



BC Farm Industry Review Board

November 2, 2020

File: N2005

DELIVERED BY EMAIL

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Dear Sirs:

RE: BROATCH V BC BROILER HATCHING EGG COMMISSION

On September 24, 2020, the British Columbia Farm Industry Review Board (BCFIRB) received a Notice of Appeal from Garrett Broatch of Stasis Farms. Although the Notice of Appeal does not specify an order, decision or determination, it appears that the appeal relates to a September 22, 2020 communication from the British Columbia Broiler Hatching Egg Commission (Commission) stating that Stasis Farms does not meet the requirements to have their own Silkie breeder flock.¹ Mr. Broatch states “even under a new entrant we can’t be considered because two producers are able to supply the market demands. BCEHC (sic) suggesting we didn’t have production prior to 2010 so we are not eligible in 2020. There was growth from 2010-onwards to where new entrants should have been included.”

Commission’s Summary Dismissal Application

On October 5, 2020, and in advance of the scheduled pre-hearing conference, Counsel for the Commission advised BCFIRB of its position that the Notice of Appeal was deficient. It failed to identify any order, decision or determination that could be the subject matter of an appeal under s. 8(1) of the *Natural Products Marketing (BC) Act (Act)* and furthermore, the Commission had made no order, decision or determination with respect to Mr. Broatch that could provide the foundation for an appeal. The Commission relied on Rule 1(3) of BCFIRB’s Rules of Practice and Procedure for Appeals which requires appellants to identify “the marketing board decision that is being appealed”. Where the appellant fails to do so, BCFIRB may on its own initiative summarily dismiss the appeal pursuant to Rule 1(9):

- (9) If a Notice of Appeal is deficient in terms of the information referenced in Rule 1(3), the chair or the chair’s delegate may allow a reasonable period of time within which the Notice of Appeal may be corrected. If such a period of

¹ Silkies are a type of Asian specialty chicken.

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time is granted and the Notice of Appeal is not corrected within the time required, BCFIRB may summarily dismiss the appeal (ATA, s. 31(1)(e)) after giving the appellant an opportunity to be heard.

The Commission provided the following facts. On September 22, 2020, Mr. Broatch telephoned the Commission and spoke with the Manager, Finance & Production (Joshua Crossett) about how to acquire a hatchery licence and a permit to produce Silkie broiler hatching eggs. He was informed:

- (a) Temporarily Regularized Producer Chick Quota was allotted by the Commission under its temporary Regularization of Historically Non-Compliant Silkie and Taiwanese Producers Program to persons who had been continuously engaged in the production of Silkie or Taiwanese Broiler Hatching Eggs from December 31, 2010 to the date of application.
- (b) The deadline for applications was 3:00 pm, May 16, 2019.
- (c) Any person who now wishes to enter the industry for the purpose of producing Silkie or Taiwanese Broiler Hatching Eggs could either acquire quota from another producer, or apply under the Commission's New Producer Program Rules or the Small-Lot Innovative Self-Marketer Program, if applicable.
- (d) Within the next year, the Commission would likely be assessing the need, if any, to announce a draw under the New Producer Program Rules for Silkie or Taiwanese hatching egg production.
- (e) He should review the Commission's Consolidated Order with respect to the requirements for a hatchery licence.

On September 23, 2020, Mr. Broatch sent an email to the Commission's Executive Director Stephanie Nelson stating, "please provide how I will I obtain the permits under the specialty breeder program for Silkies and a hatchery license". Later that same day, Ms. Nelson responded stating, "it is my understanding you had an extensive conversation with my production manager Joshua yesterday afternoon. I believe he has answered these questions."

The Commission observes that Mr. Broatch has not applied for an allotment of Temporarily Regularized Producer Chick Quota under the Commission's Temporary Regularization of Historically Non-Compliant Silkie and Taiwanese Producers Program; the New Producer Program Rules, or the Small-Lot Innovative Self-Marketer Program. He does not seek to challenge the terms or conditions of the Commission's Temporary Regularization of Historically Non-Compliant Silkie and Taiwanese Producers Program; the New Producer Program Rules, or the Small-Lot Innovative Self-Marketer Program. In any event, the limitation periods for an appeal from the terms and conditions of those programs have long since expired. Finally, he has never made an application to the Commission for permit or licence based on "extraordinary circumstances". In light of the position taken by the Commission, the pre-hearing conference was adjourned and BCFIRB inquired of the Commission whether it would be filing a summary dismissal application.

Mr. Broatch, in an email dated October 9, 2020, confirmed he would agree to a dismissal of the appeal in exchange for the Commission reviewing “his application” and responding in a reasonable amount of time. He indicated that his “request” to the Commission of July 24, 2017 had not been considered by the Commission and his requests and phone calls and emails on and after this date were held at staff level. In response to the Commission’s point that he had not applied under “extraordinary circumstances”, he indicated his intention to do so “as no application format has been given to us in the last three years.”

In its email of October 9, 2020, the Commission did not agree to the “conditional” dismissal of the appeal as proposed by Mr. Broatch and requested that its October 5, 2020 correspondence be treated as its application for summary dismissal pursuant to ss. 31(1)(a), (b), (c), and (f) of the *Administrative Tribunals Act*, on the grounds that:

1. the application is not within the jurisdiction of the tribunal;
2. the application was not filed within the applicable time limit;
3. the application is frivolous, vexatious or trivial or gives rise to an abuse of process; and
4. there is no reasonable prospect the application will succeed.

Appellant’s Position

The appellant’s response is organized under the above four grounds. He argues that the appeal is within the jurisdiction of the tribunal because staff made “personnel decisions that affected our application that should have been answered by the board”. He attaches a summary of his communication with Commission staff between July 24, 2017 and September 26, 2020 relating to his future plans in the Silkie breeder business, his inquiries with respect to a specialty new entrant program and hatchery licensing and the Commission’s efforts to get information regarding his plans, compliance with bio-security, food safety, and animal welfare issues, production data, and meeting notices to discuss BCFIRB’s 2018 appeal decision. In his September 26, 2020 email, the appellant asked Commission staff to “please provide how will I obtain the permits under the specialty breeder program for silkies and a hatchery license.”

With respect to the time limit for filing the appeal, the appellant argues that Commission staff (Ms. Nelson) denied the request to meet from the October 19, 2018 email as he didn’t have a hatchery and processing agreement in place. He asks what could he appeal when Ms Nelson placed a requirement on his farm which he followed. With respect to the appeal being frivolous, vexatious or trivial or giving rise to an abuse of process, the appellant argues that the Commission or its staff has had two plus years to put a specialty new entrant program in place for people that built a plant and hatchery. The Commission has never laid out in an official application format. The Commission did not respond to the appellant’s January 31, 2018 request that new entrant requirements be considered by BCFIRB.

With respect to the appeal having no prospect of success, the appellant argues that if his “application” fails, the appeal hearing will expose the challenges that a new entrant and new processor faces.

Commission’s Reply

The Commission’s reply is brief. It argues that the Commission did not make the “personnel decisions” as alleged. Further, the appellant does not in fact identify any such decisions made by the Commission. Further, at no time has the appellant submitted any application and he does not in fact identify any such application. The Commission attaches unedited copies of the communications referenced by the appellant. It points to a February 7, 2018 email from the Commission to the appellant which states:

“Thank you for your email.

The BC Hatching Egg Commission awaits BC FIRBs decision on this matter.

As you and I discussed in previous phone calls it was not recommended by the Hatching Egg Commission staff, specifically me, for you to place breeders at all given the uncertainty of the direction BCFIRB will decide on in its upcoming decision.

We simply do not know what the direction will be.

Since you have decided to place Silkie breeders please ensure that your Food Safety, Animal Care and Biosecurity programs are all up to date with my inspection staff and I will post all updates on the BC Hatching Egg Commission's website as soon as possible.”

The Commission argues that this email is not an order, decision or determination and even if it could be considered as such, any appeal grounded in this email would be well outside the limitation period.

Background

The panel considers it useful to set out some context regarding specialty hatching egg production in BC and the policy directives in operation at the time this appeal was filed. There is an extensive history behind the development of regulation for the hatching egg specialty production (which includes Silkie and Taiwanese Asian bird breeds). BCFIRB’s appeal decision in *Skye Hi Farms LTD et al v. BCBHEC*, March 29, 2016 resulted from appeals by six specialty producers of the Commission’s first attempt at “regularizing” specialty production through the issuance of quota. The appeal was successful resulting in BCFIRB directing the Commission to cancel its specialty regulations, ensure specialty producers were compliant with basic biosecurity requirements (including disease management and food safety); and conduct a transparent, inclusive, and informed process to determine the level of regulation beyond basic biosecurity requirements needed to achieve sound marketing policy objectives.

On June 28, 2017, the Commission made its recommendations to BCFIRB for the regulation of specialty hatching egg production following which BCFIRB conducted its own supervisory process to determine what regulatory tools were necessary for the specialty hatching egg sector to achieve sound marketing policy objectives, including industry stability, innovation and diversity.

BCFIRB's supervisory panel worked with the Commission to establish a multi-step review process, work plan, and stakeholder engagement. The supervisory panel issued its decision July 17, 2018, making several directions relevant to this appeal and application:

113. The Commission is to immediately establish a condition-based transferable production permit for Asian hatching egg production. At a minimum the permit must include:
 - (a) requirement that transfers be approved by the Commission;
 - (b) biosecurity, food safety, premises ID, and animal care requirements; and,
 - (c) current production volume by the permit holder including strain and volume of strain by production cycle, which at a minimum is to ensure that the Commission obtains up to date production information.

The Commission may set other conditions, as it sees necessary, to assist with management of the sector. Depending on the conditions, consultation may be appropriate.

114. Production permits are not to be issued to a producer until the producer is in full and current compliance with the Commission's biosecurity, food safety, premises ID and animal care Orders.
115. Specialty hatching egg producers must be in compliance with the condition set out in paragraph 115 above within 60 days of the date of this decision to be eligible to receive a production permit.
116. The Commission is to establish a framework for managing industry entry requests in conjunction with establishing rules for production permits.

Subsequently, the Commission has been given extensions for fulfilling several of the above directions. As of August 2020, the Commission has placed its review of its specialty new entrant program on hold while it makes its substantive regulatory changes. Despite this, BCFIRB was satisfied with the Commission's work to date and agreed that its implementation plan fulfilled the 2018 supervisory directions. Going forward however, the Commission must be prepared to answer any future BCFIRB and/or stakeholder questions as to when the Commission will be accepting specialty new entrant applications.

Analysis and Decision

Section 8(1) of the *NPMA* establishes a right of appeal as follows:

A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial board.

In order for there to be a valid appeal, the panel must consider whether there is in fact an “order, decision or determination” made by a commodity board. It is not enough for a potential appellant to point to a string of emails and communications and say “I am aggrieved or dissatisfied with these communications”. An order, decision or determination requires some action on the part of the commodity board.

Here, the appellant initially relied on the September 22, 2020 communications with Commission staff to trigger his appeal. However, a review of this communication reveals that the Commission staff was answering the question “how do I apply as a new entrant or to obtain a license”. The Commission’s response which sets out the relevant programs is a statement of fact reflecting the current regulatory regime.

The appellant also seems to rely on an email dated July 24, 2017 (forwarded in the Commission’s July 27, 2017 response) indicating that he is raising Silkie breeders and would like to inform the Commission. “When a program is in place please inform us that we can apply for the specialty program or comply with conditions put forward. “The appellant characterizes this email as a request to the Commission. The appellant does not however say how the Commission’s response could be taken to be an order, decision or determination of the Commission. The response indicates that the “Asian Breeder Sector is expected to comply with Schedule 5 of the Consolidated Orders which is the Biosecurity, Food Safety, Premise Identification and Animal Care Programs” and explains that Commission staff members will provide food safety training, audit biosecurity and check barn specifications and signage. There is no decision communicated in this exchange.

Further, the appellant repeatedly references his “application” and the Commission’s failure to consider his “application”. I agree with the Commission that the appellant has not made an application for the Commission to consider. Rather, it appears that the appellant has been asking for the Commission to enact a new entrant program for specialty production under which he could apply and as no such program exists, yet he has filed his appeal.

This situation is not dissimilar to *Mountain Valley Dairy Ltd. v BC Milk Marketing Board* (BCFIRB, July 15, 2015) where a producer wrote to the Milk Board asking it to review the existing regulatory framework related to licensing and pricing which he felt did not meet his particular needs. In that case, the panel referred to an earlier decision, *Saputo vs. BC Milk Marketing Board* (BCFIRB, May 9, 2008) where the panel stated:

On this point, I do not accept that an Appellant can, simply by writing a letter to a commodity board objecting to a given order or seeking clarification, generate a

right of appeal. A similar issue arose in *Klaas Korthuis dba Try Poultry Farms. v British Columbia Chicken Marketing Board October 18, 1999*, where Mr. Korthuis sought clarification of his quota holdings from the Chicken Board and then used the clarification letter as a basis to challenge the underlying quota orders which had been enacted several years earlier. In my view, it is improper for aggrieved persons to attempt to “breathe life” into an appeal merely by requesting that a board reconsider an issue. 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. [emphasis added]

Given that the July 2017 email exchange and September 22, 2020 communications do nothing more than point out the appellant’s options within the existing regulatory framework, I find there is no “order, decision or determination” of the Commission. It follows that there is no associated right of appeal. I dismiss the appeal on that basis. At the core, this appeal seems to be about the appellant’s dissatisfaction with the Commission’s failure to enact a specialty new entrant program under which he could apply for a permit and/or a hatchery license. However, this is a challenge to the existing regulatory framework as opposed to a challenge to a commodity board decision to not exercise its discretion in the appellant’s favour. Any challenge to the existing framework is not appealable as it is long since out of time.

In light of the foregoing, I summarily dismiss this appeal pursuant to 31(1)(a) of the ATA as it is not a proper appeal and as such, not within the jurisdiction of BCFIRB, s. 31(1)(b) as the appeal is outside the statutory time limit, s. 31(1)(c) as it is frivolous, vexatious or trivial and would give rise to an abuse of process and s. 31(1)(f) as there is no reasonable prospect the appeal will succeed.

Yours truly,

A handwritten signature in black ink, appearing to read 'A Sakalauskas', with a long horizontal line extending to the right.

Al Sakalauskas
Presiding Member and Vice Chair