10 in order to sell as soon as quota is granted.

One producer has claimed no interest in quota and has advised the Commission that exempting this group makes the most sense moving forward and testified to that in the last appeal heard by BCFIRB.

Three of the six have appealed 3 times. Once when awarded quota, once while in the consultative process post appeal and once post recommendation report.

Two of the six have been on side with the Commission while the Commission attempted to distribute quota and have spoken out against the Commission while during the exemption permit process.

3. Consultation comments:

The Commission reviewed the letter from the BC Chicken Grower's Association. The BC Chicken Growers Association describes the Recommendation as "highly speculative" and "not based on actual data", but the BCCGA did not provide any examples to justify these strongly worded comments. It is perhaps important to note that one of the Asian Breeder Producers who is also the appellant in the previous appeal serves as a director on the BCCGA. The Commission considers this a conflict.

The Commission carefully reviewed the joint submission made on behalf of Skye Hi Farms Ltd., Casey van Ginkel dba V3 Farms, Wilhelm Friesen & Lillian Fehr dba W. Friesen Enterprises, Robert and Patricia Donaldson dba Bradner Farms, Unger's Chick Sales (1974) Ltd. dba Coastline Chicks. Much of that submission focussed on complaints concerning the process employed by the Commission. Concerns with respect to process were also raised by BCFIRB member Chris Wendell in his letter dated August 16, 2016. The primary purpose of this report is to set out the Commission's decision on the substantive issues. However, the Commission wishes to at least address the "the concern about potential Commission non-compliance with BCFIRB's deadline" raised by Mr. Wendell. In the letter of August 16, Mr. Wendell notes that the Commission "has issued recommendations or made provisional findings" and "has not yet issued its final decision". Consequently, it was held that "any appeal is premature". The Commission at all times regarded this to be entirely consistent with the BCFIRB's directions in paragraph 136 of its decision, which required the Commission "to provide a report to its stakeholders and BCFIRB with its recommendation(s)". The Commission has done just that, and it obviously agrees with the conclusion that a "recommendation" is not a "decision, order or determination" within the meaning of s. 8(1) of the NPMA. In short, the Commission assumed that the BCFIRB's choice of language in its direction was intentional, and that its express reference to "recommendation(s)" was not intended to be read as a reference to a "decision, order or determination". The August 16 letter notes that the

Commission “declined to file a reply to counsel’s submission highlighting [the 90-day deadline].” However, the Commission simply proceeded on the basis that the BCFIRB meant what it said, and that a reply would not be necessary to advance that particular assumption before the BCFIRB.

The Commission is prepared to address its justifications for adopting the process employed in as much detail as may be necessary. However, as the principal purpose of this document is to set out the Commission’s decision on the substantive issues, it will defer further comment on process except as may become necessary, in the appropriate forum.

Substantively, the joint submission asserts that the Commission’s recommendation is not consistent with the 2005 Specialty Review, and that exemption is not consistent with supply management principles. However, it must first be noted that the Commission’s recommendation should be, to the extent possible, consistent with both the 2005 Specialty Review and the BCFIRB’s March 29, 2016 decision. As noted earlier, the 2005 Specialty Report expressly states:

Exemptions provide a tool by which Boards may authorize individuals, or groups of individuals, to produce and/or market outside certain of the Boards’ Orders. Exemption does not necessarily (or even usually) mean exemption from all regulation. Section 11 (1)(e) of the Act provides a Board with the power “to exempt from a determination or order a person or class of persons engaged in the production, packing, transporting, storing or marketing of a regulated product or a class, variety or grade of it.” It is important that any exemptions provided be clear regarding which parts of the Orders are included in the exemption.

The Commission may wish to provide, if it has not already done so, a specific exemption for Asian specialty breeders. This exemption could take the form of an annually renewable license to produce Asian specialty breeders in any amount subject only to certain requirements such as humane production practices and marketing only for Asian specialty production.

Also, the BCFIRB’s March 29, 2016 decision resoundingly rejected the Commission’s attempt to regularize these producers into a quota system. In particular, the BCFIRB repeatedly emphasized that a quota system, with its inherent, finite limits on production, would negatively affect those who are not yet engaged in production, and those who wish to further develop market share beyond current levels of production:

Moving on to the Regularization Program itself, we find that the Commission failed to take into account the impact that the level of quota allotments issued under the Program would have on the appellants’ hatching egg production operations. While the Commission would not be bound by this factor alone, some serious consideration must be given to the reality that Skye Hi and V3’s hatching egg businesses would be destroyed as a consequence of the amending order, as the quota allotted is not enough to supply their own farms let alone their third party customers. As well, W. Friesen will not receive enough quota to meet its current market needs. The Commission points to flexibility in its allotment process but we observe that it rejected out of hand the appellants’ applications for further allotments as a result of exceptional circumstances, finding that their circumstances were related to acquiring more base as opposed to specific and unique production needs. (BCFIRB Decision, par. 112)

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The Appellants (or at least some of them) who argued with vigour at the appeal that they do not want quota, and that they merely want to farm, have now essentially reversed their position. However, it is the Commission's view that a quota system of the kind it originally proposed, or even some variant of it, could not be consistent with **both** the 2005 Specialty Review **and** the BCFIRB's March 29, 2016 decision. Conversely, the Commission is of the view that exemption is an option (perhaps the only option) that can be said to be consistent with **both** the 2005 Specialty Review **and** the BCFIRB's March 29, 2016 decision.

K&R Farms provided the Commission with a letter supporting the Commission's substantive recommendation, but advanced complaints concerning process.

The BC Hatching Egg Producer Association makes comment on sustainability. The Commission feels their comment is on point. Neither the Asian Breeder Producers nor the Broiler breeder Producers can sustain this continued disruption. The Commission has spent a large amount of resources on this category of hatching eggs based on the instruction of BCFIRB and as a result the Hatching Egg Producer has carried the costs associated. The Association also expresses a concern regarding "the absence of any recognition of cost coverage for the enforcement of the [Food Safety, Biosecurity, and Premise ID] programs." In fact, the Commission's proposed, draft Amending Order (attached) specifically contemplates that the exemption does not extend to "the requirement to pay fees or charges imposed by the Commission from time to time in order to recover costs associated with the administration and enforcement of Schedule 5 to the Consolidated Order with respect to persons engaged in the marketing

of Silkie or Taiwanese broiler breeders, Silkie or Taiwanese Broiler Hatching Eggs, or Silkie or Taiwanese Chicks.”

To Date:

Post recommendation report circulation the Asian Breeder Producer category seems to remain in upheaval. A request from W. Friesen attempting to gain some confidence from the Commission on the sale of their company and the Commission remaining out of the way in order to complete the sale.

An email was received from Ms. Hunter asking the Commission to impose a moratorium to preserve the status quo, essentially making it impossible for anyone new to enter the industry. This request seems to have been made as a result of Fraser Valley Duck and Goose expressing an interest in engaging in production. When the appeal was heard, Skye Hi and V3 argued against the imposition of a quota system because it would not accommodate their aspirations and would “destroy their business”. The BCFIRB panel agreed. Paradoxically, Fraser Valley Duck and Goose might be seen as today’s Skye Hi and V3 – yet those producers now argue that the “new” status quo should be preserved so that they may maintain their market share at the expense of Fraser Valley Duck and Goose.

4. Rationale for the Prior Approval Request:

It is the Commission’s position that there is no clear path of non-resistance in the Asian Breeder Producer category of production. 6 producers self-described in the last appeal, as managing their farm and their flocks so differently. Their interests often not aligning and the only significant thread throughout is the need to ensure that they meet the standards in the Biosecurity, Food Safety and Premise ID Programs.

The Commission has attempted to regulate and grant quota, that system was appealed, and the BCFIRB resoundingly rejected the Commission’s proposed chick-quota system. The Commission shifted their thought to permits and that is currently being considered for appeal.

It seems that this small category of production will remain an ongoing issue unless the Commission can move forward with a strategy without the risk of appeal which is why the Commission is taking the step to ask for prior approval from the BCFIRB. The Commission appreciates the weight of this request but cannot see another sustainable option.

5. SAFETI Analysis of the prior approval request:

It is unfair to remain in the turmoil of appeal and disruption of the unknown future. By granting a prior approval to the Commission to permit the Asian Breeder Producers all involved can be confident of the expectations of their respective roles and can move forward with decisions. Knowing the parameters of expectation is fair to everyone.

Inclusivity has been paramount to the Commission in its decision making from the beginning of this process. Post appeal the stakeholders were listed and all circulated information was sent to them and posted to the BC Hatching Eggs website to ensure that all possible stakeholders were reached in the tight timeframe instructed to the Commission by BCFIRB.

A prior approval would effectively end the adversarial relationship between the Commission and the Asian Breeder Producer. Currently the Commission is enforcing the Biosecurity, food Safety and Premise ID programs. Several Asian Breeder Producers are pushing back against the enforcement of these programs and during a potential appeal the Commission has hesitated in using their full statutory authority over the Asian Breeder Producers for fear that it may be misconstrued as punitive action on behalf of the Commission. A prior approval removes the concern for appeal and allows the Commission to move forward on the necessary enforcement to ensure that the Asian Breeder producers are compliant in these programs.

It is the Commission's position that the Asian Breeder category of production must be strategically able to meet production demands without the obligation of regulation. This is both strategic and sustainable moving forward. The prior approval expedites the Permit Program and allows the administrative piece to be started quickly and efficiently.

The Commission strives for transparency with every decision it makes. The Work Action Plan and the Recommendation Report have both been circulated to the stakeholders and posted to the website. The Recommendation Report clearly states that the Commission may request prior approval based on the submissions received.

The Commission is accountable to all of its stakeholders and has included all stakeholders in the explanation and justification of its decisions.

6. Final Thoughts:

The Commission would ask for prior approval to permit the Asian Breeder Producers excluding them from regulation but for Biosecurity, Food Safety and Premise ID programs.

It is the Commission's position that BC FIRB awarding prior approval will ensure that the Biosecurity programs are enforced prior to the start of flu season and there can be an end to the adversarial divide between Asian Breeder Producers and the Commission as there will be clarity in the relationship between the two sides.

Regards,

A handwritten signature in black ink, appearing to be 'CL' followed by a stylized flourish.

Casey Langbroek
BCBHEC Chairman