March 13, 2015 File: 44200-50/File:#15-03, #15-04

DELIVERED BY E-MAIL

Claire Hunter, Counsel
Hunter Litigation Chambers
2100-1040 West Georgia Street
Vancouver, BC V6E 4H1

Robert Hrabinsky, Counsel
Affleck Hira Burgoyne LLP
700 – 570 Granville Street
Vancouver, BC V6C 3P1

Chris Harvey
MacKenzie Fujisawa LLP
Barristers & Solicitors
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6

Wilhelm (Bill) Friesen
Lillian Fehr
W. Friesen Enterprises dba W Friesen
1509 – 176 Street
Surrey, BC V3S 9S7

Paul D. McLean
Mathews, Dinsdale & Clark LLP
Suite 1620, 1140 West Pender Street
Vancouver BC V6E 4G1

Dear Sirs and Mesdames:

RE: Skye Hi Farms Inc. and Casey Van Ginkel dba V3 Farms v. British Columbia Broiler Hatching Egg Commission – Application for a Stay of the February 27, 2015 Quota Allotment Decision

On March 5, 2015, the British Columbia Farm Industry Review Board (BCFIRB) received a further appeal and application for a stay from Skye Hi Farms Inc. and Casey Van Ginkel dba V3 Farms (the appellants) with respect to a February 27, 2015 decision of the British Columbia Broiler Hatching Egg Commission (Commission) allotting quota pursuant to Amending Order 11 (Appeal #2). The appellants are seeking a stay of the decision until such time as the appeal is determined or alternatively, until the Commission has completed its decision-making process in respect of the allotment of quota pursuant to Amending Order 11.

By way of background, the appellants previously appealed the November 23, 2013 decision of the Commission to enact Amending Order 11 (Schedule 9, *Regularization of Historically Non-compliant Silkie and Taiwanese Producers Program Rules*) and applied for a stay (Appeal #1).

The stay application was dismissed in a decision dated March 6, 2014 where the then presiding member held in part:

> 43. ..... it is speculative at this point to know how the Commission will treat the appellants' application. The program as designed has a base component and a discretionary component which may or may not give the appellants the market share that they have gained since December 2012. Further, the Commission has the authority to make "special directions" to recognize in some fashion the appellants' business model of a "virtual hatchery". In short, the program may or may not cause the appellants irreparable harm. On this point, I agree with the Commission, that in the absence of a decision on the application, there is a factual vacuum.
>
> 44. Once the Commission makes a decision on these significant issues with respect to the appellants or any other application, a person aggrieved by or dissatisfied with that decision could bring an appeal and a stay application on short notice. While any such stay application may be more complicated in that the implications of any other allocation applications would need to be addressed, the Provincial board would have the benefit of the Commission's considered views on the merits of the application concerned, which BCFIRB expects would take into consideration the impact on other affected stakeholders. An application and arguments related to irreparable harm would then have a factual underpinning.
>
> 45. .....While I accept that the appellants are in a good position to offer opinions about certain aspects of the businesses they operate and make projections about how the Decision *might* affect their businesses, until a decision on the appellants' application has been made by the Commission, these are speculations at best.

Appeal #1 was subsequently adjourned generally at the request of the Commission. While the presiding member expressed concern regarding the length of time the Commission had taken to process applications, in her July 10, 2014 adjournment decision she held that it was in the public interest that the allotments made pursuant to Amending Order 11 be "fair, transparent and applicable to all" and granted the adjournment application.

On February 27, 2015, the Commission issued its decision (the February decision) allotting quota to the appellants based on the "default provisions" of Amending Order 11 and denying additional allotments of quota based on "exceptional circumstances". The Commission made its decision with "reasons to follow". Subsequently, the Commission invited all quota applicants including the appellants to make submissions in relation to 'minimum efficient farm size' and the prospect of increasing or decreasing allocations on a pro rata basis to best reflect the current aggregate market conditions. This submission process will not be concluded until April 3, 2015 and it is uncertain when any further Commission decisions will be made or when its written reasons will be released.

Given the appellants' position that there was urgency in having the stay application heard as they are obligated to sign supply contracts by March 13, 2015, I directed a truncated submission schedule for the appellants, the Commission and those parties identified as interveners in Appeal #1 (BC Chicken Growers' Association, Coastline Chicks, Bradner Farms and W Friesen Enterprises dba W Friesen). I have had an opportunity to review these submissions, as well as the affidavit evidence submitted by the appellants in support of their application. I note as well

that in my earlier correspondence, I had indicated that Daphne Stancil would be presiding over this preliminary matter however as she is unavailable, that responsibility falls to me.

I am mindful of the urgency surrounding this application and I wish to be clear that I have considered the arguments of the parties in their entirety although it is not my intention to refer to all of them in the course of my decision.

The Stay Application

The test for whether it is appropriate to grant a stay is set out in *RJR-MacDonald Inc. v Canada (A.G.)*, [1994] 1 S.C.R. 311. This test is also set out in Rule 7(1)(b) of the Rules of Practice and Procedure for Appeals under the *Natural Products Marketing (B.C.) Act* which provides that an appellant who applies to BCFIRB for a stay of a decision under appeal must specify

(i) Whether the appeal raises a serious issue(s) to be considered;
(ii) What harm to the applicant, that cannot be remedied, would occur if a stay is not granted;
(iii) Why the harm to the applicant outweighs the harm that would occur to others, or to the public interest, if BCFIRB grants the stay.

Submissions of Parties

The appellants argue that this appeal raises serious issues (relating to procedural fairness and sound marketing policy) to be tried. They further allege that failure to grant a stay will result in irreparable harm as the amount of quota allotted to them by the Commission to date is inadequate to meet planned contractual commitments. Further, the Commission's determination of quota allotment in stages places the appellants in a difficult position as it is unknown what quota will be allotted to them upon the Commission's completion of its submission process. The appellants rely on the affidavit evidence of specialty broiler breeder and president of Skye Hi Farms, Trevor Allen, in support of this position. As for the balance of convenience, the appellants say that it is not in the public interest to arbitrarily and suddenly impose a quota regime without advance notice, thereby creating chaos and removing producers from the market. Second, market diversity, sustainability and innovation are policy objectives of both the province and BCFIRB and these objectives will be harmed if a stay is not granted. Third, the February decision has the effect of excluding new entrants (the appellants) from the market. Fourth, a stay permits the appellants to continue to supply chicken growers who have chosen to work with them and with whom they have developed excellent relationships. Finally, the appellants say that a stay will allow the Commission to complete its decision making and allow for the appeals to be heard in an orderly way. In the absence of reasons, it is impossible to know why the Commission has made the decision it did and why it has chosen to engage in "decision-making in slices".

The Commission chose not to address the three part test for a stay or the issues raised by the appellants. Instead, the Commission characterises this application as an attempt by the appellants to obtain an unfettered right to produce broiler hatching eggs without quota, pending

further decisions of the Commission or the hearing of the appeal. The Commission says its decision to allot quota should not be confused with a decision to cancel quota where an affected party might seek a stay. It says that if a stay is granted of the decision to allot quota, the appellants would simply not receive their allotment of quota. The stay does not give them an unfettered right to produce broiler hatching eggs without an allotment quota. The Commission also says that this application must not be confused with how the appellants would potentially oppose enforcement proceedings in Supreme Court if such proceedings were in fact taken by the Commission. The Commission says that if the appellants are not seeking to pre-emptively block enforcement proceedings under the guise of a stay application on a decision allotting quota to them, then they should clearly state that they are seeking a declaration from BCFIRB that they have an unfettered right to produce broiler hatching eggs without quota.

The Commission says the history of regulated marketing is "littered with unsuccessful attempts to argue past unlawful production gives rise to a legal right to be grandfathered into the regulated marketing system". The Commission says that it would vigorously oppose the granting of such a declaration. The Commission urges BCFIRB to dismiss this application for a stay and state clearly and definitively that the absence of quota cannot and does not give rise to an unfettered right to produce broiler hatching eggs stating that if the appellants had some inherent right to engage in production without quota, the Regularization Program itself would be an exercise in futility.

The appellants made three points in reply. First, the status quo here is an absence of regulation of specialty hatching egg production. In the first stay application, the Commission made a similar argument, characterizing the notion that the appellants have a "right" to continue to produce specialty broiler hatching eggs at current production levels as "complete nonsense" given that section 37 of the Consolidated Order prohibits the appellants from producing hatching eggs without an allotment of quota and the Commission's ability to enforce that prohibition through an injunction obtained in the Supreme Court. The appellants disagree with the Commission's attempt to again characterize the period leading up to the February decision as one of non-compliance by the appellants. Rather, they say the Commission was aware of BCFIRB's 2005 Specialty Review and its directions to boards and commissions to designate specialty classes of quota and establish new entrant programs, as well as the resulting decision of the British Columbia Chicken Marketing Board to commence issuing specialty chicken quota. Despite this, the Commission failed to implement a quota program for specialty hatching eggs, thereby creating a situation where the market needs of chicken growers could only be met by producers without quota. It was in this environment, with the full knowledge and acquiescence of the Commission, that the appellants commenced production of specialty hatching eggs to supply their own registered chicken farms in 2010 and, in 2012, began operating T&C Chick Sales, a chick broker licensed with the Chicken Board.

The appellants' second point is that the arbitrariness of the Commission decision favours a stay. Given the Commission's long standing refusal to regulate specialty chicken, the appellants say they had a legitimate expectation for high levels of procedural fairness. Instead, the Commission has provided no rationale for any aspect of its decisions, in relation to Amending Order 11, the February decision, the process chosen, the timing of the decision after a multi-year delay and the

failure to complete its decision making before aspects of the decision take effect. The failure to give reasons is exacerbated by the Commission choosing not to file any evidence in support of its position on either this stay application or the stay application for Appeal #1. The February decision does not accord with BCFIRB's higher-level principles (Strategic, Accountable, Fair, Effective, Transparent, Inclusive (SAFETI)) and the Commission's apparent failure to consider the interests of the appellants is not inclusive. There is no rationale offered in support of using 2009-2012 production levels to set quota allocations for 2015 especially when the appellants alone were new entrants in 2010. Despite a lengthy adjournment to permit the Commission to finish its decision making, this decision making process is incomplete. In light of the foregoing, the appellants say there is no public interest in implementing a partial decision now as opposed to after the Commission's decision making process is complete.

The third point identified by the appellants is that in the absence of a stay there will be a shortage of chicks for chicken growers. The BCCGA raised the issue of the potential shortage of chicks for specialty chicken growers as a reason in support of a stay (see below). The appellants argue that the implementation of the February decision without prior notice or lead time to adjust to the re-apportioning of market share as between hatching egg producers will result in disruption of chick supply. They say it is curious that the Commission has not addressed this issue nor has it provided any assurance that it has considered whether there are sufficient and appropriate hatching eggs to meet grower demands. The unchallenged evidence of Mr. Allen is that the appellants need to place 471,500 chicks between January 2015 and November 2015 to meet the needs of their chicken growers and they have already expended resources selecting and raising breeders to meet these requirements. If the February decision is implemented and the appellants' operations are rendered unviable, there will need to be significant adjustments by other growers to meet the gap in production left by the appellants.

Position of Interveners

The Interveners in Appeal #1 made brief submissions. The BCCGA state that if the quota allocated under the February decision results (or has the capacity to result) in a shortage of chicks for chicken growers, it supports a stay. Lillian Fehr and Bill Friesen say that the partial decision of the Commission without any further information leaves them in a difficult position. They understand the traumatic position the appellants are in and say they may soon be in a similar situation. They support a fair and workable conclusion.

Bradner Farms, a competitor of the appellants, opposes the granting of a stay as it will allow "illegitimate specialty chick producers … to continue with the existing state of affairs". They allege that the appellants have abused the system and wasted no time in trying to increase market share in an attempt to get more breeder quota, undercutting market price without consideration to other producers and causing irreversible harm. Bradner Farms indicates that they can supply the chicks required by the specialty market without the appellants' continued overproduction.

Decision

Before considering whether the appellant has satisfied the three part test for a stay, I want to address the substance of the Commission's response – that this application is a transparent attempt by the appellants to secure an extraordinary pre-emptive order in the wrong venue under the guise of a stay application. In my view, the Commission's characterization of the appellants as non-compliant producers is an oversimplification. As pointed out by the appellants, this approach was rejected in the stay decision issued in Appeal #1 where the presiding member stated as follows:

> I have also considered the Commission's submission that the appellants have never had a right to produce without a license or quota based strictly on s. 37 of the Consolidated Order. However, in my view it would not be fair to characterize the period leading up to the Decision as one in which the Commission did not enforce the requirement under its Order that producers have quota. By way of a notice to producers dated March 2010, the Commission advised specialty producers of its intention to regularize their operations and assured them that it would not include the requirement to hold quota. [emphasis added]

I agree that under the *British Columbia Broiler Hatching Egg Scheme*, the Commission has the authority to regulate all broiler breeder flocks, broiler hatching eggs, and chicks in BC. However, in the past the Commission has not actively regulated Silkie and Asian broiler breeder flocks such as those of the appellants, even though there are no exemptions for this production either in the *Scheme* or the Commission's Consolidated Orders.

The Amending Order created a system to regularize producers such as the appellants through an application process. The February decision challenged in this appeal is the Commission's first determination of the appellants' appropriate allotment of quota based on past production. Other determinations may follow. In my view, the appellants' request for a stay to preserve the status quo in existence prior to the February decision is properly before me.

I turn now to consider the three part test for whether it is appropriate to issue a stay in these circumstances.

Serious Issue to be Tried: The appellants raise several issues on this appeal. They argue that the allotment of regularized quota granted to them pursuant to Amending Order 11 does not accord with BCFIRB's 2005 Specialty Review or sound marketing policy. They also take issue with the process undertaken by the Commission to determine how to allot quota and say this process does not comply with SAFETI and say it was unfair.

In the stay application in Appeal #1, both parties agreed that the appeal of the Amending Order 11 raised serious issues of procedural fairness and sound marketing policy. In the absence of any argument from the Commission to the contrary, I am satisfied that the appeal raises serious issues to be tried.

Irreparable Harm: Under the second branch of the test, the appellants must satisfy the burden of proving that they would suffer irreparable harm if the Commission's decision is not stayed pending appeal. The appellants rely on the uncontroverted affidavit evidence of Mr. Allen who strongly asserts that the allotment of regularized quota issued to the appellants in the February decision is wholly inadequate. He asserts that they have not been allotted sufficient quota to meet the current needs of their own specialty chicken operations let alone their current commitments to provide specialty eggs to other specialty chicken producers. The Commission has not challenged this evidence.

In the first stay application, the Commission argued and the presiding member accepted that a stay was premature as it was unclear the appellants would suffer irreparable harm in the absence of the considered decision of the Commission on the merits of the application. She held that to do so would be to render a decision in a "factual vacuum". While a decision has now been made on the appellants' application, I find that this lack of reliable factual information persists. I say this because I do not have the benefit of the Commission's considered views on the merits of the application, nor do I have its views on the test for a stay or any evidence in support of either. I do not know the Commissions' view as to the implications of a stay on any other allocation applications which may need to be addressed. The issue of a potential shortage of chicks was raised both by the BCCGA in its submission and in the affidavit of Mr. Allen, but was clearly disputed in Bradner Farms' submission. I do not, however, know the Commission's position on the possibility of such a shortage or the potential for disruption should the stay be denied.

Balance of Convenience: Under the third branch of the test, there is a presumption that legislation promotes the public interest and that a stay of that legislation would harm the public interest. As such, the onus is on the appellants to demonstrate that there would be a benefit to the public interest in staying the legislation. In this case, the appellants argue that the balance of convenience favours a return to the status quo (the circumstances as they existed prior to the February decision) until such time as the appeal is heard or alternatively until the Commission issues reasons for its February decision and makes the further allotments of quota to reflect 'minimum efficient farm size' and adjustments to reflect the current aggregate market conditions (to be completed by April 3, 2015)

I have considered the extensive evidence presented by the appellants and accept that there is a risk of irreparable harm to its business as well as potential disruption in the market place if a stay is not granted. While I note Bradner Farms' stated position that market demand for specialty chicks can be met without the appellants' current production levels, I am overall of the view that the balance of convenience favours the appellants in the circumstances. As already stated, the Commission has yet to provide reasons for its decision and has chosen not to introduce any evidence or respond directly to the issues raised by the appellants in their stay application or the submissions of the intervener, despite being given an opportunity to do so in the March 6, 2015 process letter. I would also note that the lengthy delay of the Commission in making its decision followed by the sudden institution of a partial quota regime without lead time in the absence of any reasons have all contributed to a climate of uncertainty.

It is the Commission's responsibility as the first instance regulator to determine, through a defensible process and clear rationale, what manner of regulation is effective and strategic in order to meet their roles, responsibilities and objectives in the interests of both the industry and the public. To date, this has not happened with respect to the regularization process.

The Commission may have followed proper processes in enacting Amending Order 11 and in issuing its allotment decisions. Having made the decision to regularize specialty broiler chick production, the Commission was tasked with creating a fair process (incorporating SAFETI principles) to determine the size of the "pie" and the size of each "slice" to be allotted to appropriate candidates. But that decision making process is not yet complete; the Commission has not issued reasons for its February decision and it has further allotment decisions to make.

I recognize that we are dealing with living creatures and not "widgets" and production life cycles require planning decisions to be made well in advance to ensure production levels meet demand. In these circumstances, it is in my opinion appropriate to grant the appellants' request for a stay until such time as Appeal #1 and #2 can be heard. However, the appellants should not assume that the circumstances preserved by this stay are anything but short term. Depending on the evidence heard following a hearing on the merits, and given BCFIRB's previous statements regarding its minimum expectation for the regulation of specialty production for the purposes of biosecurity and food safety, the appellants need to be aware that there is a full range of possible outcomes on these appeals. Such outcomes include but are not limited to determinations of whether a quota regime in general or an allotment of quota in particular are in fact consistent with sound marketing policy. The appellants could therefore end up with the same allotment, something more, less or nothing at all and as such, they should be mindful of these potential outcomes during this interim period.

It is in the interests of all concerned that these appeals be heard on an expedited basis. BCFIRB will be in contact with the parties to arrange a pre-hearing conference to address procedural matters and set this matter down for hearing. In the interim and in the interest of certainty, the Commission needs to issue its reasons for the February decision and complete its further allotment processes and provide reasons no later than April 3, 2015, as planned. The issuance of these further decisions and reasons may trigger further appeals. On this point, I observe that a notice of appeal was received from K&R Farms Ltd. on March 10, 2015 also challenging the February decision.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Andreas Dolberg, Vice Chair

CORRIGENDUM

Released: March 18, 2015

[1] This is a corrigendum to the decision of March 13, 2015. The last paragraph on page 3 of the decision should have read as follows:

> The Commission chose not to address the three part test for a stay or the issues raised by the appellants in its reply submission dated March 6, 2015, relying instead on its submissions made in response to the first stay application dated February 13, 2014. The Commission characterises this application as an attempt by the appellants to obtain an unfettered right to produce broiler hatching eggs without quota, pending further decisions of the Commission or the hearing of the appeal.

[2] The first full paragraph on page 7 of the decision should have read as follows:

> In the first stay application, the Commission argued and the presiding member accepted that a stay was premature as it was unclear the appellants would suffer irreparable harm in the absence of the considered decision of the Commission on the merits of the application. She held that to do so would be to render a decision in a "factual vacuum". While a decision has now been made on the appellants' application, I find that this lack of reliable factual information persists. I say this because I do not have the benefit of the Commission's considered views on the merits of the application, nor do I have its views on the test for a stay in the specific circumstances of this application or any evidence in support of either. I do not know the Commissions' view as to the implications of a stay on any other allocation applications which may need to be addressed.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Andreas Dolberg, Vice Chair