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## BC Farm Industry Review Board

August 23, 2024

File: N2401

### DELIVERED BY EMAIL

Klaas Korhuis



Claire Hunter, K.C



Dear Parties:

### RE: HOMELAND FARMS LTD V BRITISH COLUMBIA CHICKEN MARKETING BOARD

#### Introduction and Procedural Background

On May 13, 2024, The British Columbia Farm Industry Review Board (BCFIRB) received a notice of appeal under section 8 of the *Natural Products Marketing Act* (NPMA) from Homeland Farms Ltd. (Homeland) with respect to an April 11, 2024 decision of the BC Chicken Marketing Board (Chicken Board) denying Homeland's request to waive the overmarketing levy that the Chicken Board had assessed against Homeland in quota period A-186 in the amount of \$4,882.19.

#### Summary Dismissal Application

On June 26, 2024, the Chicken Board applied for a summary dismissal order of Homeland's appeal on the grounds that the appeal had no reasonable prospect of success. The Chicken Board noted that the imposition of overmarketing levies in circumstances legally and factually indistinguishable from the Appellant's circumstances in this appeal had been found by BCFIRB in three previous cases to be consistent with sound marketing policy. In those decisions, BCFIRB had determined exceptional circumstances absent and that there was no basis to overturn the Chicken Board's decision not to grant an exemption to an overmarketing levy. The Chicken Board submitted that in the present appeal, the Appellant's decision to place an additional 3,200 chicks represented a voluntary business decision and did not constitute an exceptional circumstance.

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## **Response Submissions of Homeland Farms**

In their response submissions dated July 10, 2024, Homeland acknowledged that they did in fact grow over their allotted quota amount during quota period A186. However, they submitted that their overproduction arose as a result of a force majeure event. Homeland cited Part 20.3 section B of the BC Chicken Marketing Board General Orders defines a force majeure event as follows:

“The triggering event should be one that neither the grower nor the processor could have anticipated or addressed through proper planning or diligence. This applies in particular to events that are claimed to delay the ability to keep marketing within allowable sleeves”

Homeland recounted that due to a clerical error made by the Canadian Food Inspection Agency (CFIA), which mistakenly identified Homeland’s farm as being located within an Avian Influenza quarantine area, they were delayed in receiving their chick placement for quota period A186. The delay and rescheduling of Homeland’s chick placements affected their hatchery’s planning such that at the time when Homeland was able to place its allocation there were 3,200 additional chicks available from the hatchery. Homeland had space for the chicks at its farm and decided to place, raise and ultimately sell the additional chicks.

Homeland acknowledged that placing the additional chicks was a business decision and that it in fact paid for the birds that it overproduced. However, Homeland further submitted that it would have been unreasonable and inhumane to destroy thousands of healthy chicks simply because it had been allotted its quota for the period. Homeland argued that the combination of the CFIA mistake, the resulting additional chicks available for placement, and the implicit obligation to act proactively with respect to animal welfare, created a force majeure event that should result in the waiver of the overproduction levy.

## **Reply Submissions of the BCCMB**

The Chicken Board submitted a final reply on July 19, 2024. In its reply submission, the Chicken Board identified the three parts to the argument being made by Homeland in its response submission and dealt with each in turn. The Chicken Board noted generally that nothing in Homeland’s response submissions distinguished its current appeal from the previous appeals cited in their original submission.

With respect to the first part of Homeland’s argument, in which Homeland submitted that their overproduction was due to a “force majeure event” the Chicken Board cited the full text of Part 20.3 section B of the BC Chicken Marketing Board General Orders and noted that in order for a circumstance to qualify as a force majeure event Homeland would need to be able to satisfy three preconditions:

- a) The event must render performance by the grower or processor impossible, not just difficult; and
- b) The event must not be reasonably foreseeable; and
- c) The event must be beyond the grower or processor’s control.

The Chicken Board further noted that the orders are clear that the event cannot be a minor difficulty, and cannot have been contributed to by the grower's own conduct.

The Chicken Board submitted that Homeland's admission that its placement of the additional chicks was voluntary and that it anticipated that it would overproduce entirely defeats its ability to claim any exemption based on a force majeure event as voluntary acts are by their nature within the grower's control.

The Chicken Board further noted:

Moreover, and in any event, even if the circumstances of a Force Majeure Event were satisfied (which the Chicken Board denies), a waiver under Section 20.1 is not an automatic entitlement, but a remedy granted at the discretion of the Chicken Board.

With respect to the second part of Homeland's argument in which they claimed that they gained no personal benefit from the placement of additional chickens, the Chicken Board noted that it is legally immaterial whether Homeland benefitted from the overproduction and that the application of the overproduction levy is not dependent on the Chicken Board determining that there was some net benefit to the grower associated with that overproduction.

With respect to the third part of Homeland's argument, in which it claimed that it would have been inhumane to not place the surplus chicks at its farm as it would invariably have led to the euthanizing of the birds, the Chicken Board noted that supply management requires the principled and predictable enforcement of overproduction levies and that federal penalties imposed on BC's aggregate overproduction mean that compliant growers end up paying for non-compliant growers overproduction.

The Chicken Board further notes:

Ultimately, Homeland's concerns about the chickens' interests could have been addressed without need for overmarketing. There were alternative ways to facilitate placement of the surplus chickens proactively and in accordance with orderly marketing. For example, had Homeland notified the Chicken Board when the surplus chicks were awaiting placement, the Chicken Board would have been willing to assist Homeland arrange a quota lease to accommodate the additional chicks. Instead of exploring collaborative solutions, however, Homeland refrained from alerting the Chicken Board to the surplus until overmarketing had occurred and the levy issued. The overmarketing penalty resulted from Homeland's lack of communication with the Chicken Board, and was a preventable outcome within Homeland's control.

The Chicken Board concluded that based on the undisputed facts, the appeal has no reasonable prospect of success, does not warrant the time or expense of a hearing and should be summarily dismissed.

## **Decision**

Section 31(1)(b) of the *Administrative Tribunals Act* (ATA) provides as follows:

### **Summary dismissal**

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

...

- (f) there is no reasonable prospect the application will succeed.

This appeal has been brought to determine whether the Chicken Board erred in its decision denying the Appellant relief from the overproduction levy that was assessed against the Appellant for the quota period A186.

Homeland has acknowledged that it made a business decision to accept an additional allocation of chicks and to grow over its allotted quota. As such, the Panel has little difficulty in finding that Homeland's placement of those additional chicks did not represent a force majeure event as defined in the General Orders. Homeland was not obliged either legally or morally to place the additional chicks. If Homeland had concerns regarding the humane treatment of the additional chicks it could have brought that issue to the attention of the Chicken Board to determine options for the placement of the chicks that would not have resulted in overproduction. More broadly, if Homeland has continuing concerns regarding the humane treatment of chickens by growers and hatcheries that is an issue to be addressed at a policy level with the Board and through further engagement with stakeholders in the industry generally. Homeland's reliance on the humane treatment of the additional chicks to anchor its force majeure argument in an effort to avoid overproduction levies, after it had been paid for the birds, is at best self serving.

The Chicken Board referred the Panel to three previous BCFIRB decisions that are factually and substantively indistinct from the current appeal: *Shiell Farms Ltd. and Sunset Poultry Ltd. v. British Columbia Chicken Marketing Board, November 7, 2003*; *Mountainview Acres v. British Columbia Chicken Marketing Board, March 1, 2016*; and most recently, *B&L Poultry Ltd. v. British Columbia Chicken Marketing Board, February 9, 2024*. As noted by the Panel in *Shiell* at paragraph 54:

54. The Chicken Board was created to regulate chicken in the public interest, and in the best interests of all the stakeholders in the industry. It was not given its powers under the British Columbia Chicken Marketing Scheme, 1961 to support any one interest over another. Similarly, Chicken Board members are appointed to take a broad view and to make decisions benefiting the industry as a whole. In regulating the industry both within the province and nationally, it is the Chicken Board's responsibility to ensure that growers comply with policy rules and produce their allotment within certain tolerances. Penalties for over and under production play an important role in meeting this responsibility.

In this appeal, the Panel agrees with the Chicken Board that overproduction levies have repeatedly been determined by BCFIRB to be in accordance with sound marketing. As such, an appellant needs to demonstrate truly exceptional and unavoidable circumstances for the Chicken Board to waive those levies in the first instance, or for BCFIRB to waive those the levies on appeal. The Panel finds that no exceptional circumstances have been presented by Homeland in this appeal and as such the appeal has no reasonable prospect of success.

### **Order**

The appeal is dismissed, and I make no order as to costs. However, it is further worth noting that the cases relied upon by the Chicken Board are easily accessible by all interested parties. The resources expended by the Chicken Board in this appeal to date likely significantly exceed the monetary value of the overproduction levy assessed against Homeland and those are costs that will be borne by other growers. The Panel very much encourages all growers seeking to appeal the imposition of overproduction levies by the Chicken Board to take the time to properly assess whether their circumstances are truly exceptional and unavoidable. Appeals that are summarily dismissed in the future by BCFIRB as having no reasonable prospect of success may result in costs orders against the appellants in order to compensate the Chicken Board, and by extension the other growers.

Dated at Victoria, British Columbia this 23<sup>rd</sup> day of August 2024.

### **BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

A handwritten signature in black ink, appearing to read "Neil Turner", written over a horizontal line.

Neil Turner, Presiding Member