

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT* AND  
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN  
MARKETING BOARD TO DENY AN EXEMPTION TO AN ORDER UNDER THE  
ANIMAL HEALTH ACT, AND DENY PLACEMENT OF CHICKS

BETWEEN:

MARK ROBBINS OF K&M FARMS

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

INTERVENER

DECISION

**APPEARANCES:**

For the British Columbia  
Farm Industry Review Board

Dennis Lapierre, Presiding Member  
Al Sakalauskas, Vice-Chair  
David Zirnhelt, Member

For the Appellant

Mark Robbins, assisted by Jessica  
Robbins and Jill Azanza

For the Respondent  
British Columbia Chicken Marketing Board

Rebecca Robb, Counsel

For the Interveners:  
BC Chicken Growers' Association

Paul McLean, Counsel

BC Broiler Hatching Egg Commission  
BC Egg Marketing Board  
BC Turkey Marketing Board

Did not appear

BC Poultry Association

Did not appear

Date of Hearing

September 6-7, 2022

Place of Hearing

Abbotsford, BC

Decision

December 13, 2022

## A. Introduction

1. The Appellant, K&M Farms (Mark Robbins), is a commercial poultry producer, who grows a portion (8%) of his chicken quota allocation on pasture. The Appellant asserts that while the proportion is small, the sales of these chickens make up half off the gross margin of the farm. It is a unique, differentiated approach to raising chickens which involves the Appellant annualizing his production in contrast to the normal period-to-period regulated production approach taken by the chicken industry in British Columbia.<sup>1</sup>
2. On April 13, 2022 the Chief Veterinary Officer (CVO) of the Ministry of Agriculture and Food (Ministry of Agriculture) issued an order (AIV2022-02) under the *Animal Health Act*<sup>2</sup>(the “April 13 Order”) requiring all live poultry in commercial operations to be maintained indoors from April 13, 2022 until May 13, 2022 in order to prevent the occurrence of highly pathogenic strains of the Avian Influenza (AI) virus, a disease spread seasonally by wild birds, which had been detected again in 2022, in British Columbia.
3. The April 13 Order was amended on May 10, 2022 (AIV2022-05) extending the requirement that all live poultry in commercial operations were to be maintained indoors until June 13, 2022 unless otherwise modified by the further order of an inspector (the “May 10 Order”). The May 10 Order also excluded persons who followed the *Enhanced Biosecurity for Small Scale Producers Highly Pathogenic Avian Influenza* (the “Enhanced Biosecurity Guide”), which is a guide provided to the Ministry of Agriculture dated April 15, 2022 by the BC Small Scale Meat Producers Association. The guide was produced to assist small-scale producers.
4. Between May 9, 2022 and May 15, 2022, the Appellant exchanged email communications with Woody Siemens, Executive Director of the British Columbia Chicken Marketing Board (the “Chicken Board”) with respect to the Appellant’s obligations as a commercial grower under the April 13 Order and the May 10 Order. Mr. Siemens notified the Appellant of the orders made by the CVO, outlined the gravity of the matter, indicated an understanding of the Appellant’s approach, and encouraged him to make alternative arrangements that did not include moving his birds outdoors. The Appellant responded by stating that under his “two types of production” approach his belief that his pasture raised component of his flock would be considered a small flock and that he was therefore in compliance with the May 10 Order.
5. On June 13, 2022, as a result of industry and Ministry of Agriculture concerns over the apparent ambiguity of the May 10 Order, Deputy Chief Veterinary Officer (DCVO) Dr. Chelsea Himsworth, issued an amended order (AIV2022-07) (the “June 13 Order”), which narrowed the scope of the May 10 Order and additionally delegated the power to poultry boards, including the Chicken Board, to issue exemptions from the requirements contained in the May 10 Order. The terms of

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<sup>1</sup> *Mark Robbins dba K&M Farms v. British Columbia Chicken Marketing Board* (BCFIB Decision dated May 17, 2019)

<sup>2</sup> *Animal Health Act*, SBC 2014, c 16,

the June 13 Order were included in an email to the Appellant from the Chicken Board on June 21, 2022, including the details on how to apply for an exemption.

6. The Appellant subsequently applied to the Chicken Board for an exemption from the June 13 Order. The Chicken Board sought feedback from the Ministry of Agriculture and from Poultry Health Services, an independent poultry health consultant group, with respect to the Appellant's exemption application. The Chicken Board reviewed all of the available information and the feedback that it had received from both the Ministry of Agriculture and Poultry Health Services and informed the Appellant on June 29, 2022 that his application for an exemption was denied. The Chicken Board further ordered the Appellant to cease pasturing his birds outdoors by June 30, 2022 at noon.
7. In a follow-up letter dated June 30, 2022 to the Appellant, the Chicken Board ordered the Appellant to move his birds indoors, effective immediately, until they could be processed on July 5, 2022. The letter contained a warning that non-compliance would result in revocation of future chick placements including, but not limited to, placement of 7,600 chicks on July 5, 2022 and placement of 3,500 chicks on July 12, 2022.
8. Members of the Chicken Board staff personally observed and recorded videos on July 1 to 3, 2022 of the Appellant's chickens outdoors and in the presence of wild birds.
9. On July 4, 2022, the Chicken Board determined that the Appellant was in continuing non-compliance with the June 13 Order, and informed the Appellant that his placement orders for chicks on July 5, 2022 and July 12, 2022 were revoked.
10. Subsequently, on July 4, 2022 the Appellant filed an appeal with BCFIRB of the Chicken Board's June 29, 2022, June 30, 2022 and July 4, 2022 decisions. The Appellant also made a stay application, requesting that the Chicken Board's decision to revoke his chick placements be deferred until BCFIRB issued its decision on the Appellant's appeal. On July 13, 2022, BCFIRB notified both the Appellant and the Chicken Board that the Appellant's stay request was denied.

## **B. Issues on Appeal**

11. The three issues to be addressed in this appeal are:
  - a. Did the Chicken Board err in issuing its June 29, 2022 decision denying the Appellant an exemption to the June 13 Order?
  - b. Did the Chicken Board err in issuing its June 30, 2022 order requiring the Appellant to move his chickens inside until they could be processed on July 5 2022?
  - c. Did the Chicken Board err in issuing its July 4, 2022 order revoking the placements of 7,600 chicks and 3,500 chicks with the Appellant?

## **C. Background**

12. AI is a virulent disease carried by wild birds, which has had a devastating impact on the poultry industry. In 2004 an outbreak in British Columbia severely affected the poultry industry. It grew to infect 42 producer premises and resulted in the destruction of 17 million birds, resulting in an estimated \$350 million loss to the industry.
13. AI was again detected in BC in 2005, 2009, 2014 and, 2022. In April of 2022, the BC poultry industry raised the need for preparedness with the Minister of Agriculture. In a letter sent to the CVO, dated April 6, 2022, from Steve Heppell, Chair of the BC Poultry Association, AI's reappearance in other Canadian provinces and in 25 U.S. states was noted, with the result being the depopulation of over 46 million birds in those jurisdictions. The letter further requested that, despite the requirements of certain specialty production programs where birds must have access to the outdoors, the CVO should issue an order requiring all commercial flocks be kept indoors for as long as the high security (red) status was in place.
14. The April 13 Order issued by the CVO applied to all persons responsible for chickens and turkeys in regulated commercial operations and all persons responsible for ducks or geese involved in egg production where the population was equal to or greater than 100 birds.
15. On April 13, 2022, Woody Siemens forwarded an email sent him by the Ministry of Agriculture on behalf of the CVO to Chicken Board members, notifying that all live commercial poultry operations must be maintained indoors starting April 13, 2022, ending May 13, 2022 unless otherwise modified by a further order of an inspector.
16. On May 9, 2022, the Appellant sent a request for accommodation under the April 13 Order to the Ministry of Agriculture, briefly outlining his production approach and circumstances, and explaining the need for him to place 3,400 chicks, currently in brooders, onto the pasture because the chicks would soon outgrow their space density limits. The Appellant requested permission to transfer these chickens to pasture, under shelter.
17. On May 10, 2022 the April 13 Order was amended and extended as set out at paragraph (3) above.
18. On May 14, 2022, Woody Siemens wrote to the Appellant, and indicated that the Chicken Board was aware of the Appellant's intentions to pasture raise some of his chickens outside. Mr. Siemen's letter noted the requirements and purpose of the May 10 Order and explained the industry concern about the AI risk to the entire poultry industry in the Fraser Valley. He encouraged the Appellant to make alternate arrangements that did not include housing the Appellant's chickens outside.

19. On May 15, 2022, the Appellant responded to Mr. Siemens by explaining his production approach, which entailed moving his chickens from the brooders at four weeks of age to outside shelters for a week before letting the chickens range on pasture. The Appellant offered to keep his chickens under the shelters for the full grow-out or until the May 10 Order was lifted.
20. In his response, the Appellant also explained his differentiated approach to production, stating that while he is a quota holder, his pasture operation is a small flock. Relying on the definition of a small-flock permit-holder, the Appellant expressed his belief that his pasture-raised component would be considered a small flock particularly when compared to the average sized commercial farm. The Appellant believed that he was in compliance with the Enhanced Biosecurity Guide and was therefore also in compliance with the May 10 Order.
21. Finally, the Appellant raised the matter of compensation stating: “the Board is essentially asking me to voluntarily depopulate with no compensation for lost sales and more importantly no compensation for the long-term negative impact on our direct market business.”
22. The May 26, 2022 minutes of the Chicken Board meeting of that date show that among the items discussed was the Appellant’s refusal to keep his birds indoors, citing that his business plan does not allow for it. The minutes show that the Chicken Board Chair planned to discuss the Appellant’s non-compliance with the Ministry of Agriculture.
23. On June 13, 2022, DVCO Dr. Himsforth, issued a new order which replaced the May 10 Order. The June 13 Order included a modification of the May 10 Order such that under the June 13 Order an exclusion would only apply to a person who had received an exemption from their Board or Commission. The June 13 Order delegated the power to issue exemptions to the Boards or Commissions including the Chicken Board.
24. The Chicken Board reviewed the June 13 Order on June 20, 2022. At the board’s direction Mr. Siemens emailed the Appellant on June 21, 2022 to determine whether the Appellant’s chickens had been moved and informed the Appellant that he must apply to the Chicken Board if he wished to seek an exemption. Mr. Siemens further communicated the information that would be required for an exemption request, including an explanation as to why the Appellant was unable to implement the actions required by the June 13 Order, and the steps that the Appellant would take to prevent contact between his poultry flock and wild birds. Mr. Siemens concluded the email with a suggestion that the Appellant’s barn should have room to house the remaining birds once he had shipped birds to the processor that week.
25. Mr. Siemen’s June 21, 2022 email also included as an attachment a more formal letter explaining the Chicken Board’s delegated authority under the June 13 Order and the Appellant’s legal obligation to immediately move his birds indoors until such time as an exemption from the June 13 Order was granted. The letter went

on to again explain the requirements for the exemption application and that the information that the Appellant had previously provided on May 15, 2022 was insufficient. The letter noted that the Appellant is a mainstream quota-holder, not a permit holder, and as such must follow all the Chicken Board General Orders for mainstream producers. The letter concluded by reminding the Appellant of the amount of his quota, his registered barn space, the minimum and maximum bird population density allowed in this space by the Chicken Board, and ordered him to house the chickens inside immediately. The letter noted that failure to do so by June 24, 2022 would result in further action by the Chicken Board.

26. On June 22, 2022 the Appellant responded by suggesting the Chicken Board didn't have enforcement authority and that he was seeking clarity on the status of small flocks from the CVO before applying for an exemption.
27. On June 23, 2022, the Appellant submitted a request for temporary exemption to the Chicken Board. It included a brief history of the Appellant's farm operation. The Appellant described how he began as a permit holder in 2001 growing and direct selling pasture raised chickens. After having accepted a production quota in 2016, he continued with two distinct production systems, including seasonally raising some of the chickens on pasture.
28. In the exemption request, the Appellant described his chicken sheltering arrangements. He noted that he followed the prescribed biosecurity programs and completed the biosecurity audits.
29. With respect to compliance options, the Appellant wrote that he had no barn space and that moving the chickens would make them unmarketable as pasture produced. He further wrote that his processor would not purchase his pasture raised chickens and that shipping at fryer weight would make them unmarketable as pasture raised. As a result, his loss of sales of pasture raised chickens would impact his revenues and his future market for pasture raised chickens. The exemption request included a photo of one of the outside shelters.
30. That afternoon, Dr. Himsforth sent the Appellant's exemption request to Ministry of Agriculture poultry veterinary personnel for their review and input, asking that their response be sent to Mr. Siemens. Mr. Siemens received a response June 27, 2022, which stated that in their collective (the Ministry poultry veterinarians') opinion, the exemption was not warranted.
31. On June 24, 2022, Mr. Siemens sought further input from Poultry Health Services, an Alberta-based disease prevention consulting service, and on June 27, 2022 received a detailed response which outlined the nature of the disease and the high risk of infection of birds housed outside during the wild bird migration season. Included in the summary paragraph of the Poultry Health Services response was the comment, " ...we believe that housing commercial flocks outside (if there is an alternative) during any of this particular active HPAI outbreak could be irresponsible and dramatically increases the risk of the farm and surrounding farms contracting the disease..."

32. On June 28, 2022 Mr. Siemens reported the Poultry Health Services response and its supportive information to the Chicken Board directors via email in the form of a detailed briefing note. In the briefing note he outlined the Chicken Board's authority under the *British Columbia Chicken Marketing Scheme, (1961)*<sup>3</sup> (the "Scheme") and the board's options in the circumstances. He further included a draft decision for the board's consideration and staff recommendations.
33. The minutes of the June 29, 2022 Chicken Board meeting reflect the consensus of the Chicken Board to deny the Appellant's exemption request to the June 13 Order, and the decision to sanction the Appellant if he failed to comply by noon, June 30, 2022. If the Appellant failed to comply, the Chicken Board determined that it would revoke future chick placements to the Appellant until the Canadian Food Inspection Agency (CFIA) lifted the Primary Control Zone for highly pathogenic avian influenza (HPAI) within in which the Appellant's farm is located, and until the CVO rescinded the June 13 Order, which stated in part that "all live commercial Poultry in commercial operations must be maintained indoors...".
34. The Appellant was notified on June 29, 2022 by email letter of the Chicken Board's June 28 decision to deny the Appellant's exemption request, and requiring him to cease having his chickens outdoors by June 30, 2022 at noon.
35. The Appellant responded that same day by email, asserting that the Chicken Board's decision was unfair. It stated that he had started his chickens under the May 10 Order and that as per the Enhanced Biosecurity Guide and the response to his query that he had received from the CVO, he was in compliance with the May 10 Order. The June 13 Order had resulted in his pastured flock being consistent with the provincial orders one day, under the May 10 Order, to being inconsistent the next.
36. As outlined in the e-mail, the Appellant further compared himself to permit holders, many with flocks as large as his, and whom are regulated by the Chicken Board, but did not receive the same direction as did the Appellant. In his response, he also questioned the enforcement authority of the Chicken Board and stated that it was impossible to meet the June 30, 2022 deadline. In the letter, the Appellant questioned why other permit holders hadn't received the same directions from the Chicken Board, adding that, if the matter was so serious, the Chicken Board could have acted after their letter of May 15, 2022. Despite all his concerns, the Appellant concluded the letter by stating that he would contact his processor to try to arrange an earlier processing date. The Appellant subsequently spoke with Mr. Siemens and indicated his intention to ship his chickens for processing on July 7, 2022.
37. In an email letter dated June 30, 2022, Mr. Siemens informed the Appellant that the processing plant could process the chickens on July 5, 2022 and that the Appellant was ordered by the Chicken Board to house the pastured chickens

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<sup>3</sup> BC Reg B.C. Reg. 188/61 as amended to 2022

indoors, effective immediately, until they could be processed. The letter warned that a failure to comply would result in a revocation of all future chick placements including, but not limited to placements of 7,600 chicks on July 5, 2022 and 3,500 chicks on July 12, 2022.

38. On July 4, 2022 Mr. Siemens again wrote the Appellant via email, this time informing the Appellant that staff monitoring of the Appellant's shelters from June 30, 2022 to July 4, 2022 showed not only that the Appellant's chickens had remained outdoors, but that there was also wild bird activity in and around the Appellant's shelters during those days. The monitoring was videotaped. As previously warned, the Appellant's failure to comply resulted in the Board's decision to revoke the Appellant's chick placements of 7,600 chicks on July 5, 2022 and 3,500 chicks on July 12, 2022.

#### **D. Regulatory Framework**

39. Under the *Natural Products Marketing (BC) Act (NPMA)*<sup>4</sup> the Lieutenant Governor in Council has the power to establish boards and commissions and to confer upon them certain powers (section 11). Pursuant to this power, the Chicken Board is established by the Scheme.
40. As set out at paragraph 2.01 of the Scheme:

The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the powers of the province, of the production, transportation, processing, packing, storage and marketing of the regulated product within the province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.
41. The Scheme grants the Chicken Board broad powers. The Chicken Board exercises these powers through its General Orders. The Scheme (Section 4.01) includes the power:
  - (b) to exempt from any determination or order any person or class of persons engaged in the transportation, production, packing, storing or marketing of the regulated product or any class, variety or grade thereof.
  - (b.1) with the prior approval of the Provincial board, to classify and regulate producers by area of production within British Columbia; ...
  - (c.1) to establish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board;
  - (c.2) to issue permits upon such terms and conditions as to issuance and revocation as is deemed necessary; ...

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<sup>4</sup> *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30



- (e) to cancel any licence or permit for violation of any provision of the scheme or of any order of the board or of the regulations; ...
- (l) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and effectively regulate the production, transportation, packing, storage or marketing of the regulated product, and to amend or revoke the same.

42. The Chicken Board's General Orders include the following definitions and rules:

- "Mainstream quota" is a class of expressed in kilograms of live weight for the production and marketing of chicken allotted by the Board. Mainstream quota is for the production of regular broilers, roasters, Comish or certified organic and is derived from a commercially available broiler chick stock, such as, but not limited to Hubbard ISA, Cobb Vantress, or Ross Breeders.
- "Marketing" includes producing, buying, selling, disposing of and offering for sale or other disposition.
- "Permit" means production allotment to a maximum of 2,000 chickens per calendar year for intra-provincial use only under Part 50: unless otherwise given permission by CFC or the Board.
- "Personal exemption" means chicken used for home consumption in the amount not exceeding 200 birds per calendar year.
- "Regulated product" is given the same definition as provided in the Scheme and means any class of chicken under six months of age not raised or used for egg production and includes any article of food or drink wholly or partly manufactured or derived from the regulated product.
- Only persons who hold a valid quota or permit shall produce the regulated product. (Section 3.2).
- Regulated product shall be marketed with a quota or permit unless otherwise determined by the Board (Section 4.1).
- Only persons who hold a valid quota or permit shall market the regulated product (section 4.2).
- A licence is subject to any conditions imposed by the Board on the licence. The Board may refuse to grant, renew, suspend or revoke a licence where:
  - a. the applicant is not qualified by experience, financial ability or equipment to engage properly in the business for which the application was made; or
  - b. the applicant or licensee has failed to comply with or has contravened any provision of the Act, the Scheme, these General Orders or any order or direction of the Board (Section 5.5).
- A permit is intended for small lot growers and self marketers and will be issued for a maximum of 2,000 chickens per calendar year (Section 50.1).
- If a permit holder under this program applies for, qualifies and is granted specialty quota or mainstream quota, the permit will revert to the Board (Section 50.7).
- The Board may refuse to allot a quota, or may reduce, refuse to increase, or cancel a quota allotted to a grower who fails to comply with or has contravened any provision of the Act, the Scheme or these General Orders, or any order or direction

of the Farm Industry Review Board or any order or direction of the Chicken Board. In addition, the Chicken Board may take similar action against every other grower who has been a party with a grower to any production or marketing of chicken contrary to these General Orders (Section 52.1).

## **E. Summary of Key Facts**

43. While the Panel has heard and considered all the evidence provided in this appeal including the opening statements, the sworn testimony of hearing witnesses, the disclosures of the parties and of the Interveners, the written submissions of the partial interveners and the post-hearing written final submissions of the parties, the Panel in this written decision refers only to the facts and evidence it considers necessary to explain its reasoning in this decision.

## **F. Witness Evidence**

### Evidence of the Appellant

44. In his opening statement, the Appellant explained that his flock had been previously depopulated as a result of AI occurrences nearby and accepts that AI is a serious matter. However, the Appellant claimed that in this instance, the issue is not in fact AI.
45. He argued that he was in compliance with the May 10 Order through the exemptions for small flocks, until June 13, 2022 when the Chicken Board was delegated the responsibility for granting exemptions by the DVCO in the June 13 Order. The Appellant noted that he applied for an exemption (June 23, 2022) and, on June 29, 2022 was denied that exemption request and given 27 hours to move his birds indoors.
46. He stated that he then approached his processor to set an earlier shipment date. On June 30, 2022 the Chicken Board ordered him to ship the birds on July 5, 2022 and to move the birds into his barn in the interim. He stated that he shipped for July 5, 2022 processing, which was earlier than his planned July 12, 2022 date.
47. The Appellant claimed that during this process, he responded to all correspondence promptly, complied with all CFIA reporting, and permit requirements and contacted the CVO directly about both the May 10 Order and the June 13 Order. In defining the issue of his appeal, the Appellant questioned whether the Chicken Board used principles-based decision-making in issuing its decisions, whether the Chicken Board followed its responsibilities under common law to minimize damage to the producers, the value chain and to the public, and its mandated public policy as it relates to encouraging differentiated production and niche market demands.
48. He stated that at no time did the Chicken Board reach out to consult with him, to understand his differentiated operation, to provide a best solution, to provide alternatives, or to offer support, which was unlike the way in which he had been

treated by the Turkey Marketing Board. He stated it was this lack of consultation which led to the errors by the Chicken Board and to a situation in which he could not possibly, or reasonably comply with the order by the Chicken Board to move his chickens indoors in the time provided.

49. With respect to the initial June 21, 2022 Chicken Board order requiring him to move his pastured flock indoors, the Appellant stated that there were already birds in his barn, some of which had been diagnosed with Infectious laryngotracheitis (ILT) which precluded him from housing the pastured chickens in the same barn.
50. With respect to the June 29, 2022 and June 30, 2022 Chicken Board orders, the Appellant stated that the Chicken Board failed to recognize the farm's management limitations, and that shipping to a processor was not possible on such short notice. He added that the Chicken Board had ignored its own protocols and CFIA permitting requirements for moving birds in ordering him to house his birds in his barn in the interim prior to processing. At any time, he stated, had the Chicken Board reached out to him, the outcome could have been different and the appeal would not have been necessary.
51. Consistent with the materials he disclosed in this appeal, the Appellant described having started growing chickens under a Chicken Board permit in 2001 and becoming a mainstream producer (quota holder) as a new entrant in 2006. He produces heavy roasting chicken and heavy hen turkeys.
52. He testified that in 2017, he built two barns to certified organic specifications. He explained that to be viable, he needed to differentiate and direct market his product; selling his pasture raised birds direct from his farm store. The pasture raised birds are grown seasonally to 45 days of age between May 15 and October 15 and are custom processed under an arrangement with Farm Fed, a processor. His production planning starts a year in advance, as does his chick placement planning. He felt that he was in full compliance with the April 13 Order and the May 10 Order up until the new order was issued on June 13, 2022.
53. Responding to a series of prepared questions asked by Jill Azanza, his daughter, the Appellant explained why he believed he had complied with the biosecurity protocols required by the May 10 Order for small flocks. Referring to the Enhanced Biosecurity Guide, which provided an exemption for small flocks, he explained that he qualified because, in comparison to having the chickens range with no constraints, as depicted in a photograph on the last page of his disclosure, he was keeping them under shelter. The Appellant believed keeping the chickens under shelters had a significant impact on limiting their exposure to wild birds and for that reason believed he was following the required protocols. In the absence of any feedback, he assumed he was in compliance with the May 10 Order.
54. The Appellant further stated that he believed he qualified as a small flock producer because he had grown small amounts of birds for 10 years before accepting the incentive program quota and remains a small farm similar to producers who grow 2000 to 4000 thousand birds under annual permits.

55. Responding to a prepared question about compensation, the Appellant testified that he was initially in compliance with the May 10 Order that he was essentially being asked to depopulate his flock with no compensation for lost sales and with no consideration being given to the long-term impact it would have on his direct marketing business. He noted that the request of the Chicken Board to the CVO to amend the May 10 Order had turned him from being compliant with the May 10 Order to being non-compliant with the June 13 Order and that when rules are changed during a production cycle, there is generally some form of compensation to the affected producer.
56. The Appellant stated that when the June 13 Order came into effect, it created a conundrum for him. The birds that had been moved out of the barn could not be moved back into the brooders, and as such there was no longer room in the barn for the pastured birds.
57. With respect to email exchanges with Mr. Siemens concerning his producer status, the Appellant acknowledged that he is a mainstream quota holder, not a permitholder.
58. The Appellant stated that in response to the Chicken Board's June 21, 2022 letter he planned to contact the CVO and seek clarity on the status of small flocks. He was also going to clarify the requirements for the exemptions that were provided for in the May 10 Order for growers following the Enhanced Biosecurity Guide and that he was going to apply for an exemption to the June 13 Order.
59. Offering further comment, the Appellant stated that "no effort to collaborate had been made by the Board" at the time that the Chicken Board was corresponding with Poultry Health Services with respect to the Appellant's conduct. He further criticized the timeliness of the Chicken Board's responses and that the delays were due to the Chicken Board's desire "to force me to put birds in the barn".
60. With respect to the June 29, 2022 letter from the Chicken Board to the Appellant denying his request for an exemption, the Appellant stated that this was the first time that he was not in compliance or was not engaged in the process of becoming compliant.
61. The Appellant testified that upon receiving the letter he called his processor to take the chickens in sooner, but by then he had only 27 hours to remove the chickens from the pasture. He stated that couldn't move the chickens that quickly and that the request was unreasonable. He noted that it was almost impossible to move the chickens in that span of time as the chickens could only be moved in the dark, and it would take several trips and at least 10 hours to move them all. With the short periods of darkness that time of year, it would take at least two nights to move them. The Appellant further noted that that the technical requirements for obtaining a move permit from the CFIA would also impact the timing of the move.
62. The Appellant stated that he had been offered no assistance by the Chicken Board and that if they really wanted the chickens moved, they could have used their

influence to arrange for a haul for the chickens to an unused barn. He acknowledged that he did not know of any such unused barns but that the Board would have had information as to what resources were available in that regard. In any event, moving the chickens into his own barn would have prevented him from placing his next order of chicks and he estimated his gross losses under the circumstances represented an almost \$50,000 loss to the farm.

63. The Appellant testified that it was the lack of communication from the Chicken Board that resulted in his non-compliance. He referred to two timelines which he had drafted demonstrating the manner in which communications had occurred between the parties and the manner in which he suggested the communications should have occurred. The Appellant noted that the experience that he had with the Turkey Marketing Board had been far more positive. The Appellant concluded his direct evidence by noting that he hoped that the Chicken Board would work better with growers in the future and that it would better recognize the Appellant's differentiated approach to poultry farming.
64. Under cross examination, the Appellant admitted to being aware of the orders that had been issued by the CVO and the DCVO and that he was in breach of the *Animal Health Act*. He further acknowledged his obligation to stay informed of developments and that under the General Orders the Chicken Board can take enforcement action.
65. The Appellant did not dispute that putting the birds indoors would help to prevent AI transmission. However, with respect to when he intended to comply with the June 13 Order he explained that he was waiting for the Chicken Board to come to him. In the meantime, he admitted that he had made no plans should the exemption to the June 13 Order be denied. He acknowledged that he didn't seek alternative barn space, hadn't taken steps to apply for a move permit with the CFIA, and had not contacted the Chicken Board for guidance, leeway or advice, or to explore options. The Appellant was simply hoping for an exemption.
66. The Appellant explained that he was the only quota holder growing chickens on pasture and that as such the Chicken Board should have taken steps to contact him with respect to the orders that were made by the CVO and the DCVO. He noted that all other quota holders were in compliance with the orders because they grow their chickens indoors and that because he was the only producer raising his birds outside, the Chicken Board should have known that the change in the May 10 Order would have impacted him in particular.
67. Counsel for the Respondent referred the Appellant to the SAFETI<sup>5</sup> analysis the Appellant had incorporated into his disclosure documentation and asked why the

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<sup>5</sup> 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

Appellant had not changed his practices in May when the AI issue first arose. The Appellant's response was to question why he would voluntarily move his flock without compensation.

68. Upon cross examination by counsel for the Intervener, the BC Chicken Grower's Association (BCCGA), the Appellant agreed that he was the only quota-holder pasture raising chickens and that throughout the process he hadn't contacted anyone from the BCCGA for assistance or advice. The Appellant further agreed that there are risks inherent in farming and raising chickens and that he could have sent the chickens in earlier for processing, but only if they were custom killed.
69. The Appellant further agreed that his primary concerns with respect to shipping at an earlier date were that the chickens would not be marketable as pasture raised, they would be smaller, and they wouldn't be the product that his customers were expecting.

#### Evidence of Dr. Himsworth

70. Dr. Himsworth, described her role with the Ministry of Agriculture, which includes leadership in veterinary science and diagnostics, developing animal health policies and programs, managing the diagnostics unit, and leading the Animal Health Centre.
71. Her current academic research focus is primarily AI which she described as a viral disease associated a high rate of mortality in domestic birds which is mainly caused by contact with wild birds. Its modes of transmission include direct and indirect contact with wild birds, but can also be contracted through feces, water, farm equipment and other sources. She noted that in 2022, it appeared that AI was being transmitted almost exclusively from contact between wild birds and domestic flocks.
72. Dr. Himsworth explained that the June 13 Order was something not commonly done and was issued for the purpose of bringing commercial flocks, both quota and permit birds, indoors to avoid contact with wild birds. She noted that the June 13 Order also allowed that there could be exceptions if a producer could provide evidence that they could provide a similar level of biosecurity. Approval responsibility was delegated to the marketing boards, and included the requirement for the exemption to be additionally reviewed by a Ministry poultry specialist prior to being approved by the marketing board.
73. Dr. Himsworth stated that she was not involved in the issuance of the May 10 Order. She testified there were several reasons for amending the May 10 Order. She noted that the May 10 Order was amended to narrow its scope to apply only to producers who were permit and quota holders and not to small flock or

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considered). See *Island Vegetable Co-operative Association v. BC Vegetable Marketing Commission*, (December 16, 2015) at para. 31. See also *Skye Hi Farms Inc. et al v. British Columbia Broiler Hatching Egg Commission* (March 29, 2016) at para. 119 ("Skye Hi").

non- quota producers. Additionally, the May 10 Order was amended to provide clarity and to reduce the confusion in the biosecurity requirements the May 10 Order had created. The final reason the May 10 Order was amended was to delegate authority to the marketing boards because they had the power to vet any exemption requests and the capability to enforce the Orders.

74. She testified that she consulted widely before issuing the June 13 Order including a variety of industry stakeholders, small flock owners, the Small-Scale Meat Producers Association, and the marketing boards. Reducing the scope of the order to apply only to regulated versus unregulated producers was in recognition of the impossibility of monitoring all the unregulated producers. Dr. Himsworth confirmed that she was aware that the Appellant had made an exemption request.
75. Dr. Himsworth explained that to have an exemption request approved the producer would need to show to the satisfaction of the marketing board that the applicant could provide a level of biosecurity that was analogous to the requirements of the June 13 Order. She was not aware of any other requests for exemptions.
76. Dr. Himsworth stated that the June 13 Order applied to both permit holders and quota holders, and that the risks associated with small flock holders had to be tolerated as the poultry boards did not have the capacity to monitor and enforce the June 13 Order against those smaller producers.

Testimony of Mr. Harvey Sasaki (Chicken Board Chair), Bill Vanderspek ( Chicken Board Vice-Chair), Woody Siemens ( Chicken Board Executive Director), and Karlie Erickson ( Chicken Board Production Coordinator), the testimony of whom was collectively presented as a Chicken Board panel

77. Mr. Sasaki testified that the 2004 AI outbreak in British Columbia infected 42 premises, resulted in the destruction of 17 million birds and caused a \$350 million- dollar total economic loss to BC's poultry industry which affected all levels of poultry production.
78. In 2005 AI was detected in wild flocks of ducks, in 2009 at a turkey farm, and in 2014 AI infected eleven BC poultry premises. He explained that there can be long-term consequences associated with an AI outbreak including export problems and long-term difficulties for processors.
79. Mr. Sasaki testified that the lessons the industry learned from the 2004 outbreak resulted in improving biosecurity measures, establishing biosecurity standards, creating a risk mitigation strategy, developing emergency management protocols, undertaking enhanced surveillance, and developing an emergency (incident) command system. Biosecurity programs were made mandatory by provincial boards, which eventually shifted to biosecurity audit programs.
80. Mr. Sasaki explained that the AI outbreak in 2022 started on the east coast and moved west. The Chicken Board received regular updates from other Provinces and worked closely with other poultry associations. The Chicken Board was kept

apprised of the EOC (Emergency Operations Centre), and when the disease was detected in Alberta the Chicken Board suspended on-farm audits in BC and went to a “red” status.

81. Mr. Sasaki was referred by counsel to his handwritten notes dated April 5, 2022 of a Notifiable Avian Influenza (NAI) meeting that he had with poultry industry principals and the Ministry of Agriculture Deputy Minister. Mr. Sasaki stated that he knew the Ministry Animal Health lab was out of service due to the floods that had occurred late in 2021 and wanted to know the province’s plan because not having a proper lab in service was affecting the turnaround time for disease testing.
82. Mr. Sasaki further referenced the third paragraph in a letter written April 6, 2022 to the CVO by Steve Heppell, Chair of the BCPA, and meeting attendee, which noted that certain specialty production programs required birds to have access to the outdoors in order to retain their program certifications. The letter asked the CVO to issue a directive to keep all commercial flocks inside for as long as the poultry sector was on red biosecurity status.
83. Mr. Sasaki testified that during this time, the Small-Scale Meat Producers Association had expressed an interest in engaging with the other stakeholders in addressing the potential AI outbreak and wanted to develop materials for educating small scale producers in order to encourage voluntary versus enforced compliance.
84. Mr. Sasaki was asked what his reaction had been to the May 10 Order. He stated that it still did not fully recognize the regulatory authority of the Chicken Board, and the need for the industry to be consulted at least for context.
85. Mr. Vanderspek then explained that under the Chicken General Orders, there are three levels of production. Personal exemption, which allows a person to grow up to 200 birds/year for personal use. These producers are not monitored by the Chicken Board. Permit holders, which allow a producer to grow up to a maximum of 2,000 birds per cycle. These producers are monitored and regulated by the Chicken Board. Finally, quota holders, which are the commercial growers who are the principle producers of chicken in the province and are the main focus of the Chicken Board’s activities. Both permit holders and quota holders are subject to the General Orders and the Chicken Board will contact permit holders to ensure compliance.
86. Mr. Siemens testified that he emailed the Appellant on May 14, 2022 due to complaints from other growers that the Appellant had his chickens outside. Mr. Siemens wanted to make sure that the Appellant was aware of the gravity of the situation and to encourage him to make alternate arrangements for housing these chickens. From the ensuing response from the Appellant the following day, he understood that the Appellant was not going to follow the Chicken Board’s advice and was going to leave his flock outside.



87. Mr. Sasaki noted that in email correspondence between the Appellant and the CVO, between May 10, 2022 and May 13, 2022 which included references to the Appellant's request for an exemption due to his compliance with the Enhanced Biosecurity Guide, the CVO's responses to the Appellant raised concerns within the industry about the ambiguity of the May 10 Order and the CVO's lack of consultation with the industry. These concerns led to further discussions between the Chicken Board and the Ministry of Agriculture and led to the May 10 Order being amended.
88. Mr. Sasaki noted that the email that he subsequently sent to the Appellant on June 21, 2022 referred to the June 13 Order which was issued by Dr. Himsworth and he recalled that during his follow-up telephone conversation with the Appellant, the Appellant made it clear that he was in disagreement with the June 13 Order and that he would be applying for an exemption.
89. Mr. Siemens testified that he emailed a letter to the Appellant later the same day, which stipulated that the Appellant must house his birds inside until such time as he applied and possibly received an exemption from the June 13 Order. The letter, he testified, was also meant to help the Appellant frame his request for an exemption.
90. With respect to the Appellant's written exemption request dated June 23, 2022, Mr. Siemens testified that he had sought and received a response from Ministry staff, all of whom agreed that the exemption was not warranted.
91. Similarly, Mr. Siemens had sought the input of Poultry Health Services on June 23, 2022 and had received a two-page response on June 27, 2022 from Poultry Health Services Veterinary Team titled *Risk Mitigation for Avian Influenza*, which also did not find that the exemption request should be granted. It stated:
- The Appellant is situated in the Fraser Valley and any detection of HPAI in a commercial premises will impose serious hardship on the rest of the poultry industry (movement restrictions, surveillance, production chain logistics, etc).
  - There have been recent detections of HPAI in wild birds and in non-commercial poultry in the Central Fraser Valley indicating an increased general risk for local environmental exposure. Birds ranged outside are at a significantly higher risk of this type of exposure, especially with mobile penning.
  - The outdoor "shelters" are simply not adequate for preventing/limiting exposure to wild birds or contaminated pasture.
  - As a regulated producer, mandatory biosecurity programs and audits will have provided the fundamental structure for basic biosecurity. As the industry is currently at "red", the board should ensure that this producer is compliant with the enhanced biosecurity measures indicated by this level.
  - Based on his quota and the board's description of the barn space available for kg of chicken there is adequate floor space to house the birds inside. It would be important for the board to inspect this premises to ensure that the

barn environment (ventilation, feed and water delivery systems) will provide for the welfare of the birds when enclosed.

- As specialty (pasture-raised) it is unfortunate that compliance with the CVO order will affect the enhanced market value of his product. The board should work with this producer to find alternatives related to the processing challenges and client messaging. Shortfalls in income can be partially addressed by AgriStability.

92. On June 24, 2022 Mr. Siemens also sought the input of veterinarians with Poultry Health Services, asking them for advice on what could be done from a biosecurity perspective. The Chicken Board received a two- page response on June 27, 2022 titled "Risk Mitigation for Avian Influenza", which described the disease and its potential consequences. It states, in part:

- ...Biosecurity is the most important tool for the protection against avian influenza and need to be held at the highest standard to prevent cases within commercial flocks. The literature mentions that poultry being housed outside during seasons of wild bird migration is a known high-risk event. We have continued to see cases in BC with two positive cases identified in Nanaimo and Langley on June 15th and 18th respectfully.
- ... In summary, we believe that housing commercial flocks outside (if there is an alternative) during any and this particular active HPAI outbreak could be irresponsible and dramatically increases the risk of the farm and the surrounding farms contracting the disease.

93. On June 28, 2022, Mr. Siemens emailed an update to the Chicken Board, which included:

- A Board Briefing Note describing the Appellant's farm, its quota holdings, its production approach.
- A chronology of his correspondence with the Appellant.
- Points of discussion outlining Mr. Siemens perspective on the matter.
- The advice and opinions he had received from Poultry Health Services veterinarians and Ministry of Agriculture veterinarians.
- An outline of the legal authorities of the Chicken Board.
- A SAFETI analysis for a board decision based on outcome-based principles.
- His recommendations that the Board should deny the Appellant's request for and exemption and that the Appellant's failure to comply with the Order within 24 hours should result in production implications.

94. The SAFETI analysis contained within the briefing note considered the proper response to the Appellant's non-compliance with the June 13 Order and:

- outlined the Chicken Board's broad powers as conferred by the Scheme to address the Appellant's non-compliance (Strategic),

- noted the Chicken Board's obligations to the public and the poultry industry as a whole (Accountable),
- considered the fairness of any decision the Chicken Board would make for all industry stakeholders and not just the Appellant (Fair).
- outlined the need for the Chicken Board to balance the risks involved to the industry as a whole in letting the Appellant continue to produce in contravention of the June 13 Order (Effective)
- recognized the opportunities the Appellant had been given to apply for exemptions, to provide a rationale for his conduct and to discuss his views (Transparent), and;
- outlined how the Chicken Board had sought external input in formulating its decision (Inclusive).

95. Mr. Vanderspek testified that with respect to the Chicken Board's decision dated June 28, 2022, the Board had reviewed all the information outlined in the briefing note and other materials, and had discussed the best course of action, which was ultimately determined to be to deny the Appellant's request for an exemption. Summarizing the SAFETI analysis undertaken in coming to the decision from the Chicken Board's perspective, he stated that the board recognized the importance of the AI threat and the need to protect orderly marketing. The Chicken Board had been privy to the opinions of the poultry veterinarians and the discussions that had taken place more broadly with stakeholders on the subject of AI and the Chicken Board was certain that the Appellant had been provided a fair opportunity to comply with the orders.
96. Mr. Vanderspek testified that the Chicken Board had "absolutely not" considered the Appellant's request prior to receiving the information from the Ministry, Poultry Health Services and stakeholders. Nor did the Chicken Board intentionally delay its decision.
97. Mr. Vanderspek was referred to the minutes of the June 29, 2022 board meeting and the motion that was passed that the Appellant should be warned of the consequences of non-compliance. Mr. Vanderspek noted that the purpose of the motion was to try to get the Appellant to do the right thing.
98. Mr. Siemens testified that he notified the Appellant of the Chicken Board's decision on June 29, 2022 to deny the exemption request, and that the Appellant was ordered to cease having his birds outdoors by June 30, 2022 at noon.
99. Mr. Siemens further testified that upon learning that the Appellant's processors could process his birds as of July 5, 2022 the Chicken Board ordered the Appellant to make arrangements for the pastured birds to be processed by July 5<sup>th</sup> and to move the birds indoors until they could be processed.

100. Mr. Siemens testified that on July 4, 2022 he advised the Appellant that his chick placement had been cancelled by order of the Chicken Board and that, following a short conversation, he understood that the Appellant would be appealing.
101. Commenting overall, Mr. Siemens testified that the Appellant had been provided a fair opportunity to comply with the May 10 Order and the June 13 Order, that the Chicken Board had not intended to deny the Appellant's exemption request prior to receiving it, and that the purpose of the decision to deny the exemption was to try to encourage the Appellant to do the right thing.
102. Mr. Siemens further testified that the Appellant had shown no willingness to comply with the Orders. Nor at any time did the Appellant seek the Chicken Board's assistance. Mr. Siemens stated that, in his view, the Appellant's chickens could have been moved indoors by the Appellant.
103. Ms. Erickson testified that she monitored and video recorded the Appellant's chickens on pasture from across the street from the Appellant's property on July 1, 2022 and July 2, 2022. Ms. Erickson testified that there were lots of wild birds circling overhead, and wild birds eating and mingling with the sheltered chickens. She observed the same again the afternoon of July 3, 2022, all of which was demonstrated by the video evidence presented at the Appeal.
104. In cross examination, Mr. Vanderspek, noted that the Chicken Board is a regulatory body, and not an extension service there to advise producers. He further stated that that if the Appellant had approached the Chicken Board, the board and staff would have engaged with him. Mr. Vanderspek also stated that if the Appellant had concerns with respect to the legality of moving his chickens contrary to the regulations, that he could have brought those concerns to the attention of the Chicken Board and those issues could have been resolved.
105. Mr. Vanderspek noted that if there were issues with respect to the timing of chick placements and the pressures created by the Chicken Board's decision on the Appellant's ability to ship his birds and clean his barn in time to safely receive those placements, then those were issues that the Appellant should have brought to the attention of the Chicken Board at that time and other arrangements could have been made.
106. Mr. Vanderspek stated that any assertion that the Chicken Board had been targeting the Appellant was ludicrous. The Chicken Board is a leader in specialty marketing and is a strong proponent of specialty marketing.
107. Asked by Counsel whether the Chicken Board was dealing with any other examples of non-compliance, Mr. Vanderspek stated there were none.
108. Mr. Sasaki testified, in response to a question from counsel for the BCCGA, that the role of the Chicken Board as regulator did not extend to directing growers on how to operate their farms.

109. Mr. Sasaki further stated that his staff is fully occupied fulfilling its regulatory role and does not have the capacity to play an extension role. The Chicken Board has only the resources to fulfill its regulatory role. Mr. Vanderspek concurred and stated that extension services in the poultry industry in Canada have become a thing of the past.
110. Mr. Sasaki also referred to the EOC that the Chicken Board had set up, the centralized communications role it plays, and the bulletins it had been putting out to industry in its electronic newsletters to keep its members apprised of matters affecting the industry.
111. Adding to Mr. Sasaki's comment, Mr. Vanderspek stated that because of the concentration of poultry production in the Fraser Valley, the industry will have to look at vaccinations for AI, which raises a whole new set of difficult problems including the effect it might have on exports.

Testimony of Interveners (BCCGA): Dale Krahn, Chair, and Fred Redekop, Vice-Chair was presented together as a panel

112. Mr. Krahn and Mr. Redekop both testified to being commercial poultry growers in British Columbia. Outlining the purpose of the BCCGA, Mr. Krahn stated that its goals are to support its growers, to educate the public, and to educate and lobby government on behalf of the industry. He stated that the association works on ensuring the communications of the Chicken Board are followed or considered and will accept and respond to calls from its growers pretty much anytime. Mr. Krahn stated that the Appellant is a member of the association.
113. Mr. Krahn noted that there are risks in chicken farming including weather, environmental and disease risks. To mitigate the risks associated with raising chickens, Mr. Krahn noted that he has farm and business interruption insurance and has asked the Chicken Board for assistance, which he found helpful. Both Mr. Krahn and Mr. Redekop have had experience with AI which, in 2004 cost Mr. Redekop 20,000, 5-week-old birds and the costly loss of an entire production cycle. Prevention measures have since got better, he stated, but implementing those measures requires a lot of cooperation from growers. Since the last AI outbreak, the industry has pulled together and all the stakeholders are doing what they are supposed to be doing to mitigate any losses to the industry arising from AI. Mr. Redekop was clear that the BCCGA absolutely supported the orders that were made and the steps taken by the Chicken Board in this case.
114. With respect to the difficulties of moving chickens, Mr. Krahn stated that the problem of moving chickens is common in the industry but further noted that there are contractors who do that work and it is not a terribly complicated process. Mr. Krahn agreed with the Appellant that it is better to move chickens in the dark but noted that it can also be done during the daytime.

Written Submissions of the Interveners: BC Broiler Hatching Egg Commission, BC Egg Marketing Board, BC Turkey Marketing Board, August 16, 2022

115. Summarizing the chain of events and describing the seriousness of the virus and the risk it represents to orderly marketing, the written submission of the above noted interveners includes the following statements:
- ...The effectiveness of this regulatory response is entirely dependent on compliance by stakeholders with orders made by the CVO, and with any associated directions or orders made by the commodity board. Specifically, it is essential that all stakeholders comply, regardless of the size of their farm, the class of production, or their individual marketing plans. A single producer who chooses to place their individual interest ahead of the interests of the industry can undermine collective efforts to manage a disease crisis. To be clear, non-compliance by a single producer puts other producers and entire industries at risk.
  - ...The Interveners support the Chicken Board's decision to revoke K&M Farm's chick placements for July 5 and 12. Such a measure is necessary to establish both a specific and general deterrent appropriate to the circumstances.
  - ...In fact, given the serious nature of this issue, the Interveners believe the Chicken Board was very measured in its response to address K&M's noncompliance.

**G. Analysis**

116. The May 10 Order expressly applied to all persons responsible for chickens and turkeys in regulated commercial operations. It excluded any person who "...follows the *Enhanced Biosecurity for Small Scale Poultry Producers Highly Pathogenic Avian Influenza*". This guiding document, which was attached as Appendix B to the May 10 Order, was produced by the Small-Scale Meat Producers Association "...to assist small-scale poultry producers to meet biosecurity goals within their specific context, which may include outdoor or pasture-based systems, multi-species production, and on-farm slaughter."
117. The CVO response to the Appellant, as Mr. Sasaki testified, raised both industry and Ministry of Agriculture concerns about the meaning of terms (small-scale) within the May 10 Order and what the approval process for an exemption from the order should entail. Those concerns were considered by the CVO and led to the June 13 Order being issued by the DCVO, Dr. Himsworth. The June 13 Order modified the type of production affected and additionally delegated the power to approve exemption requests to BC's poultry regulatory boards.
118. The evidence shows that the exemption request made by the Appellant to the Chicken Board on June 23, 2022 (cc'd to Dr. Himsworth) was forwarded within four hours to Ministry poultry veterinary personnel for their input. Mr. Siemens received a response on June 27, 2022. Ministry personnel agreed that an exemption was not warranted, outlining their reasons, and suggested that the Board "work with this producer to find alternatives related to the processing challenges and client messaging."

119. On June 24, 2022 Mr. Siemens also sought the input of veterinarians with Poultry Health Services, asking them for advice on what could be done from a biosecurity perspective
120. On June 28, 2022 Mr. Siemens provided the Chicken Board a Briefing Note (as described herein above), which included all the relevant background information, correspondence and documentation obtained from third parties. After taking into consideration all the materials provided by Mr. Siemens the Board issued a decision denying the Appellant's request for an exemption and approving the penalties against the Appellant as recommended in the Briefing Note.
121. Mr. Siemens informed the Appellant of the Chicken Board's decision on June 29 2022 by email and, as per the decision, ordered him to have his birds indoors by June 30, 2022. The evidence clearly showed that the Appellant didn't comply with the Chicken Board's order and Mr. Siemen's directions. The video evidence viewed at the hearing of this Appeal clearly showed the Appellant's pastured birds remained outdoors through to July 3, 2022 under shelters around and within which were wild birds, some of which were mingling with his chickens.
122. On July 4, Mr. Siemens notified the Appellant the penalty, as warned, was being applied in accordance with the Chicken Board's decision.
123. The Chicken Board panel explained under cross examination that, as a regulatory body, the Chicken Board did not reach out to growers to organize and manage their compliance with board orders. Had the Appellant contacted the Chicken Board to discuss the difficulties that he was facing complying with the orders, the board would have engaged with him, however the Appellant never in fact made those efforts.
124. The Appellant was critical of the Chicken Board, both during the hearing and in his submitted materials. He asserted that the Chicken Board never reached out to him to offer guidance, explore options, or offer any assistance. While, he agreed, all other commercial producers were keeping their birds indoors, he stated that he was the only poultry grower taking a differentiated approach and the Chicken Board knew, or should have known this, and contacted him to discuss options.
125. As the situation progressed, the Appellant blamed the Chicken Board for his not having enough time to comply with its orders. The Panel finds little merit in this view. While, in the June 27, 2022 Ministry response to Mr. Siemens the suggestion was made that the Chicken Board work with the Appellant to find solutions to ensure his compliance with the June 10 Order, the Panel heard no evidence that the Appellant sought the Chicken Board's assistance at anytime.
126. In fact, Mr. Siemens evidence showed that beginning with his first correspondence on this matter with the Appellant on May 14, 2022 the Chicken Board encouraged the Appellant to make alternative arrangements for his chickens and, having assessed the Appellant's barn space, suggested that there was room in the barn for the pastured flock if the Appellant took the necessary steps. The Appellant had

every opportunity to discuss his compliance difficulties with the Chicken Board from at least that time, but the evidence only leaves the impression that had no intention of moving his chickens.

127. In both his oral testimony and written correspondence in which he described his differentiated chicken production approach, the Appellant sought to define his pasture-raising operation as small-flock because of the limited number of birds he was growing on pasture. The Appellant then argued that as a small flock producer he should be treated as a permit holder and he was therefore in compliance with the May 10 Order as long as he complied with the Enhanced Biosecurity Guide.
128. The Panel finds that the Appellant's suggestion that, based on his differentiated approach, his pastured flock should be treated as though he was a small-scale producer is both illogical and contrary to the General Orders. The General Orders are clear that you cannot be a permit holder and a mainstream quota-holder at the same time, it is simply not permitted.<sup>6</sup> While the General Orders do not include a definition of a "small-scale producer" the Panel finds that the Appellant's pastured flock is not what is implied in the Enhanced Biosecurity Guide, the first paragraph of which states its purpose, "...to assist small-scale poultry producers to meet biosecurity goals within their specific context, which may include outdoor or pasture-based systems, multi-species production and on-farm slaughter."
129. The Appellant is a commercial producer, growing under quota. His unique growing approach for a portion of his quota, while perhaps imitative of a small-scale and/or permit grower's approaches, does not make him a small-scale producer eligible for the exclusion as was described in the May 10 Order.
130. In his submitted materials and testimony, as well as in his final submissions the Appellant sought to shift the burden of responsibility for his non-compliance onto the Chicken Board. He stated in his evidence, "...if only they had come to us...". He included in his submitted materials a two-column outline of what he suggested could have been the case had the Chicken Board reached out to him. In his final submission, he made similar arguments to the effect that the Chicken Board was irresponsible for not providing him assistance and therefore owed him compensation for his losses. In his final submission the Appellant questioned why the Chicken Board, under its statutory mandate to oversee the industry for the benefit of all stakeholders and its common law obligations, hadn't reached out to him to assist in ensuring his compliance with the orders.
131. The Panel disagrees with the Appellant's above noted assertions. There was ample evidence provided at the hearing to show that the June 29, 2022 Chicken Board decision was fully and lawfully considered and was the necessary outcome of their deliberations. Mr. Siemens made significant efforts throughout his various communications with Mr. Robbins beginning on May 14, 2022 to encourage him to accommodate the May 10 Order and eventually the June 13 Order. Those efforts

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<sup>6</sup> *British Columbia Chicken Marketing Board General Orders*, August 26, 2011, s. 50.7



were unfortunately unsuccessful and culminated in a decision issued by the Board based on a principled, outcome-based review of the matter.

132. There is additionally ample evidence, including the admission of the Appellant during cross-examination, that he had no intention of complying with the orders requiring him to move his chickens indoors. Instead, he initially sought, and received a conditional response from the CVO's office with respect to the May 10 Order which he chose to interpret as being favourable to his view of his pasture-raising approach. Then, after the June 13 Order was made and he knew that he was in non-compliance, he continued to delay because, by his own admission, he was simply hoping for an exemption.
133. This Panel finds that rather than comply with the orders issued by the CVO and the Chicken Board and meet his obligations to the industry and his fellow producers all of whom else had complied, the Appellant took advantage of the ambiguity of the May 10 Order by mis-characterizing his operation as a small-scale producer for his pastured flock. He further inappropriately interpreted a conditional response by the CVO as representing an approval exempting him from the obligations otherwise accepted by all quota holders. Then, regardless of that ambiguity being corrected by a subsequent, June 13 Order, and despite thereafter being ordered by the Chicken Board to move his chickens indoors, he simply did not comply and blamed the Chicken Board for that non-compliance. At the time of the Chicken Board's decision, compliance had become an increasingly difficult proposition, and by his calculations, a costly inconvenience for him, which ultimately led to his appeal to BCFIRB.
134. The detailed final written submissions of the Chicken Board, 43 pages in length, closely parallels the summary of the evidence the Panel heard as set out in this decision, with the following notable additions:
  - a. With respect to the comments made by Mr. Vanderspek regarding the Appellant's failure to reach out to the Board, the submission quotes Mr. Vanderspek:

"I could come up with dozens of examples where I have...had growers come to me and say I have a problem, is there some way for you to help me...We know who the 'doer's' are in this industry Everyone's best interest is getting 1,700 birds off pasture ASAP. So, Mark if something like that ever happens again, please ask for help".
  - b. The submission further states, with respect the Appellant's obligation to comply with the Chicken Board's orders:

"As a participant in a regulated industry, K&M has an obligation to comply with Board orders. A producer cannot simply sit on their hands and wait for the Chicken Board to bring them into compliance. To find otherwise would inverse the regulatory role of the Chicken Board and its ability to enforce its own orders. To overturn the Chicken Board's orders on such a basis would undermine its ability to regulate its producers and cripple orderly marketing in British Columbia."

135. The Panel agrees with this submission. The obligation to comply with orders of the Ministry and orders of the Chicken Board is the Appellant's responsibility and if there were alternative ways to achieve the same result or if the Appellant needed assistance with compliance, then it was his responsibility to present those alternatives or seek out that help.
136. At the outset of his testimony, the Appellant questioned whether the Chicken Board had used a principle- based decision making approach in issuing its orders. The Panel has reviewed the SAFETI analysis as summarized in the Board Briefing Note and finds it to be compelling. The June 29, 2022 Chicken Board decisions were thoroughly considered and well supported. The June 30, 2022 letter directing the Appellant to move his chickens indoors until they could be processed was a reasonable amendment to the June 29, 2022 decisions and was in fact an accommodation made by the Chicken Board for the Appellant's benefit in that it set out a specific timeframe for which he would need to house his pastured flock indoors. Finally, the July 4, 2022 decision to revoke the Appellant's chick placements was the direct result of the Appellant's non-compliance with the previous orders made by the Chicken Board and was therefore fully supported from the same principle based analysis.

#### **H. Decision**

137. The Scheme, derived from the *NPMA*, grants the Chicken Board a range of powers, which include making such orders, rules and regulations as are deemed by the Chicken Board necessary or advisable to promote, control and effectively regulate the production, transportation, packing, storage or marketing of the regulated product, and to amend or revoke the same.
138. The Panel accepts the submissions of the Chicken Board as well as those of the Interveners and finds that the Chicken Board did not err in issuing its June 29, 2022 decision denying the Appellant an exemption under the Animal Health Act and ordering its birds to be moved inside by June 30, 2022. The Panel further finds that the Chicken Board did not err in issuing its June 30, 2022 order requiring the Appellant to move his chickens indoors until such time as the chickens could be processed and its July 4, 2022 orders declining the placements of 7,600 and 3,500 chicks with the Appellant. The Panel agrees with the submissions of the Interveners that, given the serious nature of AI, the Chicken Board was very measured in its response.

139. The Appellant's appeal is dismissed and his request for compensation is denied.

Dated at Victoria, British Columbia this 13<sup>th</sup> day of December 2022

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



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Dennis Lapierre, Presiding Member



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Al Sakalauskas, Vice Chair



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David Zirnhelt, Member