

**British Columbia
Farm Industry Review Board**

February 7, 2020

File: N1909

DELIVERED BY E-MAIL

Brent Barkman
Bren-Den Ventures Ltd.
1320 2nd Avenue NW
Creston, BC V0B 1G6

Robert P. Hrabinsky
Affleck Hrabinsky Burgoyne LLP
1000 – 570 Granville Street
Vancouver BC V6C 3P1

Dear Sirs:

BREN-DEN VENTURES LTD. V BC EGG MARKETING BOARD

On November 30, 2019, the British Columbia Farm Industry Review Board (BCFIRB) received an email from the appellant, Bren-Den Ventures Ltd (Bren-Den), confirming that it was appealing a November 4, 2019 determination of the British Columbia Egg Marketing Board (Egg Board) that it was in contravention of the Consolidated Orders. As Brendan Barkman was travelling outside the country, the actual Notice of Appeal was received January 3, 2020. The Notice of Appeal identifies that the appeal is from the August 30, 2019 and November 4, 2019 decisions of the BCEMB.

On January 15, 2020 the BCEMB applied to have Bren-Den's appeal dismissed on the basis that it was filed beyond the 30-day statutory time limit required under the *Natural Products Marketing (BC) Act (Act)* and section 24(1) of the *Administrative Tribunals Act (ATA)*, which provides:

- 24 (1)** A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.
- (2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

Submission of Egg Board

In its August 30, 2019 decision, the BCEMB reviewed the appellant's request as well as its proposed business plan. As the BCEMB determined that, since one of Bren-Den's two barns had been out of production since September 8, 2018, and since it hadn't taken the necessary steps to retool or rebuild, Bren-Den was deemed not in good standing with the Consolidated Orders.

Bren-Den was given 180 consecutive days from September 8, 2019 (to March 6, 2020) to become in good standing with the Consolidated Orders or risk losing all or part of its Layer Quota as per

**British Columbia
Farm Industry Review Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
1st Floor, 780 Blanshard Street
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Website: www.gov.bc.ca/BCFarmIndustryReviewBoard

Part IX-Production Requirements and Limitations, Section 1 of the Consolidated Orders which states:

The Board may cancel all or any part of the Layer Quota:

- a. Issued to the producer who:
 - i. for 180 consecutive days, fails to keep or maintain the number of Layers authorized under the Layer Quota issued to that Producer; or who
 - ii. fails to maintain an active Independent Production Unit(s), housing greater than 50% of their layer quota, whereby the total legal and beneficial fee simple interest of the Independent Production Unit is held by that Producer or shareholders of that Producer.

The November 4, 2019 letter referred to in the Notice of Appeal confirmed the August decision that, as of then, Bren-Den was not in good standing and reminded Mr. Barkman that he will remain not in good standing until he places 3,454 organic hens (his total production quota holdings), 19 weeks of age into his Egg Production Units. This letter concluded with an offer of the BCEMB to help but at the same time warned that the Consolidated Orders must be followed.

The BCEMB argues that Bren-Den acknowledges that it seeks to appeal the decision made more than four months ago as the Notice of Appeal expressly identifies the August decision. Further, in an email query dated September 17, 2019, Bren-Den expressly refers to “the aug30/19 letter of decision.”

The BCEMB disputes that the November 4, 2019 letter is a decision and says that the events following the August decision cannot negate the expiration of the applicable limitation period.

The BCEMB outlines the following facts:

- Bren Den’s email to the BCEMB of September 17, 2019 raises questions and asks for reconsideration. The BCEMB response referred Bren-Den back to the August decision and confirms that as of September 8, 2019, it was not in good standing and will face the consequences in terms of levies, Service Fees and ineligibility to collect Quota Credits, lease quota or obtain a levy abatement pursuant to the Consolidated Orders Part III 2. (3) (g), Part VIII 1. (2), and Part XI 3. (2). In order to be in good standing, Bren Den needed to place its quota in organic hens.
- An internal BCEMB memo dated October 21, 2019 confirms a further request by Mr. Barkman for reconsideration of the decision that it was not in good standing and recommends that this request be declined as no new information has been provided.
- The November 4, 2019 letter under appeal reaffirms the August decision that Bren Den was not in good standing and that it had 180 consecutive days from September 8th to become in good standing otherwise the BCEMB could take further action.

The BCEMB relies on two previous decisions of BCFIRB in *Saputo v. British Columbia Milk Marketing Board* (May 29, 2008) and *Mountain Valley Dairy Ltd. v. British Columbia Milk Marketing Board* (July 22, 2015) for the principle that an appellant cannot evade the application of the statutory limitation period and thereby “breathe life” into an appeal, merely by requesting that a board reconsider an issue:

In *Saputo*, the Panel held:

If a person has a legitimate complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period. This is especially important where it is the regulatory framework that is challenged. Certainty and stability require that appeals be heard on a timely basis. Where the time to appeal is missed, it is incumbent on the Appellant to show special circumstances why the time to file the appeal ought to be extended.

Based on the foregoing, the BCEMB seeks an order summarily dismissing the appeal based on the ground that the application was not filed within the applicable time limit.

Submission of the Appellant

In response, the appellant provided 26 pages which included the BCEMB’s letter, several hand-written pages, and a short string of e-mails, some undated and with annotations and typed pages that were difficult to piece together to understand his response. The bulk of the response appears to address the merits of the appeal and why Bren-Den should be entitled to the remedy it seeks, more time to get into good standing and reimbursement for losses resulting from being placed in not good standing. The appellant raises issues relating to why it cannot operate with two flocks as opposed to one and disputes why it is not in good standing. Mr. Barkman says the appellant should have been able to collect quota credits and lease until it had time to retool its barns. He says Bren-Den has met unplanned and unexpected changes with organic standards that were outside its ten-year plan. Bren-Den has also had difficulties sourcing pullets from a hatchery due to Salmonella Enteritidis. Mr. Barkman explained his understanding of the Consolidated Orders, the barn renovation issues and the need to change his approach. He asked to be granted some measure of grace to address situations out of his control.

There is very little in the response which addresses the issue of whether the appeal is out of time. Instead, the appellant appears to dispute the timing of the decision under appeal. In the apparent first e-mail in the attached string, the appellant sent the BCEMB a query seeking information and clarification on the August decision and the BCEMB’s response of September 19, 2019 refers to the query as a “new request” that would be put to the Board at its next meeting. Mr. Barkman appears to be arguing that, as the BCEMB refers to this as a new request, it would be followed by a new decision, namely the November 4, 2019 letter.

Reply Submission of BCEMB

The BCEMB argues there is nothing in the appellant’s submission which is responsive to the summary dismissal application. It argues that the submission makes a number of confusing and

inaccurate statements, which the BCEMB responds to so as not to appear to accept the assertions of the appellant.

In response to the suggestion that there was a new request, the BCEMB states as follows:

- The appellant states: “You will see in an email from Katie my request was a new request” The BCEMB says it was indeed a “new” request, but it was merely a request to reconsider the August decision and as such was “an attempt to ‘breathe life’ into an appeal merely by requesting that a board reconsider an issue.”

In response to the one flock, two flock issue, the BCEMB states:

- The appellant states: “You will see that the second request was not about having a one flock farm but why we could not stay a 2 flock farm to avoid the not in good standing charges.” There is nothing in the BCEMB’s August decision which prohibits the appellant from “[staying] a 2 flock farm”. The appellant has at all times been able to have two flocks of different ages, but he is required to place all his birds, even if not all at once, to be in good standing.

The balance of the response takes issue with the appellant’s assertions that go the merits of this appeal and they do not form part of the consideration of this dismissal application.

Decision

In an application for summary dismissal where an appeal is filed outside the statutory time limit, a panel must consider whether there are any special circumstances which justify extending the time to file the appeal. Unfortunately, on this critical question of special circumstances the appellant is largely silent. It is not particularly clear how the email strings he refers to should be considered special circumstances. I agree with the BCEMB when it says in its reply that the appellant’s submission was non-responsive to the issues on this application.

What is clear from the appellant’s submission is that Mr. Barkman had a number of issues which he thought the BCEMB needed to be aware of and address in order to properly deal with Bren-Den’s egg operation and the compliance issues. Following the August decision that its operation was not in good standing, the appellant continued to write and call the BCEMB seeking clarification and disputing facts. It is not clear at all why, given the nature of the dispute, Mr. Barkman did not simply file an appeal.

The appellant offers no explanation as to why he delayed almost four months from the August decision to file his appeal other than to point to the ongoing communication with the BCEMB. Further, the appellant does not explain how the BCEMB’s letter of November 4, 2019 written in response to his queries created a new right of appeal. That letter clearly references and confirms the August decision; it did not change the August decision.

I see this as a case which falls squarely within the *Saputo* and *Mountain Valley Dairy Ltd* decisions relied upon by the BCEMB. If the appellant had a legitimate complaint about the BCEMB determination that it was not in good standing, the proper course was to file an appeal within 30

days and then continue to discuss the matter with the BCEMB. Failing a satisfactory resolution of its issues, the issues the appellant now seeks to raise regarding the circumstances which had led to it being unable to complete its barn renovations and produce its quota would have been properly before BCFIRB.

In the absence of the appellant demonstrating that special circumstances exist to warrant an extension of the time to file an appeal, I conclude that this appeal was filed outside the statutory time limit of 30 days and as such, I dismiss this appeal pursuant to section 31(1)(b).

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in cursive script, appearing to read "D Lapierre".

Dennis Lapierre, Presiding Member