IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION CONCERNING THE "REGULARIZATION OF HISTORICALLY NON-COMPLIANT SILKIE AND TAIWANESE PRODUCERS PROGRAM RULES"

BETWEEN:

SKYE HI FARMS INC.,
CASEY VAN GINKEL DBA V3 FARMS AND
WILHELM FRIESEN & LILLIAN FEHR DBA W. FRIESEN ENTERPRISES

APPELLANTS

AND:

BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

RESPONDENT

AND:

ROBERT AND PATRICIA DONALDSON DBA
BRADNER FARMS,
UNGER'S CHICK SALES (1974) LTD. DBA
COASTLINE CHICKS,
K&R FARM HOLDINGS LTD.,
WILHELM FRIESEN & LILLIAN FEHR DBA W. FRIESEN ENTERPRISES
SKYE HI FARMS INC., AND
CASEY VAN GINKEL DBA V3 FARMS

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Daphne Stancil, Presiding Member John Les, Chair Andreas Dolberg, Vice-Chair
For the Appellants/Interveners Skye Hi and V3 Farms	Claire E. Hunter, Counsel Rebecca Robb, Counsel
For the Appellants/Interveners Wilhelm Friesen and Lilian Fehr dba W. Friesen Enterprises	Wendy A. Baker, Q.C., Counsel Anthony Toljanich, Counsel

For the Respondent British Columbia Broiler Hatching Egg Commission	Robert Hrabinsky, Counsel
For the Interveners Robert and Patricia Donaldson dba Bradner Farms Unger's Chick Sales (1974) Ltd. dba Coastline Chicks	Christopher Harvey, Q.C., Counsel
For the Intervener K&R Farm Holdings Ltd.	Wendy A. Baker, Q.C., Counsel
Date of Hearing	September 15 - 18, 2015
Place of Hearing	Langley, British Columbia

INTRODUCTION

1. This decision addresses the issues arising from a number of appeals relating to the British Columbia Broiler Hatching Egg Commission's (Commission) enactment of Amending Order 11[1] (the Regularization Program) and the allotment of quota under that program. The Regularization Program directly affects Silkie and Taiwanese chick (TC) producers in B.C., of which there are six: Skye Hi Farms Inc. (Trevor Allen), Casey Van Ginkel dba V3 Farm, Lillian Fehr and William Friesen dba W. Friesen Enterprises, K&R Farm Holdings Ltd., Unger's Chick Sales (1974) Ltd. dba Coastline Chicks (Kelly and Teresa Boonstra) and Robert and Patricia Donaldson dba Bradner Farms. All six producers participated in the appeal hearing, the first three as appellants and interveners, and the last three as interveners.

BACKGROUND AND BRIEF OVERVIEW OF THE APPEALS

2. BC is part of an integrated national supply management system that uses quota to manage and control the production and marketing of several commodities (eggs, chickens, turkeys, hatching eggs and milk). Over the years, small niche businesses developed to service different specialty markets. These businesses often developed outside the supply management system and commodity boards struggled with how to deal with them (i.e., through enforcement proceedings or some form of regulation). In 2005, in an attempt to bring order to the patchwork of approaches across the supply managed sector, the British Columbia Farm Industry Review Board (BCFIRB) carried out a review of specialty and new entrant programs in these supply managed commodities.

3. In September 2005, BCFIRB directed all supply managed commodity boards to develop plans to register specialty producers. With the exception of the Commission, all commodity boards developed specialty programs. In its Specialty Review submission to BCFIRB, the Commission's position was that a specialty program was not required to regulate specialty hatching egg breeders or specialty hatching egg production and its intention was to exempt this production. No exemption order was enacted but in March 2010 the Commission confirmed it had no plans to allocate quota to those producing (or who may produce) "specialty" broiler breeders. Its only intention was to introduce rules for "specialty" broiler breeders insofar as necessary to achieve the objectives of premises identification, biosecurity and food safety identified in the September 2005 directions from BCFIRB.

4. In May 2011, the Commission announced a significant change in policy for specialty producers. In what many producers saw as an about-face, the Commission stated that it

[1] Schedule 9, "Regularization of Historically Non-compliant Silkie and Taiwanese Producers Program Rules

was aware that there were persons producing specialty broiler breeder flocks without a licence or quota issued by the Commission and "whether through inadvertence, or for some forgotten rationale, the Commission has not yet taken steps to enforce its orders against these persons." The Commission then announced its plan to "regularize" those "non-compliant" producers after a consultation process.

5. On November 28, 2013, the Commission issued Amending Order 11 which contained its Regularization Program. The Regularization Program creates a mechanism for producers who had commenced production of Silkie or TC broiler hatching eggs by 2010 to apply for "regularized" quota amounting to half of their production between 2009 and 2012 with provision to apply for adjustments to these allotments in exceptional circumstances.

6. On January 6, 2014, Skye Hi Farms Inc. (Skye Hi) and Casey Van Ginkel dba V3 Farm (V3) appealed Amending Order 11. Skye Hi and V3 are both specialty chicken producers who produce TC broiler hatching eggs and jointly operate T&C Chick Sales, a licensed chick broker with the British Columbia Chicken Marketing Board (Chicken Board).

7. On February 7, 2014, these two appellants applied for a stay of Amending Order 11 which was to be effective on April 14, 2014. This application was dismissed. At the request of the Commission, the appeal was subsequently adjourned generally to allow applications under the Regularization Program to be processed to determine whether an appeal was in fact necessary, and if so, to allow that appeal to proceed based on the best available evidence in the particular circumstances.

8. On February 27, 2015, the Commission, with written reasons to follow, issued its decision allotting quota to producers under the Regularization Program (Allotment Decision). Skye Hi and V3 appealed the Allotment Decision and applied for a stay until such time as the appeal was determined or, alternatively, until the Commission had completed its decision-making process in respect to the allotment of quota under the Program. The stay was granted on March 13, 2015 (March Stay Decision).

9. On April 9, 2015, the Commission issued its Reasons for Decision[2]. Skye Hi, V3 and another producer, Lillian Fehr and William Friesen dba W. Friesen Enterprises (W. Friesen), all appealed the Reasons for Decision. Skye Hi and V3 intervened in the W. Friesen appeal and W. Friesen intervened in the Skye Hi/V3 appeals.

10. K&R Farm Holdings Ltd. (K&R), a vertically integrated operation from hatching eggs to processing, raises a variety of poultry, including Silkies. K&R intervened in all of the appeals, supporting the positions of the appellants. Unger's Chick Sales (1974) Ltd. dba

[2] The Reasons for Decision document is comprised of a 33 page decision and Appendices totalling 2194 pages.

Coastline (Coastline), a producer of TC hatching eggs and Robert and Patricia Donaldson dba Bradner (Bradner), who produce both TC and Silkie broiler hatching eggs, intervened in all of the appeals in support of the Commission. The BC Chicken Growers' Association was granted intervener status, but did not appear at the hearing or provide a written submission.

11. The appeals were heard on September 15 - 18, 2015, with closing submissions subsequently received in writing. The Commission chose not to call any witnesses and instead relied on its Reasons for Decision as a comprehensive response to all the issues on appeal. The appellants called members and staff of the Commission as part of their cases.

12. In brief, Skye Hi and V3 argue that Amending Order 11 and the decisions made under that Order are not sound marketing policy because they do not provide for sufficient quota to allow Skye Hi and V3 to meet current contractual commitments to supply chicks to registered specialty chicken growers. They say the Order, if implemented, will destroy their thriving small businesses. Further, they say that the manner in which the Commission conducted itself in enacting and implementing the Regularization Program did not meet the standards of procedural fairness required or BCFIRB's SAFETI principles.[3] By way of remedy, they seek substantive revisions to the Program that would make quota available to specialty producers in production at November 28, 2013, with the amount of quota being based on their production data from the most recent quota period, except where that production was below the new entrant level of 5000 breeders, and the establishment of a Specialty Markets Advisory Committee (SMAC). Alternatively, they seek an order setting aside the decisions with specific directions to the Commission.

13. In its appeal, W. Friesen argues that the Commission erred in its Reasons for Decision by providing a pro-rata increase in production through quota allocation rather than addressing the issue of minimum efficient farm size to determine production and quota levels. It says that Amending Order 11 fundamentally alters the way the industry developed and will detrimentally affect its business. By way of remedy, W. Friesen asks BCFIRB to set aside that Amending Order 11 and the Allotment Decision, returning the issue to the Commission with clear directions setting out expectations regarding consultation, written reasons and program requirements.

14. In response, the Commission argues that there is no common law duty of procedural fairness owed to stakeholders in the exercise of a legislative or policy development

[3] The "SAFETI" principles have been developed by BCFIRB in consultation with the commodity boards it supervises to support a principles based approach to decision-making by commodity boards to carry out their responsibilities. SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", Transparent", and "Inclusive".

process. Any participatory rights granted necessarily increase the amount of time that would otherwise be required to develop and implement policies. If there are any procedural obligations imposed on the Commission with respect to a purely legislative function, they arise not from the common law but from BCFIRB's SAFETI principles where "I" refers to "Inclusive." However, the Commission cautions that, in the absence of clear language from BCFIRB to the contrary, "inclusive" should not be given a meaning that would up-end the common law principle that there is no duty of procedural fairness owed when an administrative body exercises a legislative function. To interpret "inclusive" otherwise would oblige commodity boards to grant participatory rights in the law-making process where the potential for adversely affected interests are simply too diverse or too numerous.

15. The Commission also says that although it owed no duty to provide stakeholders with participatory rights, it provided many opportunities to be heard both in the development of the Regularization Program and its implementation. As such, it met its obligations under SAFETI. The Commission further argues that any procedural defects in its process have been cured by the rehearing of the issues through these appeals. The Commission argues that a detailed review of its Reasons for Decision demonstrates that the Regularization Program and the decisions made under it are consistent with sound marketing policy.

16. With respect to the relief sought, the Commission asked that the appeals be dismissed. Alternatively, if further directions are necessary, the Commission says it would be disruptive and contrary to the best interests of the industry to direct the Commission to start again. Doing this, it argues, would "perpetuate the market chaos that results from giving recognition to a 'right' to produce without license and quota." Instead, the Commission proposed a direction that it recalculate the allocations based on verified marketings in 2011 to 2012 (as opposed to 2009 to 2012); or a direction exempting all persons continuously engaged in the production of Silkie or Taiwanese Broiler Hatching Eggs from January 1 – December 31, 2010 without a licence or quota, except any provisions regarding premise ID, food safety and biosecurity.

17. The panel notes that the submissions received in this appeal were extensive. While we have carefully considered all of the evidence and submissions, we do not intend to refer to all of it in the course of this decision.

ISSUES

18. The appellants framed their issues on appeal as follows:
    a. Did the process undertaken by the Commission in making Amending Order 11 meet the standards of procedural fairness required?
    b. Is Amending Order 11 sound marketing policy?
    c. Did the Commission err in its Allotment Decision with respect to the allotment of "Regularized Producer Chick Quota"?
    d. Did the Commission err in its Reasons for Decision by providing a 24% pro rata increase in production through quota allocation to address the issue of minimum efficient farm size?

PRELIMINARY ISSUES

a) Commission Objections to BCFIRB's "Procedural Irregularities"

19. At the outset of the hearing, the Commission placed on the record its objections to certain statements made in BCFIRB's March Stay Decision that "the Commission's characterization of the appellants as non-compliant producers is an oversimplification" and that "the Commission has not actively regulated Silkie and Asian broiler breeder flocks".

20. In addition, the Commission raised concerns about a memo prepared by BCFIRB staff and circulated to BCFIRB members including the appeal panel that summarized the history of regulation of the broiler hatching egg industry. This memo was also provided to the parties to this appeal. The Commission takes issue with the "fact" that Silkie and TC are "specialty breeds", the "fact' that the "Commission had not actively regulated Silkie and TC broiler breeder flocks" and the characterization of quota issued under Amending Order 11 as "specialty quota."[4]

21. The Commission characterizes the above comments at paragraph 66 of its opening statement as "an unequivocal, pre-emptive rejection of the Program, the decisions made by the Commission under the Program, and its detailed reasons for each" and says that the "pre-emptive findings speak directly to key, substantive issues that would otherwise have been (properly) resolved after a hearing on the merits in which evidence and argument had been received and considered." The Commission argues that, as a result, "BCFIRB cannot act, or at least be seen to be acting as an independent and unbiased decision-maker". An outcome consistent with these pre-emptive findings has the appearance of being

[4]The memo was circulated with a cover letter which expressly provided "This document is for information purposes only. While every effort has been made to ensure that it is factually correct, if any party takes issue with the facts contained in this memo, those issues can be brought to the attention of the panel during the hearing. As with all hearings, the panel will make its decision based on its own findings as to the relevant facts at issue after hearing from the parties to the appeal."

predetermined to avoid the embarrassment of overruling the earlier "findings" and an inconsistent outcome has the appearance of being determined "by a desire to demonstrate that it was not influenced by findings that should not have been made until after the hearing."

22. As this objection was made at the outset of the hearing, the panel issued a ruling that any statements made in the March Stay Decision or background memo were provisional in nature; any issue with such statements are properly addressed by the parties (including the Commission) in evidence and argument in the hearing to the extent the parties deemed necessary; and it would not make any declaration on the Commission's objections without the benefit of evidence or argument.

23. The Commission reiterated its objections in its closing submissions and, by way of remedy, sought a declaration that the impugned statements were made *per incuriam*[5], failing which, it argues that the Regularization Program, and the decisions made under it, are unsustainable.

24. Having now had the benefit of the evidence and argument in this matter, the panel reiterates firstly that the contested statements in its March Stay Decision were necessarily provisional in nature, and were not regarded as binding on this panel, particularly in the wake of the Commission's objections. We note only that these provisional statements were, subject to any argument on the appeal, not unreasonable given the practical realities concerning how regulators were directed to and did treat niche market production in other industries. These realities were one of main drivers behind BCFIRB's Specialty Review in 2005, discussed in paras. 2 and 3 above. It sought to encourage commodity boards to recognize "specialty" production under the regulatory umbrella as needed to address factors such as biosecurity, fair treatment of producers, the need for exemptions, innovation, appropriate board representation and transferability of production rights.

25. As for the comment that the Commission has not "actively regulated" Silkie and TC broiler breeder flocks, we are acutely aware that the degree to which the Commission has regulated Asian-style production, actively or otherwise, was a matter in dispute in these proceedings. As stated earlier, at the time of the Specialty Review, the Commission's position was that it did not enforce its Scheme in relation to Asian specialty breeders, and was not aware of a need to regulate Asian specialty hatching eggs and chicks. As will become clear later in this decision, that position has changed over time for reasons which we explore.

[5] *Per incuriam* means "through lack of care" and refers to a judgment or decision decided without reference to a statutory provision or earlier judgment which would have been relevant.

26. The Commission also takes issue with the statements in BCFIRB's staff memo categorizing Silkies and TC chicks as "specialty" and the notion that it issued "specialty" quota under its Regularization Program. The panel accepts the Commission's position that *it* does not *now* consider Silkie and TC broiler hatching eggs as specialty production. However, we would note that historically, both the Commission and BCFIRB considered Silkie and TC broiler hatching eggs as specialty production and this production was part of the Specialty Review, the Chicken Board issues specialty quota to produce Silkies and TCs and receives a specific allocation for specialty chicken production from Chicken Farmers of Canada.[6] That said we accept that the Commission does not consider the quota issued under the Regularization Program as specialty quota. We also observe that 'regularized producer compliance quota' is a separate class of quota from placement quota (conventional production). In all the circumstances of this appeal, we have therefore not considered ourselves bound by any of the provisional statements made in the March Stay Decision or the staff memo. We make this decision based on our fresh and independent assessment of all of the evidence and the submissions before us.

b) Extent of Procedural Fairness Owed

27. The Commission made lengthy submissions arguing that there is no common law duty of procedural fairness owed to stakeholders when exercising legislative or policy related decision-making such as with the Regularization Program. It relies on Guy Régimbauld, *Canadian Administrative Law* (Markham: LexisNexis Canada, 2008) at pp. 239 -241 where the learned author summarizes the applicable principles as expressed by the Supreme Court of Canada in various cases, a portion of which is excerpted here:

> To be considered a "legislative" decision, the exercise of the power must generally consist of two elements: (1) generality: the power is of a general application and will not be directed at a particular individual; (2) its exercise must be based on broad public policy grounds. Decisions of a legislative nature create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations. The exercise of legislative powers that will not normally give rise to a duty fairness include laws, decisions of cabinet, Crown prerogatives, regulations or other delegated legislation, general policy statements, guidelines, and administrative rules structuring the exercise of statutory discretion. There are, of course, exceptions and, sometimes, it may be very difficult to determine whether a decision is in fact "legislative" rather than administrative or quasi-judicial.
>
> There are two reasons why "legislative" decisions have been held exempt from the duty to provide procedural protection. First, where the decision is taken by a Minister or other elected official, they are accountable to Parliament and the electorate. The second reason is practical: bodies may be exempt from the duty of fairness where the potential of adversely affected interests is too diverse or too numerous to permit each individual to participate. … While individuals facing decisions based on

[6] Specialty production amounts to about 3% of total national chicken allocation. In 2013, the Chicken Board requested and received a 4% increase to base to allocate to the growing specialty production. Also the *Canadian Chicken Licensing Regulations* define "specialty chicken" to include Silkie and TC production.

> policy will benefit from the application of rules of procedural fairness, general decisions will not. Arguably, this differentiation may be questionable, since both types deserve to be considered eligible for fairness. However, if that was so, administrative decision-making, particularly broad-based policy decision-making, might grind to a halt, thereby negating some of the fundamental advantages of administrative decision-making, such as a swift, efficient and expert process.

28. The Commission says these well-established principles have been recognized by BCFIRB in *Hallmark Poultry Processors Ltd. v British Columbia Chicken Marketing Board* (October 23, 2000).

29. The Commission says that any procedural obligations imposed on the Commission with respect to its purely legislative function arise not from the common law but from BCFIRB's SAFETI principles (where "I" refers to "inclusive"). The Commission says that "inclusive should not be given a meaning that would up-end the common law principle that there is no duty of procedural fairness owed when an administrative body exercises a legislative function". To interpret "inclusive" otherwise would oblige commodity boards to grant participatory rights in the law making process where the potential of adversely affected interests are simply too diverse or too numerous.

30. For their part, the appellants argue that it is an oversimplification for the Commission to argue that no duty of procedural fairness applies to legislative decision making. They argue that the focus in determining the content of procedural entitlement should be on the extent to which a particular decision affects individual rights and interests rather than the form of the decision. They say that such a position is consistent with the *Hallmark* decision where BCFIRB held that the Chicken Board owed no duty of procedural fairness to stakeholders when enacting comprehensive regulatory reform directed at an entire industry and is in contrast to the situation here where a policy is directed at a small number of producers engaged in specialty broiler hatching egg production. Whatever the conclusion with respect to duty of procedural fairness, the appellants argue that the Commission basically concedes that the SAFETI principles impose on it procedural obligations even for purely legislative functions.

31. These same procedural fairness arguments were advanced in a recent appeal before BCFIRB: *Island Vegetable Co-operative Association v. BC Vegetable Marketing Commission*, (December 16, 2015). While the Commission would not have had the benefit of these reasons at the time of the hearing, in our view they fully address this argument.

> 29. We do not need to decide whether (amending Order) 43, which affected only a small and defined number of producers, might be an exception to the principle that no duty of procedural fairness applies to legislative or policy decisions. That is because it is our view that while the common law imposes procedural obligations on a commodity board, it does not and could not preclude a policy judgment by BCFIRB, exercising its supervisory authority under section 7.1 of the *NPMA*, that certain procedural standards were appropriate,

not as a matter of common law, but rather as a matter of sound marketing policy and having regard to all the circumstances of the vegetable industry as they pertained to the development and approval of this amending order.

30. In this regard, BCFIRB has developed the "SAFETI" principles, in conjunction with commodity boards, to support a principles based approach to decision-making by both BCFIRB and commodity boards to carry out their responsibilities. The SAFETI acronym refers to "Strategic" (identify key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities), "Accountable" (maintain legitimacy and integrity through understanding and discharging responsibilities and reporting performance), "Fair" (ensure fair process and decision-making), "Effective" (a clearly defined outcome with appropriate processes and measures), "Transparent" (ensure that processes, practices, procedures & reporting on exercise of mandate are open, accessible and fully informed), and "Inclusive" (ensure that appropriate interests, including the public interest, are considered).

31. We disagree with the VMC when it argues that SAFETI should not be given a meaning that would "up-end" the common law principle. This assumes that the common law principle is exhaustive. The common law obligation is just that – a common law duty. The common law does not and could not have the effect of precluding the application of a consultation requirement, as found by BCFIRB, as a matter of sound governance and sound marketing policy by commodity boards. In short, we find that a commodity board's procedural duties require it to have regard to both the common law and BCFIRB's SAFETI principles.

32. The VMC argues that this approach would grind decision-making to a halt and undermine the VMC's ability to undertake a swift, efficient and expert rule-making process. We think the opposite is true. Unless there are strong reasons to limit consultation, such as a need for confidentiality or an issue which requires immediate attention, consultation can only improve decisions and legitimize decision-making, particularly in a situation that could have a significant impact on a small number of affected stakeholders. In our view, and having regard to the fact that the SAFETI principles are not to be applied mechanistically and one or more elements may be departed from when there is sound reason to do so, it is entirely appropriate in the regulated marketing context for commodity boards to be accountable for demonstrating why decisions such as AO 43 were made in a fashion that was fair, transparent and inclusive. The discussion below reflects our consideration of the appellant's arguments in light of the SAFETI principles BCFIRB expects commodity boards to apply as a matter of sound marketing policy.
[Emphasis added]

32. We adopt these reasons and find that a commodity board's procedural duties require it to have regard to both the common law and BCFIRB's SAFETI principles.

33. The Commission also argues that even if there were defects in the process leading to Amending Order 11 and the Regularization Program, given that the *Natural Products Marketing (BC) Act* (*NPMA*) allows for *de novo* appeals. The appellants had an opportunity to lead all relevant evidence and make submissions such that any procedural deficiencies in the originating decisions are cured by the appeal process. We agree that the hearing allowed the appellants and interveners to provide testimony and submissions on their process concerns relating to the enactment of the Regularization Program and any deficiencies in light of sound marketing policy. To the extent that the issue for the appellants was that their concerns were not fully considered by the Commission when it

developed and passed the Amending Order, this appeal may cure that deficiency. However, the fact that a process concern could be cured through a hearing *de novo* is not justification for the Commission failing to comply with its policy obligations to properly consult with *all* relevant stakeholders. It is also not a remedy for a substantively poor decision that is inconsistent with sound marketing policy, which for reasons we set out below, we have found here.

34. Having dealt with the preliminary issues, we will now consider the appellants' process concerns.

PROCESS CONCERNS

35. These appeals raise process concerns with how the Regularization Program was developed and implemented as well as substantive issues with the Program in light of sound marketing policy. This part of the reasons will address the process concerns identified by the appellants.

History of Specialty Chicken Production and Regulation

36. To place the appellants' process concerns into context, a brief factual review of the history of specialty chicken production in BC is helpful. The appellants, interveners and their witnesses provided remarkably consistent evidence regarding the history of production of Asian chicks.

37. Chicken Board Executive Director Bill Vanderspek testified that initially specialty producers were contract growers of Silkie and TC production for processors, and processors controlled the supply of chicks to chicken growers.

38. The appellants and interveners noted that Bradner, Coastline, W. Friesen and John Giesbrecht were pioneer Asian egg producers, creating and building the industry over 30 years. We heard evidence from Ms Fehr and Mr. Friesen how, through trial and error, W. Friesen developed its own breed of Silkies and TCs, supplying its farms and other farms with day old specialty chicks. K&R, who acquired John Giesbrecht's Silkie grandparent stock in 2010, noted that its strain was different to Bradner's.

39. In the early 2000's, the Chicken Board introduced a permit program, and following the 2005 Specialty Review, implemented a quota system for specialty chicken including Silkies and TCs. The Chicken Board issued quota to Silkie and TC permit-holders recognizing the most recent period's permit production levels and providing the opportunity for smaller growers to increase to new entrant grower levels.

40. Unlike the Chicken Board, the Commission in its Specialty Review submissions maintained that a specialty program was not required for specialty hatching egg production in BC. It acknowledged that the Commission did not enforce its Scheme in relation to Silkie and TC specialty breeders and was not aware of a need to regulate Silkie and TC specialty hatching eggs or chicks. The Commission's December 2005 industry newsletter reiterated this position, adding that the Commission was in the process of "writing exemption regulations" for specialty Silkie and TC breeders.

41. By 2009, the Chicken Board had implemented a TC pricing order which gave specialty chicken growers more flexibility to align with processors. Mr. Allen and Mr. van Ginkel testified that these changes, along with their desire to develop more vertically integrated businesses, led them separately to consider getting into hatching egg production. Mr. Allen approached both Mr. Donaldson of Bradner and Mr. Boonstra of Coastline about acquiring breeder stock but neither was interested. Mr. van Ginkel spoke to Mr. Friesen and Ms Fehr who agreed to supply breeder stock as they felt dispersing this stock would benefit W. Friesen's operation in the event of a disease outbreak.

42. In a February 2010 letter to the Commission, Mr. Boonstra identified the producers of Asian-style chicks recognized by the Chicken Board as Coastline, Bradner, John Giesbrecht and Mr. Friesen and stated his view that:

> ... consideration should be given to setting a past date for recognition of the above suppliers who have a historical record of specialty meat chick sales as set out by the regulations of the (Chicken Board) . All future proposals for breeder flocks to be placed as "specialty breeders" should be placed on a list for review by the (Commission) only after guidelines and regulations are in place and a business plan has been approved by the FIRB. . . .
>
> If, as suggested, there have already been several requests or proposals to the (Commission) by parties interested in placing 'specialty' breeder flocks as a result of the potential review and subsequent imposition of regulations, the consequence of allowing any of these proposals to take place prior to completion of the review could be disastrous in an already flooded market.
>
> The refusal by the (Commission) to put an immediate moratorium on all proposals by new producers would jeopardize the financial investment and future business of the current recognized stakeholders. It could also have major legal implications that would put the (Commission) in the position of allowing the production of eggs in excess of current requirements, which would then result in eggs being sold as table or breaker eggs. [emphasis added]

43. Mr. Friesen testified that, contrary to Mr. Boonstra's statements above, there was no "flooded market" and producers were simply evolving with the changing marketplace. Customers occasionally moved to new suppliers but that is natural with competition. He

said that at one point, Coastline obtained one of his hatching egg accounts in part by undercutting on price, a reality in the open market.

44. This same letter is referenced at paragraph 22 of the Commission's Reasons for Decision where it is characterized as part of the Commission's "early consultations" with producers of Silkie and TC broiler hatching eggs. Although Coastline's letter did not directly raise the notion of "race for base", (the Commission's term for producers either deciding to enter the industry or expand production significantly in an attempt to obtain a windfall in the allotment of quota), the Commission understood this to be a concern within the industry at this time. The Commission produced no documents with respect to any consultations at this early stage and the Commission members who testified at the hearing had no insight into the Commission's activities or intentions with respect to regulation of specialty hatching eggs in 2010.

Industry Consultation 2010 - 2011

45. The first evidence of the Commission's broader industry consultation is found in some handwritten notes from the Commission and Mr. Vanderspek of a March 12, 2010 meeting held to discuss potential regulation of the specialty hatching egg sector. Mr. Allen, Mr. Vanderspek, Mr. Friesen, Ken Falk (from processor Fraser Valley Duck and Goose Ltd.) and Mr. Donaldson were all in attendance and their recollections are similar. The Commission's position was that it would not regulate the specialty hatching egg industry beyond that necessary to address premise ID, biosecurity and food safety concerns, and farms would be audited for these purposes only. Mr. Falk was emphatic that the purpose of the meeting was to dispel any myths that specialty hatching eggs may become regulated and the Commission told participants that the sector "would never ever become regulated".

46. This message was reinforced through a March 17, 2010 Notice to Industry from the Commission entitled "General information regarding 'Specialty Broiler Breeders'" which summarized the meeting as follows:

> All those who expressed a view on the subject were unanimous in the view that regulation should extend only to premise identification and the application of biosecurity and food safety rules...
>
> Accordingly the Commission is hereby communicating that there is no plan to allocate quota to those who are producing (or who may produce) "specialty" broiler breeders. Consistent with the views of meeting participants, the Commission intends to introduce rules for "specialty" broiler breeders only in so far as is necessary to achieve the objectives of premise identification, biosecurity and food safety. A copy of this notice will be published on the Commission's website.
>
> There was some discussion concerning the definition of a "specialty" broiler breeder. The consensus expressed at the meeting was that a "specialty" broiler breeder is one that is placed for the purpose of satisfying the unique "Asian" chicken market. It was noted that approximately 80% of that market is

> chicken that is marketed to consumers with head and feet on. Silkies, Taiwanese and Loong Kong were identified as breeds typically placed for that purpose. The Commission will be formulating a definition for "specialty" broiler breeder so as to clearly distinguish such breeders from mainstream breeders . . . and will be preparing draft rules intended to implement premise identification, biosecurity and food safety requirements.
> [emphasis added]

47. Skye Hi and V3, after hearing this clear direction from the Commission, proceeded in confidence with their plans to commence specialty hatching egg production. Mr. Friesen and Ms Fehr were pleased with the Commission's unequivocal statement that the unregulated market would continue as it functioned quite well for them and they would be able to follow through with their business plans. Their market for specialty hatching eggs was growing as the Chicken Board allotted growth to the farms W. Friesen was supplying. K&R was also pleased as the Commission's clearly stated position provided some certainty that it could continue to supply its own chick requirements which were growing as the overall market expanded.

48. In May 2010, Skye Hi and V3, met with then Commission General Manager Dave Cherniwchan to inform him of their plans. They emailed him their respective premise ID's, confirming details of the equipment purchases and the size of barns being built. Their communications confirm that these investments were being made solely for specialty broiler breeders and that the two farms intended to work together to supply their own production and to pursue other local and US markets. In August 2010, Mr. van Ginkel wrote to the General Manager advising that he was operational and inquired about biosecurity practices for hatching eggs. By this time, Skye Hi and V3 were hatching eggs, having sourced breeder birds from W. Friesen. They were supplying their own farms with chicks and were also in the process of developing a business plan to market to other growers.

49. Mr. Allen and Mr. van Ginkel testified that while keeping the Commission fully informed of their activities and plans, at no time did the Commission suggest that they obtain a permit or quota for their specialty operations. No such permit or quota existed.

50. Against this backdrop, in November 2010, Mr. Donaldson and Mr. Boonstra met with the Commission (and counsel) to discuss regulation of the specialty sector. There was no evidence that the Commission consulted with any of the other persons who participated in the March 2010 meeting. Even though Skye Hi and V3 were only supplying their own farms and were very small players in a market predominantly held by Bradner and Coastline, Mr. Donaldson's evidence was that Bradner and Coastline were very concerned about a disruption in their historical market share.

The "About-Face"

51. On May 2, 2011, then Commission Chair Peter Whitlock[7], sent out an Industry Notice with general information regarding 'Specialty Broiler Breeders'. It stated in part:

> It is well known throughout the industry that there are certain persons producing from Silkie and "Asian" broiler breeder flocks that are operating without licence or quota issued by the Commission.
>
> It is important to note that all such persons are, in fact, regulated in all respects by the Commission. There are no exceptions, exemptions, special rules or programs in the Commission's Consolidated Order applicable to production from Silkie, "Asian", or any other strain of broiler breeders. Whether through inadvertence, or for some forgotten rationale, the Commission has not yet taken steps to enforce its orders against these persons.
>
> The BCFIRB has made it clear that all producers must be regulated for the purposes of biosecurity, premise identification and food safety at a bare minimum. The Commission is tentatively of the view that all persons should be made to comply with all of the Commission's orders, irrespective of whether they produce from Silkie, Asian or any other strain of broiler breeders. Certainly, any failure on the part of the Commission to enforce cannot be regarded as creating a *de facto* exemption.
> [Emphasis added]

52. In its Notice, the Commission envisioned a regularization process for current "non-compliant" producers through a license and quota scheme, but emphasized that no decision had yet been made. Commission witnesses agreed that this Notice was intended to announce the consultation.

53. All four appellants characterize this Notice as a complete reversal from the Commission's March 2010 statement that the sector would not be regulated. The Commission appeared to be adopting a tone that implied that specialty hatching egg producers had always been operating in breach of the Scheme. Mr. Falk described his reaction as "anger was an understatement". The exceptions to this negative response were from Bradner and Coastline. As noted above, Mr. Donaldson and Mr. Boonstra were the only producers in the Asian sector that had met with the Commission between the release of the March 2010 and May 2011 statements.

[7] Mr. Whitlock was the appointed Chair of the Commission until June 2011 and subsequently also served as chair of the Commission's Pricing and Production Advisory Committee (PPAC). Current Chair Casey Langbroek was appointed in September 2011.

54. In 2011, Mr. Whitlock, as a consultant for the Commission, undertook a consultation process. Mr. Allen and Mr. van Ginkel met him and provided their views, as did other stakeholders, although there does not appear to be any minutes of these meetings nor does there appear to be any report to the Commission regarding the results of this consultation. The Commission's September 2011 meeting minutes do reflect that by then, draft regulations had been prepared and provided to Mr. Donaldson for comment in advance of them going to the Commission. The evidence does not disclose that any other stakeholders received a copy of the draft regulations or were given an opportunity to comment at this time. The Commission's minutes describe this draft regulation as a permit program and confirm that Mr. Donaldson was not satisfied with this approach. Under the heading "Specialty Breeders", the minutes provide:

> Peter Whitlock sent the draft regulations to Rob Donaldson for his input. Rob called Dave (Cherniwchan then General Manager) and expressed his displeasure with the regulations and stated that 'He'll take us to court for not issuing quota and just permit production." Discussion and possible guidance needed. [emphasis added]

55. It is unclear what the result of Mr. Donaldson's comment was but the Commission's October 2011 meeting minutes indicate that the draft regulations were updated and that Mr. Whitlock would be meeting with the specialty breeder producers to review another draft. (The Commission referred to Asian breeder and chick producers, subject of the Regularization Program, as specialty breeder producers at that time.) The Commission (apparently one Commission member and staff, and possibly Mr. Whitlock as well) held a meeting in December 2011 with stakeholders (six producers of Asian specialty breeders and chicks). The handwritten meeting notes indicated a range of issues were discussed, but the outcome of this meeting is unclear to the panel.

56. Despite Mr. Donaldson's displeasure, in late 2011 and early 2012, Mr. Whitlock began accepting applications on behalf of the Commission, from specialty hatching egg producers for a "Regularized Producer Permit". The Commission did not call any evidence so it is difficult to know what the policy rationale of the Commission was at this time. Current Commission Executive Director Stephanie Nelson could not find any Commission instructions to Mr. Whitlock to accept such applications. In its Reasons for Decision, the Commission characterizes these applications as "preliminary applications so that the Commission could obtain basic information about each prospective applicant's production activities and the amount of production right tentatively sought".

57. Mr. van Ginkel, Mr. Allen and Mr. Huttema of K&R all testified that they were given no indication that their applications for permits were "preliminary"; it was their understanding they were applying for permits to regularize production. Mr. Donaldson also submitted a detailed application for a permit on January 18, 2012. Notably, the Commission did not

respond to any of these applications and said little about the applications in this appeal process.

58. During 2011-2012, there were significant changes in the leadership and management at the Commission. Chair Whitlock was not reappointed after his term ended in June 2011. There was a gap between his departure and the arrival of new Chair Casey Langbroek in September 2011. General Manager Cherniwchan's employment with the Commission was terminated in early 2012, with Ms. Nelson assuming that role initially in an acting capacity.

The Second Consultation Process

59. In March and May 2012, having heard nothing on their permit applications, Mr. van Ginkel and Mr. Allen followed up with Mr. Whitlock who advised them to contact Ms. Nelson, as Commission staff would finish the process. They were later told by Ms. Nelson that the Commission was effectively "starting over" with the consultation process. In her view, Mr. Whitlock's consultation process had been disappointing and after re-evaluating that process, she held meetings with specialty producers in May and June 2012.

60. At Ms. Nelson's May 30, 2012 meeting with Mr. Donaldson, he continued to express dissatisfaction with the proposed permit program and to advocate for changes. Handwritten notes from their meeting stated "business warfare going on – people undercutting pricing with cheap chicks"; Mr. Donaldson "will not appeal if we include 2011 as long as it happens quickly"; "Kelly (Boonstra of Coastline) could be swayed by him" and that "chick quota necessary". Mr. Donaldson testified that the term "business warfare" referred to Skye Hi and V3 and that he was pressing the Commission to issue quota quickly.

61. In September 2012, Mr. Boonstra wrote to BCFIRB, stating that, "due to the delays in following through with the regulation of this industry, multiple breeder producers are flooding the market in an attempt to justify their existence in an effort to be included in the grandfathering of specialty quota. This is causing undue hardship to already established companies." Mr. Boonstra did not testify but in her testimony on this point, Ms Boonstra was unable to say what "undue hardship" was being referred to in this letter. She conceded that the only new producers were Skye Hi and V3. She also acknowledged that there was no evidence that Skye Hi and V3 had sold any chicks but suggested Coastline may have received information that they were intending to supply chicks at 90 cents and below market price. (This assertion of below market price is inconsistent with her later evidence that Coastline itself sells some chicks at 75 cents and could make a profit at 90 cents.)

62. We observe here that we do not accept as accurate Mr. Donaldson's characterization of "business warfare" in the industry at that time, and we prefer the evidence of Mr. van Ginkel and Mr. Allen that it was not until late 2012 that they acquired their first

third party customer, and throughout 2013 and 2014 others followed. One of their customers, John van Kammen, testified that he had switched from Coastline to T&C Chick Sales (Skye Hi and V3's licensed chick broker) and, in addition to a lower price, had experienced a lower mortality rate, calmer birds, quicker growth and improved feed conversion.

63. In October 2012, still having had no response to their permit applications, Skye Hi and V3 wrote to the Commission advising that the production levels they applied for "no longer adequately meet market needs and sound business principles". The Commission did not respond and in November 2012, a draft regularization program was circulated. Skye Hi and V3 responded advising that by using production data from 2009 – 2010, the Commission was not reflecting current (2012) market conditions, that the proposal was not workable on a practical basis with their operations and that the proposal should provide for a SMAC to make recommendations on price. Again the Commission did not acknowledge these concerns.

64. On March 11, 2013, the Commission sought "final" feedback on its revised draft regulation. In what appears to be some recognition of the concerns of stakeholders, this draft regulation extended the historical reference period from 2009 – 2010 to 2009 – 2012. The appellants again wrote to the Commission outlining their extensive concerns. Ms Fehr, on behalf of W Friesen, and Mr. Donaldson also provided written responses to the proposed Amending Order.

65. In response to the submissions, the Commission advised that it would not engage in one-on-one discussions with interested parties and would only accept comments if the parties agreed to have their input circulated to all stakeholders. Skye Hi and V3, and Ms Fehr ultimately agreed and the Commission circulated their submissions to the other stakeholders in September 2013, with a request for further input based on the submissions. Mr. Donaldson's submission of May 28, 2013 was however not circulated and was only disclosed as a part of the Appendices to the Reasons for Decision. In his letter, Mr. Donaldson characterised the draft regulation as the "least kind" to Bradner. His preference was to use production data from 2009 – 2010 as other producers entered the supply chain in 2011 "after hearing of quota being issued" by the Commission. While he understood the difficulty in appeasing everyone, he suggested that under such a program he would not have enough quota to finish the 2013 year. Commission witnesses could not explain why Mr. Donaldson was treated differently in the Commission's process.

PPAC Consultation

66. On November 15, 2013, the Commission referred the draft Amending Order to its PPAC.[8] There was no quorum of members for the PPAC during the meeting held to consider the referral. The minutes of the PPAC meeting listed concerns ranging from quota fluctuation with the market, quota being saleable-chick based, the requirement of producers to either associate with a hatchery or be independent, the setting of price, the participation in surplus removal system, the issue of squandered eggs and the nuances of flock production month by month, the need for an official flock schedule to be in place and the need for flexibility to ensure eggs are produced when needed. PPAC Chair Mr. Whitlock advised that these concerns had "likely been discussed" in the "extensive consultation process" and PPAC was not the forum to provide answers. According to the Minutes "due to lack of quorum, the PPAC will not be making recommendations but would like the Commission to ensure the concerns raised at this meeting had been addressed in the consultation process prior to the Commission members making their final decision".

67. The Commission meeting minutes of November 28, 2013 are silent on the PPAC's concerns and indicate only that the PPAC did not put forward a recommendation. Commission member Joe Neels who sits as an observer on PPAC, testified that he recalls discussing the issues raised by PPAC members with the Commission at its meeting but the Commission did not think there needed to be any changes to the Amending Order as a consequence of the comments. Conversely, Ms. Nelson testified that the Commission was told PPAC had no concerns about the proposed Amending Order. In any event, Amending Order 11 was passed at this meeting (in almost identical form to the March 2013 draft).

Decision Regarding Commission Process

68. Based on the above review of the Commission's process, we have no hesitation concluding that the process was flawed. In its Reasons for Decision and its submission, the Commission argued that it provided stakeholders with many opportunities to be heard, both with respect to the development of the Regularization Program and quota allocations and other decisions made under it. The Commission describes its consultations as extensive and more than sufficient to satisfy the SAFETI principles (even if those principles are not specifically referred to). The Commission says that stakeholders were informed of the Commission's preliminary objectives and intentions, and it is not realistic for the Commission to obtain approval, consent, or a consensus among all stakeholders before

[8] PPAC is comprised of 3 broiler hatching egg producer representatives, 3 hatchery representatives and further persons appointed by the Commission.

making its decisions. To do so would be a complete and improper abdication of its regulatory responsibilities. The Commission found that it had received and considered the positions of stakeholders and gave reasons it believed were responsive to (though not necessarily accepting of) those positions.

69. We disagree with the Commission's assessment of the adequacy of its process. The Commission's historical position, communicated to BCFIRB and to the industry at large, was that it did not enforce its Scheme in relation to Asian specialty breeders and was not aware of a need to regulate Asian specialty hatching eggs or chicks beyond premise ID and biosecurity and food safety concerns. Despite this acknowledgement of the minimum level of necessary regulation for Asian specialty breeders, it does not appear that the Commission enforced even this minimal level of regulation.

70. Then in May 2011, the Commission made an about-face. It began referring to "non-compliant" specialty broiler breeders who "should be made to comply", and stated that the Commission's failure to enforce "cannot be regarded as creating a *de facto* exemption". Instead of articulating a meaningful rationale for its change in position, the Commission engaged in what can best be described as classic doublespeak, stating: "whether through inadvertence, or for some forgotten rationale, the Commission has not yet taken steps to enforce its orders against these (non-compliant) persons".

71. In order to understand what changed, we would ordinarily look to the regulator for guidance around what happened in the industry to cause this shift. What do the Commission's minutes say? What documents did the Commission prepare to support a discussion regarding a significant shift in policy? What options were identified? What were the views of those stakeholders? How were those views weighed? What does the Commission articulate as its reasons for its shift in policy? In the absence of written reasons at the time, what does the Commission now say were its reasons and underlying rationale for its decision?

72. Unfortunately in this case, the Commission's public process is murky. While the Commission says that the May 2011 Notice was not a decision and was intended to "announce the consultation", the form of the Notice reflects a major shift in the thinking of the Commission from one year previous. This is a small industry, consisting of six producers who provide breeders and chicks for "grow out" and processing by a few specialty processors. All but two expressed deep concern upon seeing the Commission's Notice that it intended to pursue regularization for "non-compliant" production. Commission minutes do not disclose this topic being discussed previously; no regulatory option papers were prepared or circulated by staff. Instead, what the record shows is that in

late 2010, Mr. Donaldson supported by Mr. Boonstra, upon seeing new producers entering the industry, made their own private representations to advocate for regulation of the specialty sector to protect their historical market share.

73. The Commission's Reasons for Decision issued in 2015 disclose that the shift in thinking came after a 2010 Commission decision involving another unregulated producer. We will address the substance of that matter under sound marketing policy below, but for the purpose of understanding the process we refer to the Reasons for Decision at paragraph 26:

> Shortly after the Commission's follow-up meeting with stakeholders, the Commission received a series of informal inquiries from … (the) principal of Polderside Farms Inc. … which culminated in a formal request for special regulatory accommodation to produce broiler hatching eggs from a flock of 12,000 "RedBro" broiler breeders. This formal application was dated July 26, 2010. <u>These inquiries, and the regulatory decisions made by the Commission as a result thereof, are significant here because they brought into focus the Commission's views about whether it is sensible (or even possible) to define "specialty" production with sufficient precision to avoid undermining the orderly marketing system.</u> [Emphasis added]

74. From a process perspective, it is unclear to the panel why, if the Commission came to believe that its historical view, confirmed in March 2010, was flawed, it did not engage with the specialty broiler breeder industry. Also, it is unclear why the Commission would not have engaged with the Chicken Board, and its SMAC, given that the Chicken Board regulates Asian specialty broiler production and recognizes Asian breeds as genetically distinct from mainstream broilers. It is also unclear why the Commission did not engage BCFIRB on this issue. While Executive Director Ms. Nelson and Chair Langbroek testified as to the significance of the *Polderside* decision as a benchmark in how the Commission regulated historically non-compliant production, neither had direct knowledge of the 2010 decision. The Commission did not call witnesses with direct knowledge of it, nor did the Commission produce any background documents other than the decision itself. There is no evidence that the sector of the industry that could be most affected by this decision was made aware of it until a March, 2013 notice to producers. No explanation of its significance as a benchmark was provided until the April 2015 Reasons for Decision.

75. The Commission says that stakeholders were provided with drafts of proposed orders and given the opportunity to make written submissions to the Commission with respect to draft orders. On this point, we observe that there are no Commission minutes to confirm what lead to the May 2011 industry notice. The content of meetings is unknown. The September 2011 Commission minutes indicate that a draft regulation proposing a permit program had been prepared. It was *not* circulated to industry for comments, rather it was sent to Mr. Donaldson for his input. The evidence shows that Mr. Donaldson was not interested in

a permit program. The minutes say "he'll take us to court for not issuing quota". These draft regulations did not form part of the appendices to the Reasons for Decision and were not presented as evidence in the hearing.

76. Despite Mr. Donaldson's input, Mr. Whitlock asked interested persons to apply for permits. The Commission minutes of November 2011, January 2012, and February 2012 indicate Mr. Whitlock was reporting to the Commission on progress but the applicants heard nothing until May 2012, when the Commission announced it was "starting over" on its consultation process. Ms. Nelson commented that the consultation to this point was disappointing. Unfortunately, in our view, the process did not get better.

77. The Commission's Reasons for Decision do not acknowledge the problems with the early consultation and instead characterize these early permit applications as a part of its consultation process - "preliminary applications so that the Commission could obtain basic information". While this may be how the Commission ultimately decided to view the permit applications, the evidence is that there was a permit application process that included completed formal "Application(s) for Regularized Producer Permit" forwarded directly to the Commission office by the appellants in early 2012. And there is no indication of any meaningful communication from the Commission to these "non-compliant" specialty broiler producers who were left in a regulatory limbo not knowing what was happening with their permit applications.

78. During this period, it is also evident that the Commission was having exclusive discussions with Mr. Donaldson and Mr. Boonstra who continued to press for quota. While the panel accepts that this is part of consultation, we would have thought that allegations of "business warfare" and "undercutting with cheap chicks" would have formed the basis for further dialogue between the Commission and the broader industry to determine the validity of these concerns and what, if any, regulatory reform was needed. Instead, these allegations appear to have been accepted at face value.

79. In November 2012, another draft Amending Order, this time creating a quota program for Silkie and TC producers was circulated to industry stakeholders. Despite feedback from Skye Hi and V3 that basing allocations of quota on production from 2009-2010 (a time when they had limited production) would not reflect their 2012 production, the Commission did not appear to address these concerns. In its submissions, the Commission characterizes such concerns as the complaints of self-interested stakeholders. The procedural record also does not reflect that the Commission acknowledged that its choice of production period would significantly reduce the production volumes of three of the six specialty producers.

80. In March 2013 another draft Amending Order was circulated, this time based on production data from 2009-2012.

81. The Commission says that it gave producers the opportunity to review and comment upon the written submissions of other stakeholders. This is difficult to accept. In March 2013, when the final draft regulation now based on production from 2009-2012 was circulated, the Commission advised that it would only accept comments if disclosed to all stakeholders, yet it did not disclose Mr. Donaldson's comments until its Reasons for Decision. Further, given the fact that very little changed between the wording of the March 2013 draft regulation and the November 2013 Amending Order 11, the appellants' assertion that the Commission chose not to acknowledge or address the significant stakeholder concerns being advanced in 2013, is compelling.

82. Another procedural concern relates to PPAC, whose role under the Scheme is to advise the Commission concerning any matter relating to pricing or production. In this case, the Commission referred its draft Amending Order to PPAC for comment. PPAC did not have a quorum but in any event had a number of concerns which it thought should be before the Commission before it made its final decision. Despite the lack of quorum, we would expect the Chair of PPAC to inform the Commission of the significant concerns raised at the meeting.

83. Although minutes were taken at the PPAC meeting, it is unclear that they were disclosed to the Commission at its November 28 meeting or at any time after. We acknowledge that Commissioner Neels' evidence was that he advised the Commission of PPAC's concerns but we found his recollection of events generally to be poor. The Commission's Minutes are silent on the issue. Further, this evidence is contradicted by Ms Nelson who said that the Commission was told the PPAC had "no concerns" with the proposed Amending Order. While it may be true that the PPAC had no recommendation, its minutes do reflect a number of concerns regarding production management especially from the hatchery sector of the industry which had a minimal participation in the consultation process. It is unclear to what extent these concerns were considered by the Commission before it passed the motion adopting the Amending Order. Despite the Amending Order being passed at the November 28 meeting, it was not circulated to stakeholders until the day after its December 19, 2013 meeting.

84. Procedural concerns continued. As recently as March 4, 2015, the Commission sent a memo to specialty producers asking for submissions on minimum efficient farm size. Based on our review, the submissions received appear to be a thoughtful starting point for the Commission to develop policy. Despite the fact that the Commission did not specify the type of information it required, its Reasons for Decision are highly critical of these

submissions, finding "an unacceptable failure on the part of those applicants to provide the economic analysis (based, presumably, on their own financial records) as would show the extent to which they are viable (or not)". Commissioner Neels admitted that if he were asked to provide an economic analysis to support a minimum farm size, he could not look at just his farm as he would need to consider other farms to develop a recommendation regarding minimum farm size.

85. Perhaps even more worrying is that throughout this long multi-staged process the Commission failed to engage with specialty processors after the initial March 2010 meeting. Mr. Falk, representing the processor Fraser Valley Duck and Goose, made direct efforts to contact the Commission to no avail. K&R also appears to have been mostly left out of the process. The panel is perplexed how the Commission could develop a regulatory framework for Silkie and TC hatching eggs without at least hearing from the processors who process these chickens for the retail market, and considering their issues prior to making its far-reaching decisions.

86. The appellants stated that they have tried to stay as informed as possible on industry issues but found their efforts thwarted by the Commission. Mr. Allen and Mr. van Ginkel testified to being refused entry or asked to leave hatching egg producer meetings between October 2013 and April 2015. They attended a February 2014 biosecurity training session at the request of the Commission but upon asking for access to the producers' section of the Commission website were denied as they were not producers. It is difficult to reconcile the Commission`s stance given its recognition of the importance of specialty broiler hatching egg production complying with food safety and biosecurity standards.

87. The Commission characterized the many process concerns identified by the appellants as a criticism of its delegation of the consultation and decision writing to "other resources" (presumably referring to staff, consultants and counsel). We agree with the Commission that the *NPMA* authorizes delegation of many of its powers, to the extent and in the manner necessary for the proper operation of the Scheme, and we certainly agree that the Commission can obtain help from staff and counsel. However, we see the problem identified by the appellants here not with the fact that the Commission delegated certain functions but that it did not retain sufficient control and oversight of its process or decisions. The Commission chose not to call any evidence in support of its Reasons for Decision despite the fact that the presiding member in the pre-hearing conference of April 9, 2015 indicated that after reviewing the Reasons for Decision, she was not entirely clear on the underlying rationale for those decisions and that the panel would benefit from hearing the Commission's "thinking" on the rationale. The Commission took issue with this comment, asserting deliberative privilege. In a September 2, 2015 letter, the presiding member clarified:

> My comments identified by the Commission from the pre-hearing conference were not intended to be parsed or taken as being an implicit legal ruling on deliberative privilege. Rather, I intended them in light of what I have understood to be the customary practice of BCFIRB regarding appeals from commodity boards or commissions. That practice ordinarily requires the board or commission to make a representative available to defend, explain and if necessary to clarify a challenged decision in light of sound marketing policy. BCFIRB usually seeks information regarding the basis and objectives for a decision under appeal and to determine whether or not these accord with sound marketing policy.

88. Despite the foregoing, the Commission chose not to call any witnesses. The appellants were required to apply for summons so that a past and present Commissioner would attend the hearing. The panel heard from these witnesses, the Commission Chair and staff as part of the appellants' case. From their evidence, it appears that the consultation was led by staff and there is no record of how the Commission was briefed. In the absence of a documentary record, we would expect the Commission to speak to its process and decision making but the impression left was that the Chair and Commissioners who testified were unfamiliar with specialty industry stakeholders, their historical production and their concerns. Their recollection of events was poor and not very detailed. More troubling is the Commissioners' inability to speak in a meaningful way to their Reasons for Decision or the principles flowing out of the 2005 Specialty Review which created a template for this type of policy development.

89. On its current website, the Commission has published its Vision and Mission:

> **Our Vision**: It is through co-operation with industry stakeholders that our greatest successes will be derived.
> **Mission**: To oversee the production activities of BC broiler hatching egg producers and regulate the marketing of their product and to act as a leader for the BC broiler hatching egg producers in dealings with other participants in the chicken meat industry.

90. Although it is unclear when the Commission may have published its Vision and Mission, we certainly do not take issue with either statement. These are appropriate goals for a commodity board. However, it does not appear to the panel that the Commission has acted in a manner consistent with its Vision or Mission statement. In this appeal and in its policy development process, the Commission did not identify its specific strategic objectives for the Asian sector of the industry. Without those objectives being in place, it is unclear how the Regularization Program could meet strategic outcomes, support its Mission or come within its Vision. The Commission did not cooperate with all industry stakeholders impacted by its decision.

91. In its Mission statement, the Commission recognizes the importance of regulating in the context of the broader chicken meat industry. Given the potential for the Regularization Program to significantly affect both the Asian broiler hatching industry and the specialty

chicken industry, a process more similar to the one contemplated following the 2005 Specialty Review directions and undertaken by the other four supply managed commodity boards would have been appropriate and consistent with its Mission. Such a process does not require the commodity board to legislate by committee. It requires the regulator to identify a strategic objective and the options to achieve that objective, and consult as necessary to avoid unintended consequences in the broiler hatching egg industry and the broader chicken meat industry.

92. In light of the many process-related concerns above, the Commission's process cannot be said to have reasonably engaged stakeholders, and certainly cannot be said to have been sufficiently "accountable", "fair", "transparent" or "inclusive" to satisfy BCFIRB's standards in respect of process.

Consideration of the substance of the Amending Order and Sound Marketing Policy

93. The appellants argue that Amending Order 11 and the Regularization Program are not consistent with sound marketing policy. Their criticisms are many. A major flaw they identify is the Commission's decision to base quota allotment on a historical production period which does not recognize more recent market changes. They say that this discriminates against new entrants (Skye Hi/V3) and long-time producers (W. Friesen) with lower production in the reference period followed by steady growth. The net result is that the appellants receive far less quota than their current market requirements while Bradner and Coastline are allocated more (even more than they requested). They argue that the averaging of prior production years, coupled with a 24% pro rata "growth" allocation, had the effect of redistributing growth in the market to the larger producers, regardless of the customer relationships developed by the appellants in the recent years of steady growth and not included in the reference period.

94. The appellants say that the Regularization Program is inconsistent with a number of the directions from BCFIRB's 2005 Specialty Review; does not provide for a SMAC, and does not provide for a designated specialty quota or licence for production and marketing of specialty products (rather purporting to "regularize historically non-compliant" production).

95. On this latter point, the appellants do not understand the Commission's discomfort (originating in the *Polderside* decision) in identifying Silkie and TC hatching eggs as specialty production. They say that the Chicken Board classifies Silkie and TC as specialty chicken and has no difficulty differentiating Silkie and TC from mainstream chicken; a Silkie or TC cannot be grown from a mainstream egg. They assert that the inclusion of Silkie and TC chicken into the federal Canadian Chicken Licensing Regulations belies the

Commission's suggestion that it cannot be legislatively defined with sufficient precision. The appellants say that the unwillingness of the Commission to coordinate its classification of quota with federal regulatory rules or the Chicken Board's quota scheme creates a potentially negative impact on the specialty chicken growers relying on a stable supply of broiler breeder eggs and day old chicks.

96. W. Friesen also disagrees with the significance of the *Polderside* decision saying that it was based on the incorrect premise that specialty egg producers do not have a consumer other than hatcheries. Growers can and do source their own chicks in the specialty sector, and as we heard from Mr. van Kammen there are many considerations to selecting a supplier, in addition to price. W. Friesen argues that the Commission's allotment decisions would force the appellants' customers to purchase the breed of chick produced and sold by Bradner or Coastline, even though these customers prefer, and have chosen to purchase the appellants' strain of chicks. This could result in an unacceptable disruption of the market.

97. The appellants identify many more concerns with the Regularization Program. They say it does not provide for a mechanism to set price; that the quota allotments do not recognize production levels from the nearest quota cycle; that regulations should be relevant to real time facts and not history that is too old to address current market situations, resulting in a reallocation of a producer's current commitments to others. They say that the Program does not address minimum farm size or the official flock schedule; there is a lack of clarity on "marketing"; it does not recognize incorporated producers.

98. They argue that there is no consideration of how the 10/10/10 rule (the requirement that a producer be subject to a declining assessment of 10% per year upon the transfer of quota over a 10year period) will apply to a producer like W. Friesen that has been in operation for many years. They say regularization will impact Ms Fehr and Mr. Friesen's plans to retire as the Commission direction that only those in business in 2010 would be able to participate in the new quota system prevents them from selling their business until the quota system is in place. Further, they say any quota received would be subject to the declining assessment under the 10/10/10 rule as the Commission has not granted any concession, making the sale of its business difficult. On this point, the Commission's position was a rather callous one of "buyer beware" rather than entertaining any appropriate consideration of exceptional circumstances regarding the sale or transfer of the new quota for a producer which was one of the original breeders of the Asian strains.

99. The intervener, K&R, argues that these decisions also create a number of problems for its unique vertically integrated structure. It says it requires the right to produce hatching eggs sufficient to have enough day-old chicks to supply its specialty chicken quota issued by the Chicken Board. K&R says it cannot purchase chicks from other hatcheries as its customers

demand the Silkie strain developed and maintained by K&R.[9] K&R describes itself as an innocent bystander, by and large ignored in the consultation process, with the result that its business model has not been considered by the Commission.

100. For its part, the Commission describes the development and implementation of the Regularization Program as a "mammoth undertaking" that involved developing a "major policy that has far-ranging implications". The Commission urges this panel not to focus on what it describes as the appellants' many and varied complaints and instead to pay very close attention to the "broad considerations" described in its Reasons for Decision. The Commission says that "policies and decisions which focus on ad hoc efforts to placate individual, self-interested stakeholders will provide a very poor foundation for a broad policy such as this with far-ranging implications".

101. The starting point for the Commission is that Silkie and TC broiler hatching eggs have "always" been subject to regulation: section 8(1)(a) of the Scheme, section 11(1)(c) and (f) of the *NPMA* and section 37 of the Consolidated Order. This production has always been actively regulated, although the Commission concedes a failure to actively enforce. Producers of Silkie and TC broiler hatching eggs have always required a valid licence and have always been properly regarded as non-compliant. The Commission says that the requirement to hold a licence and quota embodied in section 37 is sound marketing policy as it is the foundation of the Commission's enforcement, exemption and regularization powers. The Commission's regularization concept is premised on the idea that producers of Silkie and TC broiler hatching eggs are prohibited from engaging in marketing without licence or quota.

102. In its Reasons for Decision, the Commission stated:

> …it is the Commission's considered view that there is no sensible way to legislatively define a special class with sufficient precision so that it is perfectly clear what falls into the class, and what does not. Though the "Silkie" bird (and the market it serves) is perhaps the most unique, it becomes considerably more challenging to articulate why a Taiwanese broiler breeder should be treated differently from a RedBro broiler breeder, or from a Hubbard ISA broiler breeder, or a Cobb Vantress broiler breeder, or Ross broiler breeder. Any lack of precision in the definition would have the potential to destabilize the entire regulatory underpinnings of regulated marketing.

[9] We note here that Mr. Donaldson's evidence on this point was different. He says it is the price of Asian chickens that is determinative and that strain only becomes a factor at the retail level when price is the same.

103. The Commission says that given the unique circumstances of the hatching egg industry, the genetics of the breeder do not provide a compelling rationale for the allotment of quota. Producers and hatcheries have always been able to source the genetics of their choice without intervention from the Commission, and in the rare circumstance where this is not possible, the Commission has a program to provide for an allotment of quota to an Innovative Self-Marketer who is unable to source the genetics of their choice. Its view is that making special accommodations for the genetics of the broiler breeder would have a destabilizing effect on the industry. To obtain a Silkie chick, one needs a Silkie broiler breeder; to obtain a Taiwanese chick, one needs a Taiwanese broiler breeder; to obtain a Cobb chick, one needs a Cobb broiler breeder.

104. The Commission says for this reason it concluded special accommodations should be extended to persons who "have been continuously engaged in the production of Silkie or TC Broiler Hatching Eggs from January 1, 2010 to December 31, 2010 without a licence issued by the Commission and without Placement Quota allotted by the Commission". The focus on the producer and not the genetic strain of broiler breeder "casts the 'lasso' in a narrow manner avoiding the disruption that would inevitably occur if special accommodations (quota or permit) were granted to anyone seeking to produce from a particular genetic breed (a 'lasso' of virtually infinite scope)."

105. As for its choice of historical production period, the Commission says its Reasons for Decision place critical importance on avoiding a "race for base" or "race for quota". We understand "race for base" to mean a situation where producers decide to enter an industry or expand production significantly in anticipation of production controls to obtain a "windfall" in the allotment of quota to secure production opportunities, not justified by either their market share or exceptional circumstances.

106. The Commission offered its Regularization Program only to those producers in production in 2010. Although the market was not actively regulated, the Commission maintains it sought to avoid the instability it expected to result when industry participants positioned themselves to receive a windfall quota allotment not justified by either market share or exceptional circumstances. The Commission says that the Program expressly provides for allotment of quota upon actual, demonstrable market share and there is flexibility built in for an allotment exceeding historical production upon proof of exceptional circumstances.

107. The Commission did not provide specific evidence of market disruption through a "race for base". It was unaware of the directions in the 2005 Specialty Review that the 12 months leading up to December 31, 2004 (eight months prior to BCFIRB's decision) or "the nearest quota cycle to this twelve-month period" should be used in applying production controls. The Commission was not in a position to reconcile the application of different

time periods (the two years plus it used and the shorter one directed by BCFIRB in the Specialty Review) in its reasons.

108. The Commission says producers of Silkie and TC broiler hatching eggs have a reduced levy as they are ineligible to participate in surplus removal programs, do not receive any subsidy from eggs marketed to the breaker and are relieved from the Official Flock Schedule. With respect to the suggestion that the Program is deficient, it says it was not intended to include all possible regulation but rather to serve as a foundation for further regulation. Ms Nelson, the Executive Director of the Commission, used the analogy that this Regularization Program, as published, represented the torso, "with the arms and legs to be added later".

Decision Regarding Substantive Concerns and Sound Marketing Policy

109. The panel accepts the arguments of the appellants and K&R, that the Regularization Program and its implementation decisions do not reflect sound marketing policy. While the Commission argues that it has "always" regulated specialty breeder and broiler hatching egg production, we do not agree. Certainly, as a matter of law, BCFIRB and the Commission have always recognized that specialty Asian breeders and broiler hatching eggs fall within the definition of regulated product. But the fact is that the Commission chose not to enforce its Scheme in relation to Silkie and TC breeders and for many years, saw no need to do so. While it contemplated enacting regulations exempting Silkie and TC breeders from the existing regulatory scheme for broiler hatching egg producers, and dealing with the application of biosecurity standards, including premise ID, and food safety standards in a manner specific to Asian specialty producers, in an apparent lapse in governance, it has never exercised its regulatory responsibilities.

110. The Commission decided to change direction in 2011 which is a regulator's right. However, we are not persuaded by the Commission as to the significance of the *Polderside* decision. This decision appears, on its face, to be inapplicable to the situation at hand. A producer of a breed of bird (Redbro), indistinguishable genetically from a conventional bird, sought special accommodation to allow her to produce chicks to grow the Redbro chicken. The Commission accommodated her request based on her argument that she required the assistance of the Commission to nurture the development of the product and related market through the designation of "specialty". At no time, did the Commission give industry stakeholders an opportunity to comment on the relevance of the *Polderside* rationale to Silkie and TC production. Instead the Commission simply references *Polderside* in its March 2013 notice to producers and establishes it as an historical fact in its Reasons for Decision, pointing to it as justification for its about-face regarding the regulation of Silkie and TC production.

111. We do not find the *Polderside* rationale helpful in considering the decisions on appeal. The Commission says that Redbro chicken is not genetically distinct from conventional chicken production but what was distinct in the *Polderside* application was the intention to self-market chicken grown under quota from a strain of chicks not available from a BC hatchery. In contrast here, the appellants and their witnesses maintain that Silkie and TC chicken *are* distinct. They say that other regulators classify Silkie and TC as specialty and have no difficulty differentiating Silkie and TC from mainstream production. We share the appellants' concern that the Commission's unique approach appears inconsistent with federal regulatory rules and the Chicken Board's quota scheme. The Commission did not consider the potential implications of the differences in classification between the Chicken Board and the Commission in making its decisions.

112. 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.

113. Further, the Program does not create a mechanism by which a producer can increase quota holdings to the minimum level for a new entrant producer. The Commission failed to provide the appellants with industry data that might have supported their arguments for a viable minimum farm size as opposed to a 24% pro rata allotment of quota. The quota created by the Regularization Program is not interchangeable with conventional hatching egg quota and while the Commission does not consider it "specialty", it is distinct from conventional quota. Although the Commission does not apply the term "specialty" to the hatching egg quota issued under the Regularization Program, up until 2011 it considered this production to be specialty. In 2012, the Commission began to refer to these producers as "regularized" producers. The panel finds that the production this program authorizes is a type of niche production that formed the basis for the 2005 Specialty Review, and the directions of that report apply to this historically non-regulated production, irrespective of the changes in name the Commission used to describe it or the direction the Commission took to regulate it.

114. The Commission's decision in 2015 to use historical production data from 2009 - 2012 appears to benefit the two largest producers, Bradner and Coastline, while at the same time disadvantages W. Friesen, K&R, Skye Hi and V3. W. Friesen re-entered specialty production in 2009, Skye Hi and V3 were not in production until mid-2010, and K&R did not acquire production until 2010. While the Commission did move off its earlier reference period of 2009 - 2010, the period chosen still resulted in the appellants' receiving production volumes below current market share. Even though Coastline and Bradner did not support the change in reference period, they received production volumes in excess of their current market share.

115. While it is, of course, not necessarily a regulatory error to refuse to give stakeholders everything they want, 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. This sector was developed by a number of businesses, including hatching egg producers (Bradner, Coastline, K&R and its predecessor John Giesbrecht, and W. Friesen), chicken growers, and processors some of which were named in the hearing (Wingtat Game Bird Packers Inc., Fraser Valley Duck and Goose, Fairline Development (Canada) (1992) Inc., Farm Fed (part of K&R)), in conjunction with the Chicken Board. These members of the value chain worked together to meet the very unique but important market demand for Silkie and TC chicken. The system developed with regulatory underpinnings through the Chicken Board's quota system and had enough flexibility to allow the sector to evolve as the needs of the various segments changed.

116. Part of this ongoing change was 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. Skye Hi and V3 built on the successes of W. Friesen and, as a result of the quality of their product, customer service and reasonable chick prices, attracted new chicken growers to contract for the purchase of chicks. At the time of the September 2015 hearing, Skye Hi and V3 had each grown to about 5000 breeders per two-year cycle, comparable to a producer under the Commission's mainstream new entrant program.

117. 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.

118. A central theme of the Commission's submission is that "policies and decisions which focus on ad hoc efforts to placate individual, self-interested stakeholders will provide a very poor foundation for a broad policy such as this with far-ranging implications". As noted above, we cannot disagree. Unfortunately, in this case we find that it was the Commission that appeared to focus excessively on the interests of only part of the sector and failed to effectively engage all stakeholders. The Commission thereby failed to develop a "foundation for a broad policy" and a strategic direction for the Asian hatching egg sector. A convincing policy rationale for the Commission's focus was not provided to us on this appeal. The appellants' however, provided clear evidence that the Program fails to create an environment for promoting industry stability, innovation and diversification, which are all critical for the continued success of this small but important sector.

SAFETI

119. While the foregoing is sufficient to dispose of this appeal, we consider it appropriate to review the Commission's decisions case through the lens of the SAFETI principles BCFIRB has developed, in conjunction with the commodity boards, to ensure that the decision-making of boards and commissions is fair and accords with sound marketing policy. By 2013, the Commission was aware of the SAFETI principles. While we agree with the Commission that a statement that it has considered and applied SAFETI is not required, what is necessary is that a decision be seen to reflect the principles in a meaningful way. In our opinion, the Commission`s decisions do not pass this test.

120. **Strategic:** We find a complete lack of any strategic rationale in respect of the decision-making to actively regulate the Asian hatching egg sector. From the 2005 Specialty Review onward, the Commission was clear that it had no intention of regulating the specialty sector. This position changed in 2011. Apart from pressure from the two largest producers to institute quota regulation, there is little evidence of the strategic considerations leading to this shift. The suggestion of turmoil and instability in the specialty hatching egg sector was unsupported by the evidence. Contrary to Skye-Hi and V3 being engaged in a "race for base", we would characterize the appellants as engaging in

a growth opportunity and helping to develop a stronger and more resilient Asian hatching egg sector in the process.

121. **Accountable:** The Commission was not accountable to all stakeholders in the value chain throughout the consultation period 2011-2015. We heard many examples of stakeholders attempting to engage in policy discussion being met with inadequate response from the Commission. More troubling is the Commission's preferential treatment of two producers to the detriment of this industry sector.

122. **Fair:** Fairness refers to the process followed, and is not limited to common law procedural fairness. A fair process would consider the individual contribution of each producer to the industry and determine how best to recognize and/or accommodate that contribution. Some industry participants simply were not consulted which, in itself, is unfair.

123. A lack of procedural fairness here also extends to an unfair outcome. The Commission's decisions would have significantly jeopardized the businesses of four of the producers, while at the same time allocating more quota to the two dominant producers than they had requested. They received quota allotments significantly in excess of their production. Given our conclusions above, we find that the process followed was unfair to the majority of the participants in the industry.

124. **Effective:** We have concluded that the Regularization Program as ordered by the Commission would have destroyed the appellants' business, and eliminated an important component of K&R's business. It does not provide for or reflect the current state of the industry. Significant growth has occurred since 2009. Reinforcing an out-of-date and uncompetitive situation in a system with so many production advantages is indefensible as a matter of policy. The loss of the appellants' business would have shorted the supply of chicks, minimized the diversity of product available to the sector, disrupted the specialty Asian chicken supply, and potentially created a demand for imports from other provinces or internationally. The outcome could have been damaging to a sector where BC is a strong national leader and therefore not effective.

125. **Transparent**: Given our conclusions under Process Concerns above, we find the Commission`s process in developing and enacting its Regularization Program non-transparent. Regulators are challenged by balancing the need for openness and the risk of a "race for base" whenever they implement new production control programs. The risk can be mitigated by establishing rules regarding the reference periods and undertaking an open dialogue expeditiously. The Commission did not find the appropriate balance. The process was non-transparent to the individuals who were currently producing in the sector and other members of the value chain.

126. We understand that there were significant changes at the Commission, both at the Chair and staff level during a critical time in the development of the Regularization Program. That does not excuse the inadequate record of the consultation process (records of previous decisions, discussions, briefings or consultations simply do not exist). Given the length of time over which this process dragged on and the turnover in staff, the lack of records became an acute problem. It also does not excuse Commission members' lack of awareness (as described in paragraph 88) of the 2005 Specialty Review which provided advice for commodity boards developing and implementing a specialty or niche program, the unique attributes of the Asian chicken industry, the underlying rationale for its Reasons for Decision, and the manner in which that Decision addressed (or did not address) the concerns of stakeholders. The Reasons for Decision, do not read like a decision of a regulator making a strategic decision in the best interests of the industry. Instead, they read like a legal argument justifying a particular decision irrespective of industry realities.

127. **Inclusive:** Inclusivity denotes an obligation to consider all individuals who could potentially be impacted by a decision. Based on early feedback and interests demonstrated, the consultation can be refined to include all known stakeholders in the decision-making process. All relevant interests and input must be carefully balanced. The inescapable conclusion here is that the Commission started from a narrow perspective and gave disproportionate weight to the views of the two largest producers, to the detriment of the overall interests of the industry.

REMEDY

128. The panel has given a great deal of thought to the appropriate remedy. The Commission appears to have little appetite to start over, suggesting it would be disruptive and contrary to the best interests of the industry to perpetuate the market chaos that results from giving recognition to a 'right' to produce without licence and quota. Instead, the Commission proposes that we direct it to calculate the allotments of quota having regard to historical production data from 2011 to 2012 (as opposed to 2009 to 2012). Alternatively, it proposes a direction to exempt all persons engaged in the production of Silkie or TC broiler hatching eggs from 2010 until the present, without the requirement of a licence, permit or quota (but still enforce provisions regarding biosecurity, premise ID, and food safety).

129. While this panel could, as a matter of jurisdiction, step in and make this decision, we decline to do so. In our view, the Commission as the first instance regulator needs to undertake a proper process and determine what the strategic goals and objectives are for this small sector of the industry and what regulation, beyond that needed to address premise ID, food safety and biosecurity concerns, if any, is necessary to achieve those goals and objectives. This is not a "mammoth undertaking". After September 2005, other

supply managed commodity boards, in considerably larger industries, finalized their specialty or niche programs over a matter of months.

130. The panel has chosen not to impose an order regarding production controls or pricing for a number of reasons. To do so would repeat the Commission's mistakes regarding accountability, transparency and inclusivity. The panel did not hear from all relevant industry participants and production and pricing orders can only be properly made with full input. Also from a substantive perspective, while acknowledging that maintaining multiple, market responsive producers is key, it would be impossible for the panel to set appropriate production levels to achieve this outcome, based only on the evidence heard at the hearing. Similarly, although the Scheme provides authority for the Commission to regulate breeders, hatching eggs or chicks, the panel did not hear evidence regarding which element of production (breeders, eggs, or chicks) should actually be regulated. Even though the Commission issued regularized producer quota based on chicks, the panel is not in a position to specify which element of production should be the "regulated product" for the purposes of Asian production. For all these reasons, we do not make an order regarding production and price.

131. It is for the Commission to consider the appropriate degree of regulation in light of the Order below. Any decision by the Commission made to regulate the Asian hatching egg sector will be subject to appeal to BCFIRB unless the Commission seeks and obtains prior approval from BCFIRB in its supervisory capacity as was done for the other supply managed commodity boards as required by the 2005 Specialty Review.

ORDER

132. The appeal is granted, and Amending Order 11 and the decisions made under that Amending Order are set aside.

133. Within 30 days of this decision, the Commission is to take whatever steps it determines necessary to ensure that its current order regarding biosecurity standards, including the registration of farm premises, and food safety standards extends to persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks and inform stakeholders and BCFIRB of whatever action it has taken.

134. Before enacting any other regulation in regards to persons engaged in the production of Silkie or TC broiler hatching breeders, eggs, or chicks, the Commission is to consider the full scope of potential regulation, develop options and determine which best meet its objectives for the industry. At a minimum, the Commission must determine if production controls are necessary and whether or not the Commission should be setting chick price.

As part of its consideration, we would expect the Commission to consider the role the Chicken Board currently plays in regulating the production of specialty chicken and the impact of its pricing orders which include a pricing component for Asian specialty chicks. To put it another way, should the Commission directly regulate the amount of production of Asian breeders, eggs or chicks and their price or should the Chicken Board indirectly regulate these components of Asian production through its regulation of specialty chicken?

135. The Commission must decide if further regulation is needed to achieve sound marketing objectives including industry stability, innovation and diversification based on the application of the outcome based principles of a SAFETI analysis.

136. No later than 90 calendar days from the date of this decision, the Commission is to provide a report to its stakeholders and BCFIRB with its recommendation(s) with respect to paragraphs 134 and 135 above, fully supported by a process consistent with SAFETI principles. This report will determine whether or not the Commission intends to exempt persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks, from regulation except with respect to any provisions regarding biosecurity, including identification and registration of premises, and food safety referred to in paragraph 133 above. If the Commission's choice is for exemption, the report must include draft changes to the existing regulatory scheme to support the exemption.

137. In the event that the Commission decides not to exempt persons engaged in the production of Silkie or TC broiler hatching eggs from regulation and instead decides to pursue some form of regulation of production levels and /or pricing, the Commission has a further 90 days to complete an appropriate consultation process and enact a regulation(s) supported by a SAFETI analysis. If regulations are enacted to deal with production and pricing, they must include an appropriate mechanism (such as an advisory committee) through which the Commission will seek and obtain advice from those affected, each time it changes any aspect of production or sets a price for the Asian sector.

COSTS

138. The appellants seek their costs in this appeal, relying on the decision in *Island Eggs Sales Ltd. v. British Columbia Egg Marketing Board* (October 10, 2000) decided under section 8(11) of the *NPMA* which authorized the board to make orders for payment of any or all actual costs. BCFIRB (then the BC Marketing Board) felt that in all the circumstances, an order of costs against the commodity board was appropriate stating:

> 27. While not wishing to be regarded as adopting the judicial practice that "costs follow the event", particularly with regard to commodity boards which must frequently make difficult judgment calls in a complex area, we are satisfied that the unique facts of this

> case reach the standard for an order of costs to be made against the Egg Board. For the reasons set out in our August 4, 2000 decision at paragraphs 71-93, the Egg Board's decisions in this case, while made in good faith, disclosed a number of significant errors in practice and judgment, the cumulative effect of which had a serious adverse effect on the Appellant and the industry, which in our judgment makes a direction of costs appropriate.

139. The panel determined that proper balancing of factors would be achieved through an order that the Egg Board pay the appellant's costs according to the Tariff then in place for party and party costs set out in Appendix B of the Supreme Court Rules, at Scale 3.

140. In *BC* Vegetable *Greenhouse I, L.P.* v. *British Columbia Vegetable Marketing Commission* (BCFIRB, May 20, 2005), BCFIRB made an order for costs against the appellant under section 47 of the *Administrative Tribunals Act* which allowed for an order "requiring a party to pay part of the costs of another party or an intervener". We observe that section 47 has since been amended to allow for an order "requiring a party to pay all or part of the costs of another party or an intervener" in connection with an application. In our opinion, section 47 now authorizes a tribunal to order 100% indemnity for a party seeking costs.

141. In this case, given the panel's finding above regarding the Commission's significant errors of both policy and process we find that an award of costs is appropriate. However, we are not satisfied that an order for 100% indemnity is appropriate. In this case, we order the Commission to pay to each of the appellants Skye Hi, V3 and W. Friesen part of their costs as a lump sum in the amount of $7500 each, payable forthwith.

Dated at Victoria, British Columbia this 29th day of March, 2016

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

D. E. Stancil

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Daphne Stancil, Presiding Member

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John Les, Chair

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Andreas Dolberg, Vice Chair