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## BC Farm Industry Review Board

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File: N2102

### DELIVERED BY EMAIL

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Dear Parties:

### RE: **CROSS ET AL V BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION – SUMMARY DISMISSAL DECISION**

#### Introduction

The appellants, Allan and Shelly Cross, Royal Columbia Poultry ULC, Royal Feather ULC and Royal Greens Poultry Ltd. are appealing a January 29, 2021 enforcement decision of the British Columbia Broiler Hatching Egg Commission (Commission) to suspend their producer licences.

Prior to the prehearing conference scheduled for March 11, 2021, the Commission applied to summarily dismiss this appeal. A written submissions process was established and I have now had a chance to review those submissions.

For the reasons that follow, the Commission's application is dismissed.

#### The Appeal

By way of background, Royal Columbian, Royal Greens and Royal Feather are holders of broiler hatching egg producer licences. Broiler hatching eggs, as their name implies, are fertilized eggs laid by broiler breeder hens for the purposes of hatching chicks to grow broiler chickens as part of the regulated chicken industry. As not all the eggs produced by broiler breeder hens are ultimately hatched, the Commission's Consolidated Order manages the flow of eggs into the consumer market in order to limit the risk of salmonella enteritidis (SE).

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Very briefly, section 27(1) of the Consolidated Order<sup>1</sup> provides that no producer shall market broiler hatching eggs other than through the Commission, to a hatchery, to a breaker or as otherwise directed by the Commission. Section 27(2) requires producers to market all breaker quality eggs through the Commission. Section 27(3) requires a producer to destroy all unmarketable eggs. Section 27(4) provides that the Commission can impose penalties on persons who fail to comply with these provisions and the Commission may suspend or cancel a producer's licence.

In September 2020, the Commission determined that the appellants were no longer marketing their small breaker quality eggs through the Commission as required by the Consolidated Order. The Commission concluded that the appellants were participating in farm gate sales of eggs. On October 13, 2020, the Commission gave the appellants an opportunity to show cause why the Commission should not impose terms and conditions with respect to the marketing of regulated product or suspend or cancel the appellants' licence or quota. In the show cause process, the appellants did not deny that they were in fact selling and distributing eggs. They indicated that they had been active in farm gate sales, charitable contributions to food banks and local recovery homes with their "non-hatching eggs" for many years.

The appellants met with the Commission on December 17, 2020. On January 7, 2021, the Commission issued its 13-page Decision titled Small Egg Program Non-Compliance in which they addressed the appellants' arguments that small eggs (breaker quality eggs) are not "hatching eggs" and therefore not a regulated product and that section 24 (now section 27) is not clearly written.

In response to the appellants' arguments that "breaker quality eggs" are not regulated, the Commission reviewed the definition of "natural product" in the *Natural Products Marketing (BC) Act* and the Scheme as well as the over arching powers conferred upon the Commission "to promote, regulate and control in any and all respects the production, transportation, packing, storing, and marketing, or any of them of the regulated product ...and ..all powers necessary or useful in the exercise of those powers..." The Commission concluded there was no genuine ambiguity in the Scheme and it clearly applied to "breaker quality eggs" for the following reasons:

- The definition of "regulated product" in the Scheme includes "broiler" which means a chick or chicken not raised or used for egg production; "broiler breeder" which means a chick or chicken raised or used for the production of broiler hatching eggs; and "broiler hatching egg" which means a chicken egg suitable for hatching a broiler chick.
- "Suitable for hatching a broiler chick" needs to be understood in the context of the legislative history as differentiating broiler hatching eggs from table eggs.
- The definition of "regulated product" in the Egg Scheme "layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed" needs to be read as implicitly excluding broiler hatching eggs as they are specifically regulated elsewhere.

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<sup>1</sup> Formerly, section 24 of the Consolidated Order.

- In the alternative, the Commission concluded that the Commission has the power to regulate “breaker quality eggs” as to do so is necessarily incidental to its statutory mandate.

The Commission noted the purpose and importance of section 24 (now section 27) to address the public health threat of SE caused by farm gate sales producers by ensuring the integrity of the BC broiler hatching egg industry. The Commission reiterated its view that marketing of hatching eggs includes donations as a form of sale and stated:

Regardless of that interpretation, a plain reading of section 24 is that no hatching eggs are to be disposed of in any manner other than specifically by section 24 or as directed by the Commission. Which authorization you have not received from the Commission. Registered producers have an obligation to operate under supply managed regulation.

The Commission also noted that failure to enforce against others is not an excuse or mitigating factor for these producers. It enforces its orders as required and has warned other producers to come into compliance.

The Commission’s made the following order:

**Decision**

The Commission finds that Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are both in noncompliance with section 24 of the Consolidated Order.

**Order**

Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are, within two weeks of the date of this Order, to demonstrate to the satisfaction of the Commission that they are both in full compliance with section 24. The Commission must be fully satisfied that both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are in compliance by the deadline. If either Royal Columbia Poultry ULC or Royal Greens Poultry Ltd. are not in compliance after that deadline, their respective licenses will be immediately suspended, without further order until such time as the Commission is fully satisfied that compliance has been achieved.

Significantly, the appellants chose not to appeal the Commission’s finding of non-compliance in the January 7, 2021 decision.

Following the issuance of the decision, the Commission tried to confirm that the appellants had taken steps to comply with the Consolidated Order. Although the appellants wrote to the Commission stating “as of 21Jan2021, we are in compliance with your ridiculous interpretation of small egg program in the Consolidated Orders”, on January 22, 2021, the appellants denied the Commission’s inspector access to their farm store.

On January 27, 2021, the Commission decided to suspend the appellants’ licences, which decision was communicated to the appellants on January 29, 2021 in its follow up decision regarding license suspension for non-compliance with the breaker quality egg program.

This decision, which is the subject of the appeal, states:

I am writing further to the Commission's decision dated January 7, 2021 and the site inspection that took place on January 22, 2021. During the site inspection, it was observed that a sign was present at the roadside advertising eggs for sale between 12:00 pm and 5:00 pm. You also advised that you are selling eggs at the farm gate. Despite a request to enter and inspect the farm gate shop located on premises, you denied access to the Commission's inspector contrary to section 41 of the Consolidated Order of January 1, 2021....

Additionally, the inspector found a website, advertised on the store front. This website contains pictures of hatching eggs for sale, that information is attached. In light of this, we are writing to advise that the licences of both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are suspended effective January 28, 2021. Your hatchery has been notified. The Commission will consider lifting the suspension only when it is fully satisfied that both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. have come into full compliance with section 24 of the Consolidated Order. [emphasis added]

As a result of the suspension, the Commission refused to allow pick up of the appellants' regulated product. Subsequently, the Commission conducted an inspection on February 1, 2021 which confirmed that the appellants were selling table eggs. The appellants say they were compelled to either cease selling white table eggs at their farm gate or provide a notarized letter confirming the status of the table eggs and commit to frequent inspections and stop donating eggs to charity. The appellants opted to cease selling table eggs.

On February 2, 2021, the appellants confirmed they had removed all table eggs from their store, and any related signage and confirmed their intention to not sell or donate any type, kind or form of hatching egg. The Commission then reinstated the appellants' licences.

On February 2, 2021, the appellants filed their appeal of the January 29, 2021 decision to remove their licenses stating as follows:

- The decision rendered our farm inoperable
- The decision implies we were in non-compliance
- We are asking to review and overturn the decision.

### **Commission's Position**

The Commission seeks an order summarily dismissing this appeal on three grounds: mootness, no reasonable prospect of success and out-of-time.

The Commission argues the appeal is moot as the appellants have ceased all donations and farm sales of all types, kinds and forms of hatching eggs and have confirmed they intend to remain in compliance and on that basis, their licences were reinstated. The Commission says there are no longer any live issues applying the two-part test from *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 as modified by *R. v. Smith*, [2004] 1 S.C.R. 385. As the appellants have given their word, in writing, that they have

ceased all donations and farm sales of all types, kinds and forms of hatching eggs, and that they “intend to remain in compliance” and on that basis, their licenses have been reinstated, the Commission argues there is no longer any “tangible and concrete dispute” that would justify the expenditure of limited resources to hear this appeal. BCFIRB should decline to hear the appeal on the basis that it has become moot, and on the basis that the appeal is frivolous, vexatious or trivial within the meaning of paragraph 31(1)(c) of the *Administrative Tribunals Act (ATA)*.

The Commission also argues that to the extent that the appeal is directed at the Commission’s decision finding the appellants in contravention of the Consolidated Order, there is no reasonable prospect that the appeal will succeed within the meaning of paragraph 31(1)(f) of the *ATA*. The appellants have provided no reasonable counter argument to the Commission’s January 7, 2021 non-compliance decision.

Finally, to the extent that the appeal is directed at the requirement that “[e]very Producer must market through the Commission all Breaker Quality Eggs“, presently referenced at subsection 27(2) of the Commission’s Consolidated Order, the appeal was not filed within the applicable time limit within the meaning of paragraph 31(1)(b) of the *ATA* as the relevant provisions have been a feature in the Commission’s Consolidated Order since 2010.

### **Appellants’ Position**

The appellants argue that the burden is on the Commission to show that the case is so clear that it would be inappropriate to hear the appeal and where it is clear on its face, that the appeal cannot possibly succeed or that it is devoid of merit. The appellants argue that the appeal is not moot and live issues remain. They argue that the Commission used licence suspension and the concomitant threat of ongoing threat and disruption of the appellants’ business operations to extract promises to cease activity which the appellants argue are permitted under the Consolidated Order, including farm gate sales and donation of breaker quality eggs, and to cease selling table eggs that are not regulated by the Commission. The appellants’ also observe that Royal Feather’s licence was suspended and reinstated despite the fact that the January 29, 2021 decision makes no reference to Royal Feather. The appellants argue that licence suspension also has the potential to impact future licensing decisions and the impact of the cancellation and reinstatement has yet to be determined.

The appellants argue that the appeal raises serious issues relating to the interpretation of section 27 of the Consolidated Order including whether “donating” falls within “marketing”, whether the Commission has authority to regulate “breaker quality eggs”, whether the appellants were in fact in contravention of the Consolidated Order, and whether the Commission complied with s. 27(6) prior to suspending their licenses.

### **Commission Reply**

In its brief reply, the Commission argues that the focus of the appellants’ appeal is subsection 27(2) of the Consolidated Order which it says is clear and unambiguous.

Though the appellants describe “breaker quality eggs” as “non hatching eggs”, they concede that they have marketed breaker quality eggs contrary to the Consolidated Order. The appeal is an effort to overturn subsection 27(2), on the basis that continued compliance will “adversely affect [them]”. This subsection has been “on the books” since 2010 and as such, this challenge to the provision comes 11 years too late and has not been filed within the applicable time limit. Finally, the Commission disputes that it has not made submissions to support its position that the appeal has no reasonable prospect of success in that it expressly adopted and incorporated its extensive statutory interpretation analysis contained in the January 7, 2021 decision into its summary dismissal application.

## **DECISION**

Before considering the specific arguments of the parties, it is important to be clear on what decision is actually under appeal. This is not an appeal of the Commission’s January 7, 2021 non-compliance decision which undertook a detailed statutory interpretation analysis of the Commission’s authority to regulate ‘breaker quality eggs’. The appellants are appealing the follow up January 29, 2021 enforcement decision of the Commission which suspended the appellants’ producer licences following an investigation that determined that the non-compliance found in the January 7, 2021 decision was on-going.

The appellants’ Notice of Appeal is brief and states “the decision rendered our farm in-operable” and “the decision implies we were in non-compliance. We are asking to review and overturn the decision”. Again, I note that the decision that is referred to is the decision to suspend licenses.

With this understanding, in my view the appellants can appeal whether the Commission was correct in its view that there was evidence of non-compliance at the time of the Commission’s inspection in January 2021. I note as well there is an issue about whether the decision even extended to Royal Feather given the decision does not mention that operation and presumably there are related issues as to the appropriateness of its licence suspension in the absence of any warning notice. Further, even if there was evidence of non-compliance, the appellants could appeal the appropriateness of the enforcement measure imposed by the Commission and argue that it was disproportionate to the non-compliance observed. Finally, the appellants could argue that the Commission failed to consider all the elements of subsection 27(6) prior to imposing the license suspensions.

However, it is not open to the appellants to use their appeal of the January 29, 2021 enforcement decision to dispute the findings of non-compliance made in the January 7, 2021 decision. Contrary to the appellants’ arguments that the Commission has split its case, it is the appellants that have split their case. The appellants appear to be attempting to appeal the compliance decision without directing their arguments to the written reasons where the Commission makes its findings of non-compliance.

If the appellants want to dispute the findings of non-compliance and the authority of the Commission to regulate “breaker quality eggs”, they must appeal the decision that made the findings of non-compliance. They have not done so. If the appellants wish to file an appeal of the January 7, 2021 decision, they will need to apply to BCFIRB and demonstrate what special circumstances exist to warrant extending the time for filing an appeal.

Given my findings above, it is not necessary for me to consider the Commission’s summary dismissal application as, in my view, the issues relating to non-compliance and the regulatory authority of the Commission are not before me on this appeal.

Accordingly, this appeal can proceed on the limited grounds set out above; namely:

- (a) that the Commission erred when it decided that there was evidence of non-compliance with the January 7, 2021 decision at the time of the Commission’s inspection in January 2021;
- (b) that the Commission erred in suspending Royal Feather’s licence in the absence of any warnings issued to Royal Feather or any reference to Royal Feather’s non-compliance in the January 29, 2021 decision,
- (c) even if there was evidence of non-compliance, that the enforcement measure imposed by the Commission was inappropriate and disproportionate to the non-compliance observed; and,
- (d) that the Commission failed to consider all the elements of subsection 27(6) prior to imposing the license suspensions.

## **ORDER**

The Commission’s application is dismissed.

Dated at Victoria, British Columbia this 5<sup>th</sup> day of May, 2021

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD  
Per



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Al Sakalauskas, Presiding Member