



September 29, 2016

File: #16-09 & 16-10

**DELIVERED BY E-MAIL**

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Dear Sirs/Mesdame:

**RE: AN APPEAL REGARDING THE BC EGG MARKETING BOARD'S NEW ENTRANT PROGRAM - SUMMARY DISMISSAL DECISION**

The appellants, Amanda Korthuis, Ron Middleton and Robert Graham Covey filed notices of appeal to BCFIRB on July 28, 2016, appealing the British Columbia Egg Marketing Board's (Egg Board) decisions of June 10, 2016 terminating their applications to participate in the New Entrant Program.

BCFIRB held a pre-hearing conference on August 30, 2016 during which the Egg Board raised two preliminary issues relating to the appeals – whether they were filed within the time period established by the *Natural Products Marketing (BC) Act* and the *Administrative Tribunals Act* and whether the appeals raise an appealable issue given that they purport to challenge the New Producer Program Rules themselves.

**Issues and Grounds for Appeal**

The appellants outline the issue under appeal in their Notices of Appeal and information provided with the notices. The process established to follow the pre-hearing conference, provided them an opportunity to expand on their positions.

During the pre-hearing conference and based on the appellants' submissions, the Egg Board identified what it saw as a direct challenge to the New Producer Program Rules themselves.

The Covey Notice of Appeal states:

The process to enter the BC Egg Marketing Boards 2016 new producer program layer draw, is deeply flawed. It has become a creative essay contest and not the luck of a draw.

The decision should be changed to a simple draw not an evaluation of pros or plans that they are unduly qualified to evaluate.

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**British Columbia  
Farm Industry Review Board**

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The Korthuis/Middleton Notice of Appeal states:

Although the rules of the program were reviewed and amended after last year's draw, it is still our belief that it has been designed to deter people who are not already involved in the industry, as the requirements and information needed are not readily available to the public. If it is necessary to have a history in industry, then it would seem that this is not in fact a New Entrant program random draw, but an essay competition for those already engaged in egg production at some level.

The Revised Pre-hearing Conference Report of September 12, 2016 clarified the appellants' positions as follows:

Ms Korthuis and Mr. Middleton raise questions about how the Respondent Egg Board evaluated their submission and therefore how the Respondent Egg Board exercised its discretion in applying the rules that BCFIRB has prior approved.

BCFIRB established a written submissions process to address the preliminary issues and I have reviewed the submissions received.

### **The Submissions of the Egg Board (September 16, 2016)**

The Egg Board continues to proceed on the basis that each appeal is understood to be both a direct challenge of the New Producer Program Rules and a challenge to the Egg Board's evaluation of their individual applications, even though I acknowledged during the pre-hearing conference that the New Entrant Rules themselves could not be subject of the appeal.

The Egg Board says that an appeal that purports to challenge the New Entrant Rules themselves should be summarily dismissed on the basis that the appeal is out of time (279 days after the New Program Rules were promulgated and 159 days after BCFIRB approved the New Program Rules), is frivolous, vexatious or trivial or gives rise to an abuse of process and there is no reasonable prospect the appeal will succeed: see s. 8.1(1) of the *Natural Products Marketing (BC) Act* and ss. 31(1)(b), (c) and (f) of the *Administrative Tribunals Act*.

The Egg Board says that to the extent that the appeals are intended to challenge the Egg Board's evaluation of their individual applications, it takes no issue with an extension of the time to appeal to BCFIRB (48 days) provided the appellants are willing to forego any further review of their applications by the Egg Board. The Egg Board points to its letter of July 20, 2016 delivered to unsuccessful applicants which states:

The reason for the delay is that once the eligibility letters were sent, applicant's that were not successful had 30 days to formally appeal the committee's decision to the BC Egg Marketing Board (BCEMB). Once BCEMB completes this formal review process, applicants have an additional 30 days to appeal BCEMB's secondary ruling with the BC Farm Industry Review Board... At this time, BCEMB is reviewing requests submitted by applicants and until this process is complete we cannot finalize the draw pool. We recognize this delay was not planned and would like to apologize for any inconvenience this may cause.

If the appellants wish to have the Egg Board conduct a further review of their applications, it says it is prepared to do so despite the time to request such a review has expired. But if the appellants seek a further review by the Egg Board, the Egg Board's position is that these appeals to BCFIRB should be dismissed as being premature and as such, an abuse of process.

The Egg Board submission sets out the relevant background relating to the Egg Board's revisions to the New Producer Program Rules in March and October 2015 and the subsequent approval of the New Producer Program Rules by BCFIRB in a supervisory decision dated March 1, 2016. The Egg Board's

argument that the appeals are frivolous, vexatious or trivial, gives rise to an abuse of process and have no reasonable prospect of success relates only to the extent that these appeals can be seen as a challenge to the New Producer Program Rules themselves.

Because the New Producer Program Rules were approved in writing by BCFIRB pursuant to its supervisory jurisdiction, the Egg Board says that the appeals amount to an impermissible effort to appeal a direction of BCFIRB: *Salmon Arm Poultry Ltd. v. BC Egg Marketing Board* (May 16, 2001) and *Elkview Enterprises Ltd. v. BC Egg Marketing Board*.

As noted above, I agree with this element of the Egg Board's submission.

### **The Appellants' Submissions**

The appellants' response is very brief. On the out-of-time issue, the appellants appear to reference the Egg Board's July 20, 2016 letter although I note Mr. Covey indicates he did not receive this letter directly.

On July 21, 2016 we became aware of the additional 30 day extension for appeal, and subsequently started the appeal process on the 23 of July with contact to FIRB

We originally did not submit an appeal as this information was not made aware to us. However after the deadline of July 10th passed we happened to cross an email from Joey Aebig of BCEGG directed to some applicants regarding the NPP draw delay. The email made us aware of an additional 30 days to the formal appeal process, as a result of not having this information our opportunity to appeal would have been lost.

As you can see our timeline for appeal falls within the time limitations based on the 30 + 30 NPP draw delay email. Also the result of not having the process for appeals transparent for all applicants further hindered our opportunity to appeal.

In their final reply, the appellants state "There is every reasonable prospect that our appeal should be heard and succeed" and our appeal is (a) is within the time limitation and (b) deals with inconsistent evaluation of applicants.

On the out-of-time issue they state:

The use of an appeal process is hidden from all that failed to meet the boards standard. Nowhere on the boards' New Producer Program web site does it give information on the appeal process nor the time line for this process.

By accident we happened upon the letter from Mr Aebig telling some applicants of the extended deadline for the appeal (30+30 days)

The appeal process is **clearly hidden, information** is given to a chosen few.

[emphasis in original]

The balance of the submission addresses the merits of their appeals on the evaluation process and states in part:

Although all the rules of the program were amended after last year's draw, it is still our belief that the evaluation of applicants' information in the New Producers Program is inconsistent and not a true evaluation of information given. Thus we aren't appealing a rule made by a commodity board but how the evaluation occurred and the consistency of the evaluation. We therefore see our appeal permissible and wish to be heard.

### **The Egg Board's Offer of September 16, 2016**

In its submission, the Egg Board indicated that, as an alternative to proceeding with these appeals, it was prepared to include these appellants in its formal review process made available to the other unsuccessful applicants for the purpose of reconsidering their applications.

If the appellants accept this offer, the Egg Board says their appeals to BCFIRB would need to be withdrawn or dismissed. If the appellants are not approved by the Egg Board to be part of the pool for a draw after a "secondary ruling", they can then file a new appeal with BCFIRB regarding that ruling (or decision).

I am not familiar with the Egg Board's "secondary" review process, and prior to making any decision, I encourage the appellants to contact the Egg Board directly to fully understand the requirements of the Egg Board's process.

### **DECISION**

I agree with many of the general legal principles outlined by the Egg Board with respect to out-of-time appeals and the potential abuse of process that would result from allowing an appeal to proceed, where a commodity board or commission is acting on specific instruction or prior approval from BCFIRB in our capacity as supervisory board. However, as indicated above and noted during the pre-hearing conference, based on my review of the Notices of Appeal and the submissions, I am satisfied that what the appellants are seeking to appeal is not the New Program Rules themselves but rather "how the evaluation occurred and the consistency of the evaluation".

The Egg Board's summary dismissal arguments (out-of-time, frivolous, vexatious or trivial, abuse of process and no reasonable prospect of success) were only directed at these appeals to the extent that they could be seen as a challenge to the New Producer Program Rules themselves. The Egg Board is not advancing an out-of-time argument with respect to the evaluation process aspect of the appeals despite the fact the appeals were filed outside 30 days (48 days).

In any event, my conclusion is that special circumstances exist related to the failure of the Egg Board to reference the BCFIRB appeal provisions and the 30 day time limit, or to explain its internal review process in its June 10, 2016 decision to the appellants. These special circumstances allow me to extend the time for filing these appeals. Given the foregoing, I dismiss the Egg Board's request for a Summary Dismissal.

At the time of the pre-hearing conference, I did not appreciate that the Egg Board was conducting a formal review of unsuccessful applicants. Because of this, I want to be very sure that the appellants understand the process decisions before them at this time. The Egg Board made a decision in respect of the appellants' applications under the New Program Rules on June 10, 2016 (the decision they seek to appeal). Although that letter does not reference an appeal or review process, the Egg Board's letter of July 20, 2016 contemplates a two stage process whereby a committee of the Egg Board will conduct a formal review of unsuccessful applicants and make a "secondary ruling". It is not clear whether all the unsuccessful applicants received this letter and if not, why not?

Any future decision the Egg Board makes under this formal review process, would be appealable to BCFIRB within 30 days of the date of its issuance.

The Egg Board in its submission has offered that a committee established by the Egg Board, conduct a formal review of the appellants' applications and issue a ruling. If the appellants want to proceed with this formal review, then these appeals are premature. I agree that if the appellants choose to proceed with the Egg Board's formal review, these appeals must be either withdrawn or dismissed. Should the appellants be dissatisfied with the outcome of the Egg Board's formal review, they could file new appeals with BCFIRB.

The appellants have a choice, proceed with the Egg Board's formal review process available to unsuccessful applicants in which case these appeals must be dismissed or withdrawn **or** proceed with the appeals now on the issue of the evaluation process carried out by the Egg Board under the Rules leading to the June 10, 2016 decision.

I am asking the appellants (Mr. Covey and Ms Korthuis and Mr. Middleton) to advise BCFIRB and the Egg Board, after giving careful consideration of the options before them, of their intentions no later than **4:30 p.m., October 4, 2016**, following which BCFIRB will make any further process directions necessary with respect to these appeals.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

Per:



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Daphne Stancil, Presiding Member