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Dear Sir/Mesdame:

RE: AN APPEAL BY J&E EGG FARM - SUMMARY DISMISSAL DECISION

Introduction

The appellants, Jared and Emma Les dba J&E Egg Farm (J&E) are appealing an order of the British Columbia Egg Marketing Board (Egg Board) “refusing J&E’s September 2019 request that it be grandfathered under the definition of “Producer-Vendor” in force when it obtained its licence such that it would be exempted from the requirement that it self-market a minimum of 75% of their product; and (2) declaring that J&E must meet additional requirements in order to be permitted to count Free Bird Organic sales towards their vending requirement” communicated on October 7, 2019.

Prior to the prehearing conference scheduled for November 19, 2019, the Egg Board 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 Egg Board’s application is dismissed.

The Appeal

By way of background, in 2015 the appellants were successful in the New Producer Program licence lottery and received a “Producer-Vendor” licence. Unlike conventional producers that ship through a grading station, producer-vendors are responsible for developing their own markets for their production.

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Farm Industry Review Board**

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The definition of “Producer-Vendor” in the Egg Board’s Consolidated Order at the time provided as follows:

“Producer-Vendor” means a Producer who produces and Markets, offers for sale, sells, stores or transports all or any portion of the Regulated Product produced or grown by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced or grown by any other Person.”

The appellants commenced production and self-marketed a portion of their production to restaurants, grocery stores and at the farm gate. The Egg Board’s records show the appellants’ have historically self-marketed about 11% of their production.

There is contradictory evidence from the parties as to the nature of discussions about the Egg Board’s expectations and the development of the requirement that producer-vendors self-market 75% of their production which occurred in 2016, the Egg Board’s consultation with industry about these changes and the appellants’ awareness of these changes.

In November 2017, and with the prior approval of BCFIRB, the Egg Board amended its Consolidated Orders and amongst other things changed the definition of “Producer-Vendor” definition to include a 75% minimum self-marketing requirement.

In August 2018, the Egg Board advised the appellants of their obligation to meet the 75% minimum self-marketing requirement and requested a new marketing plan. Discussions between the Egg Board and the appellants continued around non-compliance issues. On December 7, 2018, the Egg Board wrote to the appellants confirming they were not in good standing and requesting more detailed sales and marketing plans.

The appellants’ difficulties meeting self-marketing targets continued and by late August 2019, the Egg Board was requesting a further detailed plan. In September 2019, the appellants requested an exemption from the 75% requirement, asking to be “grandfathered” under the rules in effect in 2015 when their licence was granted. They also sought assurances that they would be permitted to include the Free Bird Organic production towards any vending requirements.

On October 7, 2019, the Egg Board advised the appellants as follows:

Thank you for attending the September 19 board meeting to provide additional details regarding your business plan. In your September 13, 2019 letter, you asked the Board consider two requests:

1. That the Producer-Vendor definition in the 2010 Consolidated Orders, amended to 2015 when you entered and won the producer-vendor license, be upheld for your farm.
2. That all Free Bird Organic sales count towards your vending requirement.

As a follow up to the discussion at the board meeting, we would like to reiterate that the Board and all producers are expected to uphold the most recent version of the Consolidated Orders no matter the producer’s start date or date of the approved changes. Changes made to the Consolidated Orders are done in the best interest of the industry and must be upheld.

A typical producer has their eggs picked up by a grading station and then is paid for that product by the grading station, through the BC Egg Marketing Board. In order to be classified as a producer-vendor, you must be able to provide documentation showing that you are vending your product in a manner that is different from the traditional producer and grader relationship. The Board is willing to consider sales through Free Bird Organic if J&E Egg Farms continues to be the only producer supplying Free Bird Organic and J&E Egg Farms can prove that you are vending Free Bird Organic product directly to the retailers in a manner satisfactory to the Board.

As a reminder, in order to come into compliance and be deemed in good standing with our Consolidated Orders, you will be required to vend a minimum of 75% of your production for three consecutive months and maintain the percentage on a weekly rolling average above 75% thereafter. If the 75% self vending requirement is not reached within 24 months of our December 7, 2018 letter, the Board maintains the right to take additional steps which may include cancellation of quota as per Part IV, section 6, subsection 1 of the Consolidated Orders...

Egg Board's Position

The Egg Board seeks an order summarily dismissing this appeal pursuant to ss. 31(1)(a), (b), (c), and (f) of the *Administrative Tribunals Act* (ATA) on the grounds that the application is not within the jurisdiction of the tribunal, not filed within the applicable time limit, is frivolous, vexatious or trivial or gives rise to an abuse of process; and there is no reasonable prospect the application will succeed.

The Egg Board says that there is no appeal properly before the BCFIRB as the Egg Board's email dated October 7, 2019 is not a "decision" but is merely reiterates that the appellants are obliged to comply with the "75% self-marketing" requirement implemented by the Egg Board on November 1, 2017. Relying on *Saputo v. British Columbia Milk Marketing Board* (May 29, 2008), the Egg Board argues that an appellant cannot, simply by writing a letter to a commodity board objecting to a given order, generate a right of appeal. Viewing this as a disguised appeal of the 2017 amendments to the Consolidated Orders, the Egg Board says this appeal was not brought within the statutory limitation period of thirty days and is out-of-time.

The Egg Board also argues that no appeal lies in connection with the implementation of the "75% self-marketing" requirement as the draft amendments to the Consolidated Orders were reviewed and prior-approved by BCFIRB on March 27, 2017: see *Mountain Valley Dairy Ltd. v. British Columbia Milk Marketing Board*, May 29, 2008. The Egg Board says that the thrust of the appellants' position is that the terms of its license confer rights which may be asserted against the Egg Board, such that the appellants are immune to subsequent regulatory changes made by the Egg Board. The Egg Board says it is a cornerstone of supply management that quotas and licenses do not confer any rights which may be asserted against the regulator: *Sanders v. British Columbia (Milk Board)* (1991), 53 B.C.L.R. (2d) 167. As such, the Egg Board argues there is no reasonable prospect that this appeal can succeed.

In reply, the Egg Board says that even if the appeal could be recast as a challenge to the Egg Board's application of the 75% requirement to the appellants, the appeal is still outside the statutory limitation period as the application of the "75% self-marketing" requirement to the appellants in particular was made almost one year ago, on December 7, 2018. Any appeal regarding the application of that requirement to the appellants should have been brought before January 7, 2019 and there are no exceptional circumstances to justify the hearing of this appeal 10 months after the expiration of the statutory limitation period.

Appellants' Position

There appellants argue there is no basis to summarily dismiss the appeal. The Egg Board has not met the test under s. 31 of the ATA to show that the case is so clear that it would be inappropriate to hear the appeal. The power to summarily dismiss should only be exercised where it is clear on its face that an appeal cannot possibly succeed or is devoid of merit: *Jacobsen v. British Columbia Milk Marketing Board*, October 3, 2016. An appeal that "impacts the potential profitability" of a new entrant's "prospective operation", "raises serious issues" and cannot be characterized as frivolous, vexatious or trivial. *Jacobsen v. British Columbia Milk Marketing Board*, October 22, 2008.

The appellants argue this appeal raises serious issues as it appears that the Egg Board gave no consideration to the request for an exemption and its decision-making process was inconsistent with SAFETI requirements. The appeal was filed in time and even if an extension were required, there are special circumstances justifying an extension.

As a matter of its broad statutory authority, the Egg Board had discretion to grant an exemption to the 75% vending requirement by grandfathering J&E under the 2015 terms. The appellants rely on *K&M Farms v. BC Chicken Marketing Board*, May 17, 2019 where the Chicken Board was required to apply SAFETI principles in exercising discretion in respect of an exemption request and consider "the broader implications of the decision" and whether "there was a sound marketing policy justification to allow [the exemption]." Further, in assessing an application for "entitlement to grandfathering", a commodity board must consider all of the circumstances, including the historical regulatory context in order to be fair in its decision-making: *Hong v. BC Chicken Marketing Board*, July 26, 2001.

The appellants argue that an appeal from a decision to refuse an exemption filed within 30 days is not out of time because it comes later than the initial policy decision from which the exemption is later sought. On a summary dismissal application it is insufficient for the commodity board to simply argue that the appeal is an attempt to "improperly bypass the appeal provisions by purporting to appeal an affirmation of an earlier decision". The commodity board must show that there is no arguable case that the decision at issue is properly interpreted as a decision to refuse to grant an exemption.

Here, the thrust of the request rejected by the Egg Board was that J&E be grandfathered under the 2015 regulation and exempted from the 2017 amendment. Unless the Egg Board has demonstrated that there is no "arguable case" that this aspect of the decision should be

interpreted as a refusal to grant a requested exemption, the appeal should not be dismissed as out-of-time. They also say the second ground of appeal from the decision to impose additional requirements on J&E to include Free Bird Organic sales towards their vending requirement is clearly a decision specific to J&E, rather than a reiteration of the change to the Consolidated Order and the Egg Board has provided no reason that the appeal of this aspect of the decision should be considered out-of-time.

The appellants refer to a number of special circumstances which justify extending the time to appeal including the Egg Board's failure to provide timely and accurate information about self-marketing, failure to communicate its expectations and/or concerns with certain plans, and its encouragement to convert to organic production and build a larger barn only to then cancel J&E's December 2016 quota bid. The appellants also argue that the Egg Board singled out J&E in establishing and enforcing the 75% minimum requirement without regard to their good faith efforts to comply and efforts to come into compliance prior to seeking an exemption should not be used to as a basis to obtain summary dismissal of an appeal as out-of-time.

DECISION

My decision turns on a proper characterization of the appeal before me. I agree with the Egg Board that it is improper for an appellant to seek to breathe life into an appeal by writing letters to a commodity board seeking clarification or concessions; in such cases, the appropriate course would be summary dismissal. However, I note that here that it was not open to the appellants to appeal the November 2017 amendments to the Consolidated Orders as those amendments were prior approved by BCFIRB, as required by section 37(c) of the British Columbia Egg Marketing Scheme. Any challenge to the amended Consolidated Orders would have needed to be by way of judicial review.

I also observe that in its prior approval process, BCFIRB reviewed the Egg Board's proposed changes to its Consolidated Orders and granted that prior approval based on the information given to it by the Egg Board. That process did not include an examination of how the proposed changes to the Consolidated Orders may impact registered producers. The fact that a registered producer feels unreasonably impacted by these amendments would appear to raise a legitimate question related to how the amended order was implemented and whether, based on particular circumstances, an exercise of discretion was warranted to accommodate any unreasonable impact. I disagree that the Egg Board's email of October 7, 2019 does not communicate a "decision". The appellants asked for an exemption and were advised the Egg Board intended to "uphold the most recent version of the Consolidated Orders no matter the producer's start date or date of the approved changes". In my view, the Egg Board made a decision not to consider the request for an exemption.

Turning to the question of timing, the significant date is not when the Consolidated Order was amended as that Order could not be appealed. The issue of timing arises in a consideration of whether the appellants have acted reasonably and whether their request for an exemption in September 2019, almost two years after the amendment, raises an out-of-time argument. Based on the appellants' evidence, it does appear that efforts were made after the amendment to work

with the Egg Board to increase self-marketing. The appellants are critical of the Egg Board's conduct and appear to blame them for their self-marketing issues. From the Egg Board's perspective, it appears that the appellants were non-compliant for a long period of time and the Egg Board's efforts to work with the appellants yielded no notable changes in J&E's self-marketing.

I am not able to make a finding here on the adequacy or *bona fides* of the appellants' efforts to come into compliance before seeking an exemption and that decision should be made by an appeal panel after hearing all the evidence and the arguments of the parties.

On a summary dismissal application, the burden is on the Egg Board to show that the case is so clear that it would be inappropriate to hear the appeal. The summary dismissal power deprives appellants of their right of appeal and should only be exercised where it is clear on the face of the appeal that it cannot possibly succeed or that it is devoid of merit. I cannot say that there is clearly no merit to this appeal. In my opinion, the appellants have raised an arguable case in favour of an exercise of discretion from the Egg Board to mitigate against the impact of the amendments to the Consolidated Orders on their operation. As such, this application is dismissed and this appeal will proceed to a full hearing.

ORDER

The Egg Board's application is dismissed.

Dated at Victoria, British Columbia this 6th day of January 2020.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per



Pawan Joshi, Presiding Member