

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT AND
AN APPEAL FROM AN ENFORCEMENT DECISION OF THE BRITISH
COLUMBIA BROILER HATCHING EGG COMMISSION

BETWEEN:

ALLAN AND SHELLY CROSS, ROYAL COLUMBIAN POULTRY ULC, ROYAL
FEATHER ULC and ROYAL GREENS POULTRY LTD.

APPELLANTS

AND:

BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

RESPONDENT

AND:

BRITISH COLUMBIA BROILER HATCHING EGG PRODUCERS' ASSOCIATION

INTERVENER

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Al Sakalauskas, Vice Chair and
Presiding Member
Pawan Joshi, Member
David Zirnhelt, Member

For the Appellants

Arpal Dosanjh, Allan Doolittle and
Natasha John, Counsel

For the Respondent
British Columbia Broiler Hatching
Egg Commission

Robert Hrabinsky, Counsel

For the Interveners:

Did not appear

Date of Hearing

By written submission and zoom
hearing, September 21, 2021

Introduction

1. The Appellants, Allan and Shelly Cross, Royal Columbian Poultry ULC (Royal Columbian), Royal Feather ULC (Royal Feather) and Royal Greens Poultry Ltd. (Royal Greens) are appealing a January 29, 2021 decision of the British Columbia Broiler Hatching Egg Commission (Commission) to suspend their producer licences for non-compliance with the Consolidated Orders (the “suspension decision”).
2. The suspension decision followed a January 7, 2021 decision of the Commission which found the Crosses, RCP and RGP were non-compliant with the section 24 requirement of the Consolidated Orders (the “non-compliance decision”) to market “breaker quality eggs” through the Commission.¹ The Commission’s non-compliance decision gave a grace period for the Appellants to demonstrate compliance requiring the Appellants:

...within two weeks of the date of this Order, to demonstrate to the satisfaction of the Commission that they are both in full compliance with section 24². The Commission must be fully satisfied that both Royal Columbian Poultry ULC and Royal Greens Poultry Ltd. are in compliance by the deadline. If either Royal Columbian Poultry ULC or Royal Greens Poultry Ltd. are not in compliance after that deadline, their respective licenses will be immediately suspended, without further order until such time as the Commission is fully satisfied that compliance has been achieved. [emphasis added]

3. The suspension decision under appeal stated:

Dear Mr. & Mrs. Cross:

RE: DECISION FOLLOW UP REGARDING LICENSE SUSPENSION FOR NON-COMPLIANCE WITH THE BREAKER QUALITY EGG PROGRAM

I am writing further to the Commission’s decision dated January 7, 2021 and the site inspection that took place on January 22, 2021.

During the site inspection, it was observed that a sign was present at the roadside advertising eggs for sale between 12:00 pm and 5:00 pm. You also advised that you are selling eggs at the farm gate. Despite a request to enter and inspect the farm gate shop located on premises, you denied access to the Commission’s inspector contrary to section 41 of the Consolidated Order of January 1, 2021, which provides as follows:

41. (1) Every Person licensed by the Commission shall, upon request, furnish to the Commission, or to any officer or auditor of the Commission, or to any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request, any information or documentation relating to the production, transportation, packing, storage and marketing of Broiler Hatching Eggs, Saleable Chicks or broiler breeders.

¹ Through Commission oversight, Royal Feather is not mentioned in the January 7, 2021 non-compliance decision or the suspension decision.

² The Commission published updated Consolidated Orders on January 1, 2021. As a result, section 24 has now been renumbered as section 27. The text of the section remains unchanged.

- (2) Every Person licensed by the Commission shall make specific answers to any questions submitted to that Person by the Commission, or by any officer or auditor of the Commission, or by any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request.
- (3) Every Person licensed by the Commission shall permit the Commission, or any officer or auditor of the Commission, or any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request, to search vehicles in which the regulated product is transported, and to inspect all Farm or business premises owned, occupied or controlled by such licensed Person.

Additionally, the inspector found a website, advertised on the store front. This website contains pictures of hatching eggs for sale, that information is attached.

In light of this, we are writing to advise that the licences of both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are suspended effective January 28, 2021. Your hatchery has been notified. The Commission will consider lifting the suspension only when it is fully satisfied that both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. have come into full compliance with section 24 of the Consolidated Order.

Yours truly,
Jim Collins,
Chair
BC Broiler Hatching Egg Commission

4. On February 2, 2021, and after completing satisfactory inspections and receiving assurances from all the Appellants that they had ceased all donations and farm sales of all types, kinds and forms of hatching eggs, the Commission reinstated the Appellants' licenses.
5. On February 2, 2021, the Appellants filed their notice of appeal of the Commission's suspension decision with the British Columbia Farm Industry Review Board (BCFIRB).
6. The Commission applied to summarily dismiss the appeal on the grounds that the issue raised was moot, there was no reasonable prospect of success, and it was filed out-of-time. On May 5, 2021, the Presiding Member dismissed the Commission's application and directed the appeal to proceed by written submissions and oral hearing, if necessary. The Presiding Member reasons for dismissing the application and his clarification of the issues on appeal state in part:

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

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

With this understanding, in my view the appellants can appeal whether the Commission was correct in its view that there was evidence of non-compliance at the time of the Commission's inspection in January 2021. I note as well there is an issue about whether the decision even extended to Royal Feather given the [compliance] decision does not mention that operation and presumably there are related issues as to the appropriateness of its licence suspension in the absence of any warning notice. Further, even if there was evidence of non-compliance, the appellants could appeal the appropriateness of the enforcement measure imposed by the Commission and argue that it was disproportionate to the non-compliance observed. Finally, the appellants could argue that the Commission failed to consider all the elements of subsection 27(6) [formerly section 24(6)] prior to imposing the license suspensions.

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

7. The Panel received and reviewed the following:
 - (a) July 23, 2021 written submission of the Appellants along with the supporting affidavits of the Appellants, Mr. and Mrs. Cross, and Art Wiebe;
 - (b) August 11, 2021 written submission of the Commission with the supporting affidavits of Ms. Nelson and Kaitlyn Loewen;
 - (c) August 27, 2021 reply submission of the Appellants.
 - (d) September 15, 2021 Respondent's supplementary submission on credibility
8. After determining there was a gap in the affidavit evidence and, as the parties were making arguments on credibility and asking that adverse inferences be drawn, the Panel convened a one day zoom hearing on September 21, 2021 to receive oral evidence as to the events of the Commission's inspection of the Appellants' premises conducted on January 22, 2021 and final arguments.

Issues

9. Did the Commission err in its January 29, 2021 suspension decision by:
 - (a) concluding there was evidence of non-compliance with the January 7, 2021 decision at the time of the January 22 inspection;
 - (b) suspending Royal Feather's licence in the absence of any warnings issued to Royal Feather or any reference to Royal Feather's non-compliance in the January 29, 2021 decision;
 - (c) imposing enforcement measures inappropriate and disproportionate to the non-compliance observed; and

- (d) failing to consider all the elements of subsection 27(6) prior to imposing the license suspensions.

LEGISLATIVE FRAMEWORK

10. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (*NPMA*) the Lieutenant Governor in Council has the power to establish boards and commissions, and to confer upon them certain powers (section 11).
11. Pursuant to this power, the Commission was established by the British Columbia Broiler Hatching Egg Scheme, B.C. Reg. 432/88 (Scheme) and vested with the authority within the Province to promote, regulate and control the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part.
12. The Commission has enacted its Consolidated Order, as amended January 1, 2021, which among other things creates the channels through which broiler hatching eggs and breaker quality eggs can be marketed and creates a prohibition against the marketing of unmarketable eggs.
13. The following sections of the Consolidated Order are relevant to this appeal.

PART VI – PRODUCTION REQUIREMENTS AND LIMITATIONS

Marketing of Broiler Hatching Eggs

27. (1) Subject to subsections (2) and (3), no Producer shall market Broiler Hatching Eggs other than:
 - (a) through the Commission;
 - (b) to a Hatchery;
 - (c) to a breaker; or
 - (d) as may otherwise be directed by the Commission.
- (2) Every Producer must market through the Commission all Breaker Quality Eggs.
- (3) Every Producer must destroy all Unmarketable Eggs. No such Unmarketable Eggs shall be marketed, through the Commission or otherwise.
- (4) After giving a Person an opportunity to be heard, the Commission may impose terms and conditions with respect to the marketing of a regulated product and may suspend or cancel the licence held by, or Quota allotted to, a Person if that Person has failed to comply with subsections (1), (2) or (3).
- (5) Where a licence and/or Quota has been suspended for a definite period by reason of a failure to comply with subsections (1), (2) or (3), and that failure to comply has not been rectified within the period of suspension and continues, the Commission may forthwith cancel the licence and/or all or any part of the Quota allotted to that Person.

- (6) Before the Commission imposes terms and conditions with respect to the marketing of a regulated product or suspends or cancels the licence held by, or Quota allotted to, a Person, the Commission shall consider the following:
- (a) previous enforcement actions for contraventions of a similar nature by the Person;
 - (b) the gravity and magnitude of the contravention;
 - (c) the extent of the harm to others resulting from the contravention;
 - (d) whether the contravention was repeated or continuous; (e) whether the contravention was deliberate;
 - (f) any economic benefit derived by the Person from the contravention; and
 - (g) the Person's efforts to correct the contravention.

PART IX - REPORTING AND INSPECTION

Licensees to Furnish Information and Permit Inspection

41. (1) Every Person licensed by the Commission shall, upon request, furnish to the Commission, or to any officer or auditor of the Commission, or to any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request, any information or documentation relating to the production, transportation, packing, storage and marketing of Broiler Hatching Eggs, Saleable Chicks or broiler breeders.
- (2) Every Person licensed by the Commission shall make specific answers to any questions submitted to that Person by the Commission, or by any officer or auditor of the Commission, or by any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request.
- (3) Every Person licensed by the Commission shall permit the Commission, or any officer or auditor of the Commission, or any other Person as may be authorized by the Commission from time to time to make an inquiry, report or corrective action request, to search vehicles in which the regulated product is transported, and to inspect all Farm or business premises owned, occupied or controlled by such licensed Person.

PART XI - COMPLIANCE

Suspension or Cancellation

46. (1) In addition to any other remedies available to the Commission in respect of a contravention of an Order of the Commission, the Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330, the British Columbia Broiler Hatching Egg Scheme (B.C. Reg. 432/88), or other applicable legislation and regulations, the Commission may suspend or cancel the licence held by, or Quota allotted to, a Person determined by the Commission to be in contravention.
- (2) Where a licence has been suspended for a definite period for a contravention and that contravention has not been rectified within the period of suspension and the contravention continues, the Commission may forthwith cancel the licence.

14. Section 2 of the Commission’s Consolidated Order defines the following terms:
- “**Breaker Quality Eggs**” means unbroken Cull Eggs and Underweight Broiler Hatching Eggs, other than Cull Underweight Broiler Hatching Eggs.
 - “**Broiler Hatching Egg**” includes a Breaker Quality Egg, a Cull Egg, a Cull Underweight Broiler Hatching Egg, an Underweight Broiler Hatching Egg, and an Unmarketable Egg.
 - “**Cull Egg**” means a Broiler Hatching Egg not yet placed in a Hatchery’s incubator and having any one or more of the following characteristics: soft shelled, cracked, rough shelled, misshapen, too large, stained or dirty.
 - “**Cull Underweight Broiler Hatching Eggs**” mean Underweight Broiler Hatching Eggs having any one or more of the following characteristics: punctured, broken, very dirty or mouldy.
 - “**Marketable Egg**” means a Broiler Hatching Egg (other than a Breaker Quality Egg or an Unmarketable Egg) that is produced by a flock of day-old broiler breeder pullets placed in accordance with the Official Flock Schedule.
 - “**Underweight Broiler Hatching Eggs**” mean Broiler Hatching Eggs (other than Silkie or Taiwanese Broiler Hatching Eggs) weighing less than 52 grams.
 - “**Unmarketable Eggs**” means broken Cull Eggs and Cull Underweight Broiler Hatching Eggs.
15. The production requirement found in section 27 of the Consolidated Order requires broiler hatching eggs to be marketed through the Commission, a hatchery, or a breaker (for industrial use) and a producer is required to market “breaker quality eggs”³, that is unbroken cull eggs that may be underweight and too small for the hatchery, through the Commission for marketing through the breaker. Section 27 (formerly section 24) was initially implemented in 2010 to address concerns about small eggs, not destined for the hatchery, being marketed to consumers and the associated public health concerns related to the presence of Salmonella Enteritidis (SE) in these eggs. Given that broiler hatching eggs marketed to persons other than hatcheries, could be sold to bakeries, restaurants, and food retailers, the Commission considered non-compliance a significant public health risk.

Background

16. The Crosses, through their corporate entities, have been hatching egg producers for more than 28 years. They have one of the largest hatching egg operations in Western Canada. Mr. Cross is a past president of the BC Broiler Hatching Egg Producers Association and was a former member and vice-chair of the Commission until his resignation in December 2018.
17. A by-product of producing broiler hatching eggs are those small eggs that do not meet hatchery specifications to be grown into broiler chickens and are a small percentage of the hatching eggs produced on any hatching egg farm. Historically,

³ Breaker quality eggs were formerly referred to as non-hatching eggs.

producers would consume, give away, sell or donate these eggs. However, in 1999, the Commission established its Non-Hatching Egg Program (NHEP) to address the public health threat – especially from SE – caused by farm gate sales of hatching eggs to the public. As the Commission stills sees SE as a concern, section 24 helps protect public health and ensure the integrity of the BC industry by removing these small eggs from farms, providing some nominal value to the producer (\$0.70/per dozen). The program remained unchanged for many years and not all producers participated.

18. Mr. Cross, as both a registered producer and a former Commission director, was aware of the Consolidated Order's requirement to market breaker quality eggs through the Commission. In 2018, to encourage regulatory compliance, the Commission (including Mr. Cross as a director) began a rebate program for compliant broiler hatching egg producers. Commission meeting minutes of February 5, 2018, confirm the Commission discussed compliance and specifically references donations of regulated product are included in the definition of "marketing". The compliance checklist completed by producers reflected this understanding as it required producers to confirm that their small eggs were shipped through the NHEP and that they did not engage in farm gate sales or donations of small eggs. Royal Columbian and Royal Feather participated in this program and completed compliance checklists confirming "no farm gate sales or donations" and received a small rebate.
19. In March of 2020, due to the outbreak of COVID-19, the Commission advised producers that "the Small Egg Program will remain unchanged, unless Producers are uncomfortable receiving people on farm". The Appellants took this notice to mean that participating in the NHEP was now optional. As a result, they stopped shipping their small eggs through the Commission "to avoid transmission of COVID and other biosecurity risks". Instead of composting these eggs as contemplated by the Consolidated Orders, they engaged in farm gate sales and donations to charitable organizations.
20. On September 10, 2020, Ms. Nelson sent the following email to Mr. Cross:

For clarity, I am questioning why you are not participating in a mandatory program. The Consolidated Orders lays out a producer's obligations to the program and I can direct you to Section 24 (1) a-d & 2 which states:

24. (1) Subject to subsections (2) and (3), no Producer shall market Broiler Hatching Eggs other than:through the Commission;
 - a) to a Hatchery;
 - b) to a breaker; or
 - c) as may otherwise be directed by the Commission.
- (2) Every Producer must market through the Commission all Breaker Quality Eggs.

If there is an issue that I can assist with to get things back on track with you and your farm's participation in the breaker program please let me know.

21. On September 15, 2021, Ms. Nelson sent a follow up email to Mr. Cross. She did not receive a response to either of her emails.

22. The Commission discussed the Crosses non-participation in the NHEP at its September board meeting and on October 13, 2020, Ms. Nelson wrote the following letter:

In June, the Commission's temporary driver was instructed by you to remove the small egg program equipment, flats, and pallets, from your premises. This was reported to me in September. Following that report I emailed Allan on three separate dates reminding him of the requirements of section 24

I did not receive a response to the emails from September 10 or the 15 and as a result reported the situation to the Commission at their regularly scheduled September Commission meeting. Additionally, the following photo was recently taken at your premises which indicates that off-site egg sales are happening at this premises.

In accordance with subsection 24(4), you are hereby given an opportunity to show cause why the Commission should not impose terms and conditions with respect to the marketing of a regulated product, or suspend or cancel your licence, or suspend or cancel your Placement Quota. Your response must be received by the Commission in writing no later than October 19, 2020.

23. On October 18, 2020, Mr. Cross's response acknowledged he was engaging in farm gate sales through his store and donating eggs but maintained that this was not prohibited under section 27 of the Consolidated Orders stating as follows:

...for many years (actually nearly 3 decades) we have been active in farm gate sales, charitable contributions to multiple community food banks, and several local recovery homes with our non-hatching eggs.

We have also had affirmation from the BCBHEC to sell our non-hatching eggs at farm gate, farmers markets and for balut incubation sales. We checked with the Province to make sure we were in compliance and they affirmed these activities.

We have never sold eggs to the "guys in the van" who resale eggs to restaurants, stores, etc. Which is what we have always understood was a problem, but have never known the "Commission" to do anything even about that. Though they have been well aware of it forever.

All of our farm gate sales are in compliance with Provincial and Federal regulations allowing such Farm Gate activity....

The food banks in particular have been and still are in tremendous need of eggs and other food donations. We believe it would be the BEST example possible for Producers to be selfless at this time of unprecedented need in our communities and give generously.

24. By letter dated October 30, 2020, the Commission wrote to the Appellants:
Please provide further clarification, information, evidence, and argument on the following points:
1. You state that "[a]ll of [your] farm gate sales are in compliance with Provincial and Federal regulations allowing such Farm Gate activity." Please comment on whether you regard your farm gate sales to be in compliance with section 24 of the Commission's Consolidated Order and, if so, provide your reasoning for that position.
 2. You allege that the Commission has a "problem of not being able to pick up or pay for eggs". Please provide us with your evidence and arguments in relation to this assertion.
 3. You allege that you have "had affirmation from the BCBHEC to sell our non-hatching eggs at farm gate, farmers markets and for balut incubation sale." Please provide us with your evidence and arguments in relation to this assertion.

25. On November 19, 2020, the Appellants responded, stating in part:

Your letter is a very odd response to our letter. I guess the Commission is not interested in farmers feeding those in need in a charitable way. This is very disappointing, and inconsistent with the spirit of farming...

We both know there are many other Producers who sell from the farm gate.

...This is a ridiculous process and a waste of everybody's time and money.

...There never has been any penalty for having farm gate sales. Not when I was on the Board, and none that I have ever heard of in my quarter century as a farmer.

...You will see that the regulation of non-hatching eggs sold at the farm gate and charitable egg donation regulations are already addressed by the Provincial and Federal Governments.

It is agreed however that it is the exclusive mandate of the BCBHEC to regulate, price and place BC Hatching Eggs. We encourage you to focus first and foremost on your primary mandate to the great waiting Many for you to do so.

Commission's Show Cause Process

26. On December 17, 2020, the Crosses appeared before the Commission to show cause why the Commission should not take enforcement action as a result of their sales and donations of breaker quality eggs. Commission minutes indicate that the Appellants were quite heated in their presentation and made personal attacks against Commission staff and members and threatened litigation. The Appellants argued they were in compliance with section 24, as small (breaker quality) eggs are not hatching eggs and therefore, not subject to regulation by the Commission. Further, they argued

section 24 was a knee jerk reaction, not written clearly and producers did not understand “legalese”.

Commission’s Compliance Decision

27. The Commission issued its 13-page non-compliance decision on January 7, 2021 concluding the Appellants had marketed “breaker quality eggs” other than through the Commission. The Commission addressed the Appellants’ arguments regarding its authority over non-hatching or breaker quality eggs:

In our view, the Scheme’s purposes and objects only reinforce the conclusion that your argument should be rejected. The purpose and object of the Scheme is to effectively regulate hatching egg production in order to promote the public interest and to maximise production and price stability through a system of quotas, licences and permits.

Regulation of hatching eggs will not be effective if such regulation is not comprehensive. The purpose of regulation necessarily includes Breaker Quality Eggs. To hold otherwise would undermine the very basis upon which regulated product is regulated by the Commission. How could the Commission direct the marketing and disposal of hatching eggs if they were not a regulated product in the first place? Similarly, how could the Commission regulate the placement of “pullets” if they are not yet breeders? Many sections of the Consolidated Order, tracing back to the beginnings of the Commission, are based on the reality that regulated product includes all hatching eggs. Section 24 alone has been in place for 10 years.

In particular, it is the Commission’s view that the language “suitable for hatching a broiler chick” is to be read and understood as a differentiation to table eggs.

28. The Commission discussed the regulatory authority of the British Columbia Egg Marketing Board under the British Columbia Egg Marketing Scheme for table eggs (as distinct from broiler hatching eggs). The Commission concluded that if it was incorrect in its view of its authority, it would still be empowered to enact regulations concerning “breaker quality eggs” as a necessary incident to its statutory mandate:

Having found that the Commission was duly authorized to implement section 24, it should be noted that the purpose and importance of that section has been communicated to all producers many times since implementation. It was by no means a “knee jerk” reaction. Rather, it was a responsible decision in the face of a known public health threat – especially from SE – caused by farm gate sales (which in many cases included the “white van”) in BC. It remains the view of the Canadian Food Inspection Agency and both federal and provincial health authorities that SE continues to be a threat to the public. As the prevalence of SE in the BC hatching egg sector remains a concern, section 24 continues to be an important means of protecting public health indirectly by ensuring the integrity of the BC industry.

As SE remains prevalent in the BC hatching egg sector, the Commission is implementing in 2021 a new SE mitigation program. It will not be until the success of that program is proven that the Commission would be prepared to revisit the need

for section 24. While well aware of the overall pricing situation and understanding that section 24 and the Non-hatching Egg Program might not be perfect, the Commission must balance those considerations against the overall interests of the public and the industry until such time as SE is mitigated in the BC hatching egg sector. [emphasis added]

29. Having found the Appellants non-compliant, the Commission did not immediately suspend their licences pursuant to section 46 of the Consolidated Orders but instead issued the following order:

Decision

The Commission finds that Royal Columbian Poultry ULC and Royal Greens Poultry Ltd. are both in non-compliance with section 24 of the Consolidated Order.

Order

Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are, within two weeks of the date of this Order, to demonstrate to the satisfaction of the Commission that they are both in full compliance with section 24.

The Commission must be fully satisfied that both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are in compliance by the deadline. If either Royal Columbia Poultry ULC or Royal Greens Poultry Ltd. are not in compliance after that deadline, their respective licenses will be immediately suspended, without further order until such time as the Commission is fully satisfied that compliance has been achieved. [emphasis added]

30. The Appellants did not appeal this decision but did seek further clarification in an email dated January 7, 2021:

In regards to your decision letter and letter to the BCBHEPA concerning ungraded eggs being a food safety risk.

I will ask again 2 questions for clarity please (we had many other unanswered questions to the Commission previously)

#1- For non-hatching eggs, donations or farm gate sales etc, is there any other problem besides 'food-safety'?

#2- Can we sell our eggs to another Grading Station other than the BCBHEC as Section 24 c & d describe?

We wouldn't think that it matters 'which' Grading Station makes the eggs safe for consumption.

We still think these are simple and easy questions, and ask for a prompt response. And we ask for a deferral or delay of penalty equal to your response time.

31. The Commission's January 7, 2021 reply email stated:

Section 24 of the Consolidated Order is unambiguous. Paragraphs 24(1)(a), (b), (c) and (d) are expressly subject to subsections (2) and (3), which provide as follows:

(2) Every Producer must market through the Commission all Breaker Quality Eggs.

(3) Every Producer must destroy all Unmarketable Eggs. No such Unmarketable Eggs shall be marketed, through the Commission or otherwise.

With respect to your request “for a deferral or delay of penalty equal to [our] response time”, the Commission has made its decision. If you are aggrieved by or dissatisfied with the decision, your remedy now is to appeal to the BC Farm Industry Review Board within 30 days of the decision.

Commission’s Compliance Investigation Process

32. On January 18, 2021, Ms. Nelson sent three text messages and an email to the Appellants in follow up to the Commission’s non-compliance decision and seeking to drop off equipment for the NHEP. She did not receive any response.
33. On January 19, 2021, Ms. Nelson left a telephone voice mail for Mr. Cross indicating she was following up on the non-compliance decision. Again, she received no response.
34. On January 19, 2021, Ms. Nelson drove by Royal Columbian’s premises in Langley and observed a roadside “eggs for sale” sign. It was too dark to take a picture and returned the next day to take a picture of the sign.
35. At its January 21, 2021 board meeting, the Commission reviewed Ms. Nelson’s small egg compliance program update which set out the Appellants’ conduct, the unsuccessful efforts to confirm compliance and the presence of “eggs for sale” sign and decided to conduct an investigation as authorized by section 41 of the Consolidated Orders.
36. At 8:35 pm on that same evening, Mr. Cross sent the following email to Commission administrative assistant, Naylene Thompson:

Subject: BCBHEC threat to take RCP producer License for Donations to a needy community (#RCPfeedspeople, not BCBHEC)

FYI –

BCBHEC and Producer Members,

Your interpretation has no roots in history or fact. Your ‘process’ was dishonest. So was your promise of payment for our 53 week early kill last June due to Industry over supply.

Not too long ago YOU gave ME approval to sell non-hatching eggs for baluts = human consumption farm gate sales.

Yet just a couple years later you threaten to take away our License for donating the same eggs to hungry people in our community? As far as you scaring everyone about farm gate sales and SE, have you ever made an honest open investigation as to why the only Province with a non-hatching egg program has by far the most SE? Could it be the un-sanitized materials you put in every farmers cooler? (remember the BCBHEC using used USA import flats in the program?) Or the visit to dozens of farms each week with these materials, and then going to a mink farm to dispose of broken eggs. FYI- egg graders don’t take broken eggs because they are the MOST likely to be contaminated, but you have them on the same truck with our clean eggs and ‘clean’ packing materials at the same time.

Hey, maybe after we all ship our manure out, we could use the same truck to backhaul shavings for our chicks and save some money?!

If the BCBHEC is going to pretend to be regulator and operator of this by-product you will be liable for your poor or hazardous operation.

We are complying only because of your threat of taking our License, not because it is a good or more safe practice for our farm. To the contrary, you are forcing us to compromise our bio-security, health, safety, and finances of our farm. And clearly increasing our risk of SE.

As of 21Jan2021, we are in compliance with your ridiculous interpretation of the small egg program in the Consolidated Orders. Sincerely, Allan & Shelly Cross
Royal Columbian Poultry ULC

37. Ms. Nelson's evidence is that she was the expected point of contact for the Appellants and this staff person was on leave. As a result, the Commission was not aware of this email prior to making its decision to investigate further.

Commission's Inspection

38. On January 22, 2021, Commission inspector Ms. Loewen, and British Columbia Chicken Marketing Board inspector Kira Neu, inspected the Appellants' premises and prepared a site inspection report. The inspection report notes the "producers were made aware that the inspection was instructed by Ms. Nelson for evidence of egg sales". The inspectors observed a roadside sign advertising eggs for sale between 12:00 pm and 5:00 pm. The report records the following questions and answers:

1. Are you selling eggs at the farm gate?

No hatching eggs for sale at the farm gate. I am selling eggs at the farm gate.

Have you sold hatching eggs before?

I am not answering that question.

2. Are you donating eggs?

No. We have donated eggs in the past. (This information was obtained through conversation later in the inspection)

3. Why does the sign out front indicate that you have eggs for sale?

There are eggs for sale at the farm gate, they are not hatching eggs.

4. How are you disposing of small eggs and cull eggs currently?

Collected and either shipped with the small egg program or composted. The small egg program has not come to the premise in months. I would ship the eggs through the small egg program if the truck came to this premise.

5. How are you disposing of double yolked eggs currently?

Collected and either shipped with the small egg program or composted.

39. Ms. Nelson subsequently confirmed that the website, posted on the Appellants' store front, was still advertising hatching eggs for sale.

40. Ms. Loewen attested in her affidavit, and confirmed in the inspection report, that Mr. and Mrs. Cross denied the inspectors access to the farm gate shop which was advertising meat and eggs for sale. Mr. and Mrs. Cross in their affidavits disputed denying the inspector access. Mr. Cross stated that he thought the inspector's request to see in the store was informal and beyond the scope of the inspection; he told the inspectors they could not go in. Mrs. Cross said she asked the inspectors if they needed to go in, to which the inspector responded "No, it's ok". The Appellants asked the Panel to draw an adverse inference given the failure of the Commission to produce an affidavit from Ms. Neu.
41. Given the equivocal nature of this evidence, and the fact that the Appellants' video recording did not cover this conversation, the Panel convened an oral hearing to clarify what transpired at the inspection.
42. Mr. Cross testified in his affidavit that "in the early afternoon of January 22, 2021 we received notice that the commission was going to conduct an inspection of Royal Columbian for the purpose of ensuring that we were in compliance of section 27 of the consolidated order". His evidence on direct, as reflected in his video of the inspection, was that "the purpose of the inspection was to inspect saleable hatching eggs on the farm in the CAZ zone". He did however concede that he understood that the purpose of the inspection was to see and to affirm that he was not selling, donating hatching eggs of any kind, type or form, consistent with section 27.
43. There is no dispute that the inspector asked the Appellants if she could look in their store. Mr. Cross's evidence is that he did not see this as a demand or part of the inspection. He describes it as a "casual curious request" perhaps reflecting the inspector's interest in "churkey". Mr. Cross acknowledges he said no to the request to enter the store although he does not believe he denied the inspector entry. He expressly told the inspector there were no hatching eggs for sale in the store and it was his belief that the inspector had no authority to enter the store. The inspector did not refer to section 41 and/or the consequences of not allowing access to the store. Mr. Cross asked the inspector at the end of her inspection if there was anything else she wanted to see and she said no.
44. Mrs. Cross initially testified that she thought the inspectors wanted to see the "saleable hatching eggs on the farm in the CAZ zone" but also conceded that she understood that the inspection was about compliance with section 27 although she says the inspector did not use those words.
45. Mrs. Cross's evidence is that they did not deny entry to the farm store and her response to the inspector was "no, we are not denying you entry, but do you need to go in there?" to which Ms. Loewen responded "no, it's ok". In her affidavit, Mrs. Cross states "in fact I invited Ms. Loewen to look in the farm gate store and she declined." In her oral evidence she stated if the inspector had said "yes I need to see in there", they would have let her in.

46. Ms. Loewen's recollection was that when she asked Mr. Cross if he was refusing access to the store, Mr. Cross said the store was not within the CAZ and was not within the audit scope. While she disputes that she said "it's ok" when told she could not enter the store or anything to that effect, she agrees she did not press the issue. When asked at the end of the inspection if there was anything else she wanted to see, she did not repeat her request to see inside the store.
47. Ms. Neu confirms this evidence. She recalls Ms. Loewen asked if they could see the farm store, which in turn the Crosses denied, saying that it was out of the scope of what they were there to see. The subject was not pushed, and the inspectors continued to the CAZ and viewed the barn operations, egg room and manure storage. She does not remember Ms. Loewen saying anything to the effect that it would be okay if they didn't go into the store and if they had been given access, her evidence was that they would have gone into the store to verify that there were in fact "no saleable hatching eggs inside".

Commission's Suspension Decision

48. The Commission met on January 27, 2021, reviewed the Appellants conduct in the 14-day period, the inspection report and the continued presence of eggs for sale signage at the roadside and on the website. The Commission considered the impact of licence suspension on the Appellants' egg flow to the hatchery and the need for time to come into compliance. On January 29, 2021, the Commission advised the Appellants of their licence suspension:

...we are writing to advise that the licences of both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. are suspended effective January 28, 2021. Your hatchery has been notified. The Commission will consider lifting the suspension only when it is fully satisfied that both Royal Columbia Poultry ULC and Royal Greens Poultry Ltd. have come into full compliance with section 24 of the Consolidated Order.

Commission Decision to Lift Suspension

49. Following the suspension of the Appellants' licences, the Crosses emailed the Commission on January 29, 2021 and accused the Commission of being reckless with its power and characterized its actions in suspending their licences as extreme and heavy handed. They reiterated they had told the Commission they were in compliance and again threatened legal action. The email acknowledged "when your inspector asked to go inside our farm store, we did refuse to them as it is not located in our farm premise, similar to our home and garage etc." and concluded "you have no evidence that we are NOT in compliance. You are NOT our store regulator. You are not the regulator for other types of eggs. You only regulate Hatching Eggs, and quite frankly you have done a TERRIBLE job at that."
50. On January 30, 2021, the Crosses again emailed the Commission asserting their compliance, confirming they had stopped selling the few (ten) flats of non-hatching eggs per week and donating the rest and pointed out that the Commission had not picked up the breaker quality eggs as required. The email stated, "if looking in our

Churkey store, or having a sign, or a picture of brown eggs on our Churkey website removed was a requirement for compliance you should have told us". The email went on to demand that the Commission explain what they needed to do to satisfy the "Commission's definition of compliance".

51. On January 31, 2021, the Commission responded to the Appellants and concluded as follows:

In the circumstances, a mere assertion that you are compliant will not suffice. It is incumbent on you to demonstrate to the Commission's satisfaction that you are in full compliance with the Consolidated Order. At a minimum, you will be required to show that:

- a) you will be responsive to all Commission communications, whether originating from staff or otherwise;
- b) you have removed all roadside signage referring to the sale of eggs and will submit to full monitoring and inspection (including access to the farm gate shop, if requested) to ensure your continued compliance; and,
- c) you will be subject to spot checks to ensure compliance until such time the Commission is satisfied.

52. Later that day, Mr. Cross responded to the Commission's email reiterating that they were in compliance and that they were very careful to explain to the inspector that the eggs they were selling in their store were not any form of hatching egg from broiler breeder chickens. They again maintained they had no idea the inspector was requiring or demanding entry to the farm store by anything that was said. Mr. Cross asked the Commission for another inspection.

53. The next day, the Commission conducted another inspection of the Appellants' premises along with an inspector from the British Columbia Egg Marketing Board. This time, Mr. Cross allowed access to his store where it was observed that they were selling table eggs. Mr. Cross refused to provide records regarding the source of the table eggs. Following the inspection, the Commission met. The Commission was concerned about the lack of documentation and delayed its decision to allow the producer to make a legitimate effort to supply the requested documentation.

54. Ms. Nelson emailed Mr. Cross requesting copies of all records associated with the farm gate store stating:

Further investigation is necessary to satisfy the Commission with respect to past marketing's of breaker quality eggs, and to ensure that you will not market breaker quality eggs in the future. The Commission will need to see the records associated with the farm store in order to consider lifting the license suspension.

To be clear, the following information needs to be provided;

1. All records concerning on-farm egg sales (whether hatching eggs or table eggs) from June 1, 2020 to today.
2. A full and detailed account of all egg suppliers, and volumes of egg sales (hatching or table eggs)
3. The identity of all egg suppliers
4. The amount of eggs sold through the shop

5. The customer list and
6. Financial records pertaining to the sale of eggs.

Additionally, the Commission will need a full and detailed account of what you have done with the breaker quality eggs since June 2020, when you asked staff to remove the program equipment, to today. If destroyed please provide details on of how they were destroyed

55. In his response of February 1, 2021, Mr. Cross denied having any records related to egg sales or donations of eggs to food banks.

56. On February 2, 2021, Commission Chair Jim Collins wrote to the Appellants:

As you have already been advised, the Commission is prepared to meet and consider the suspensions as soon as you supply the information and assurances it has requested. To avoid further delay, I urge you to deal with this matter with candour and sincerity as soon as possible. It is your obligation to demonstrate compliance with the Consolidated Order to the "full satisfaction" of the Commission.

A more substantive explanation of the Commission's position follows below but one aspect relates to hatching egg producers advertising eggs for sale (usually a sign) being required by the Commission to remove that advertising. You are stating that the sign (and website) advertising eggs for sale now refers to table eggs. The Commission is finding it difficult to understand why advertising and selling table eggs outweighs the value of producing hatching eggs in accordance with the Consolidated Order.

You have repeatedly stated that you are not now marketing hatching eggs from your farm. However, you have taken the position that "breaker quality eggs" are not hatching eggs at all, and that they do not constitute "regulated product" within the Commission's jurisdiction. To date, you have not acknowledged that you have been marketing hatching eggs from your farm contrary to the Commission's Consolidated Order. Do you now acknowledge that both RCP and RGP have marketing breaker quality eggs in violation of the Consolidated Order? In the absence of a clear admission from you to that effect, your communications to the Commission suggest that you are continuing to rely on the position that "breaker quality eggs" are not regulated by the Commission, despite the fact that the Commission has clearly rejected that argument in its earlier decision. In the absence of a clear acknowledgement from RCP and RGP regarding their past violations of the Consolidated Order, it is unlikely that the Commission will have sufficient comfort with respect to the prospect of future compliance that would be necessary to lift the suspensions.

With respect to your present and future compliance, the sudden appearance of table eggs on your farm raises questions.

Against this background, you claim to be unable to provide any meaningful details, and that you have no records at all, concerning: (a) the volume of breaker quality eggs marketed from your farm since June 1, 2020 and the identity of purchasers (a CFIA requirement); (b) the volume of breaker quality eggs "donated" by RCP and RGP since June 1, 2020; (c) the volume of breaker quality eggs claimed to have been composted by you since June 1, 2020, whether expressed in relative or absolute terms.

With respect to the sudden appearance of table eggs on your farm, you again claim to have no information or records whatsoever concerning: (a) the identity of your supplier(s); (b) when you first started to acquire table eggs for sale at your farm; or (c) the identity of purchasers (a CFIA requirement).

This and your previous statements with respect to the Commission's rules does not give it confidence that you are taking your obligations as registered producers under the Consolidated Order seriously.

I encourage you to provide the Commission with a full and frank response concerning your past and present marketings of hatching eggs and table eggs, accompanied by supporting records (which should exist). In the absence of records, you might consider providing the Commission with a statutory declarations in which full, frank and detailed particulars of your past and present marketings of eggs can be communicated under oath.

If "\$50-80 in sales per week" of table eggs from your farm is so important to you instead of your obligations under the Consolidated Order, it is essential that you provide full and complete information and available records as to why that is the case. Vague responses, devoid of detail and unsupported by any records are making it difficult for the Commission to find the regulatory comfort level it needs to consider lifting the suspensions.

Again, the Commission remains prepared to meet on short notice once it is in receipt of the information required above.

57. By telephone call on February 2, 2021, Ms. Nelson gave the Crosses two options to bring their farms into compliance: either give up selling table eggs from the farm gate store, modify the sign and website accordingly and remove all eggs from the store, be inspected and confirm they will not sell eggs going forward; or alternatively, provide the documentation requested, submit to frequent monitoring and swear an affidavit stating they will not sell hatching eggs, and thereafter continue selling table eggs.
58. The Crosses on behalf of the Royal Columbian, Royal Greens and Royal Feather chose option 1.
59. Later that day, Ms. Nelson inspected the Crosses premises and confirmed that the Crosses had removed all white table eggs from their store. Subsequently, the Crosses advised the Commission:

In response to your request, we confirm that as of the sending of our email to you on January 25, 2021 we ceased all donations and farm sales of all types, kinds and forms of hatching eggs.

We have remained in compliance since then, including all three inspection dates on January 22, February 1st and February 2nd.

We intend to remain in compliance
60. The Commission lifted the licence suspensions of RCP, RGP and Royal Feather later that day.

Decision and Analysis

61. The Appellants argue that the January 29, 2021 suspension decision must be looked at in isolation and confined to the grounds set out in that decision. In essence, they say this appeal is really about the validity of the inspection conducted on January 22, 2021. The Commission's reliance on the January 7, 2021 non-compliance decision in their response is inappropriate and misplaced and is an attempt to use the Appellants' decision not to appeal that decision to insulate its suspension decision from *de novo* review.
62. For the reasons that follow, the Panel disagrees with the Appellants' characterization of the conduct of the Commission and the importance of the January 7, 2021 decision to this appeal. On its face, the suspension decision is clear that it is a "decision follow up regarding license suspension for non-compliance with the breaker quality egg program". If there was any confusion about the reference line, the introductory line confirms the decision is "further to the Commission's decision dated January 7, 2021 and the site inspection that took place on January 22, 2021". The significance of that sentence is clear. The January 7, 2021 decision gave a 14-day grace period for the Appellants to demonstrate compliance and following the inspection, the Commission had evidence of "eggs for sale" signage, a website offering hatching eggs for sale and only an oral representation that table eggs, not hatching eggs, were being sold from the store.
63. This is not simply a case of a producer failing to cooperate with an inspection in violation of section 41. To place the inspection in context, the events leading up to both the compliance and enforcement decisions are relevant as one does not exist in isolation from the other. The Panel must first understand the basis for the January 7, 2021 decision which found the Crosses, RCP and RGP in non-compliance with the requirement in the Consolidated Order to market "breaker quality eggs" through the Commission.
64. While it is apparent that the Appellants disagree with the Commission's decision that it had authority over "breaker quality eggs", there is no dispute that the Appellants understood that the basis of the Commission's finding of non-compliance related to the fact that they had opted out of the NHEP in 2020 and were selling these eggs at their farm gate store or donating them to food banks or charities instead of composting them as required under the Consolidated Order.
65. In its January 7, 2021 decision, and after concluding the Appellants were non-compliant, the Commission could have immediately imposed terms or conditions on the Appellants' licences or issued a licence suspension. Instead, the Commission exercised lenience and gave the Appellants a 14-day grace period to demonstrate full compliance with section 24 to the satisfaction of the Commission. The effect of this decision was to require the Appellants to take affirmative steps to demonstrate to the Commission they were no longer engaged in selling or

donating eggs. Despite the repeated protestations of the Appellants to the contrary, the obligation that they demonstrate compliance to the satisfaction of the Commission was not unduly complicated or onerous. Nor do we agree that the Commission created a moving target for compliance.

66. A reasonable interpretation of the non-compliance decision is that the Appellants had a 14-day window to take affirmative steps to show compliance. To demonstrate a sincere interest in getting into compliance, the Appellants could have sent an email to the Commission, acknowledging their past error in not participating in the mandatory NHEP and their erroneous belief that it had become optional. They could have confirmed their intention to be compliant and remain compliant and either use the NHEP or compost their eggs going forward. This email could have been supported by photographs showing that they were no longer engaged in hatching eggs sales at their store, removal of signage and a screenshot confirming that their website no longer offered hatching eggs for sale. They could have provided confirmation that they had received the equipment for egg pick up by the NHEP or alternatively, evidence of composting of eggs. Further, the Appellants could have provided emails from those who formerly received donations acknowledging that such donations had ceased.
67. Similarly, the Appellants could have invited the Commission to conduct an inspection of their farm to confirm their many oral representations that they were no longer engaged in hatching egg sales from their store and that they were composting and/or making appropriate use of the NHEP. At a minimum, this would have required the Appellants to show inspectors inside their store (where they previously sold hatching eggs) and inside their barns (where they composted eggs).
68. Further, if their efforts proved unsatisfactory to the Commission, the Appellants could have asked what more was necessary.
69. As set out below, however, that is not what transpired.

Appellants' Efforts to Demonstrate Compliance Between January 8 – January 21, 2021

70. There is no dispute that between January 8 and the close of business on January 21, 2021, the Appellants failed to take any steps to demonstrate compliance with section 24. Further, the Appellants failed to respond to the Commission's texts, email and phone message all trying to confirm receipt of NHEP equipment. The Appellants made no effort to demonstrate a willingness to participate in the NHEP or explain their lack of communication with the Commission in their evidence in this appeal. The Commission could have decided to suspend the Appellants' licences based on the Appellants' failure to avail themselves of the 14-day grace period. Instead, the Commission gave the Appellants a further opportunity to demonstrate compliance.

Appellants' January 21, 2021 Email

71. The Appellants say the Commission erred in not accepting their email sent after hours on January 21, 2021 to a Commission staff person (on leave at the time) as adequate assurance of their intentions to be in compliance.
72. The Panel finds that the Commission did not err in failing to accept this email as adequate assurance of compliance. It is hard to understand why the Appellants chose to correspond with anyone other than the Executive Director or possibly the Commission Chair in matters as significant as compliance and enforcement. Further, it is unclear why they would have waited until after the close of business on the 14th day of the grace period to convey their "assurance". This conduct does not reflect well on the Crosses. Instead, it reflects a reluctance to engage in a significant compliance matter where human health is at potential serious risk.
73. Finally, when one looks at the wording of the email, the Appellants continue to dispute the Commission's interpretation of its authority as having no basis in history or fact. It criticizes the Commission's process and accuses the Commission of scaring those with farm gate sales about SE. The email goes so far as to accuse the Commission's NHEP as being the cause of SE problems. The Appellants say they will comply but only because of the threat of license suspension and not because the NHEP is a good or more safe practice. They state "as of 21Jan2021, we are in compliance with your ridiculous interpretation of the small egg program in the Consolidated Orders".
74. It is not at all surprising to the Panel that this email did not satisfy the Commission or give it any comfort that the Appellants intended to remain in compliance. While the email contains a bald assurance of compliance, the Appellants continued to challenge the Commission's authority and dispute that their past conduct in not participating in the NHEP created a public health risk. The email fails to acknowledge the extent of historical non-compliance or meaningfully demonstrate any steps taken since the non-compliance decision to rectify the situation. It does not identify any steps taken to dispose of the small eggs previously being sold from the farm store. It does not contain any supporting photographs showing removal of "eggs for sale" signage. It does not explain that any eggs being sold from the farm gate store are now table eggs. It does not confirm that the Appellants have obtained the equipment to send small eggs to the NHEP. There are no pictures confirming that eggs are now being composted or any independent confirmation that egg donations have ceased.
75. Based on this email, the Commission could have decided that the Appellants had failed to demonstrate compliance and proceeded to suspend their licenses on that basis pursuant to section 46. But it did not do so. In fact, once again the Commission exercised lenience and gave the Appellants a further opportunity to demonstrate compliance.

Commission's January 22, 2021 Inspection

76. Much was made in the oral hearing about the purpose of the January 22, 2021 inspection. Although Mr. Cross's evidence in his affidavit was that he understood that the Commission was going to conduct an inspection "for the purpose of ensuring that we were in compliance of section 27 of the Consolidated Order" in his oral testimony his evidence was that "the purpose of the inspection was to inspect saleable hatching eggs on the farm in the CAZ zone". In support of this view, he points to the video of Inspector Loewen where she makes a statement to that effect.
77. This argument seems to be an attempt to restrict or curtail the areas of interest for the inspectors, in effect arguing that "saleable hatching eggs" would be found in the barn as the regulated product shipped to the hatchery and are distinct from the small eggs sold from the store. We note in her evidence, Ms. Neu referred to wanting to see the "saleable hatching eggs" in the store.
78. The inspection report completed contemporaneously with the inspection states "producers were made aware that the inspection was instructed by Stephanie Nelson for evidence of egg sales". While Ms. Loewen acknowledged her statement on the video that she was there to inspect "saleable hatching eggs on the farm", she nevertheless maintained that the Appellants understood she was looking for evidence of egg sales.
79. Based on our review of the affidavit evidence and the oral testimony, the Panel does not find that the Appellants had any real confusion about the purpose of the inspection. Having been found non-compliant due to their small egg sales on January 7, 2021, and having been given 14 days to demonstrate compliance, it is inconceivable that the Crosses had any real doubt that the Commission remained concerned about their on-farm small egg sales. Further, the questions the inspector asked relating to the Appellants' egg sales at the farm gate, their prior history of selling and donating hatching eggs, the existing signage related to egg sales, and their current disposal practices should have left very little doubt about the purpose of the inspection.
80. Understanding that the Commission was concerned with the Appellants' prior practice of not participating in the NHEP and their hatching eggs sales from their store and/or their donations, it is difficult to accept the Appellants' characterization of the inspector's request to see the inside their store. Whether Mr. Cross thought the inspector was primarily interested in what he was doing with eggs in his barns (within the CAZ) does not explain why he would not have willingly opened the door to the store from which he previously sold small eggs when asked to do so. Further, equating the inspector's right to enter his farm store with her right to enter his garage or daughter's house is disingenuous. Clearly, the farm store was integrally associated with the non-compliant activities as the Crosses historically used their store as a means of disposing of small eggs. Further, the suggestion

that Mr. Cross thought the reason the inspector wanted to see inside the store because she was curious about churkey is in our view disingenuous and not believable.

81. Mr. Cross's position on this appeal appears to be that demonstrating compliance to the satisfaction of the Commission requires no more than a mere verbal assertion of a state of facts and the Commission is obliged to accept those facts at face value with no supporting evidence. Mr. Cross does not seem to recognize that as a producer in a regulated industry, it is up to him to know the rules and to follow them and demonstrate compliance when asked by the Commission to do so.
82. We find that Mr. Cross's responses to the inspector's questions were evasive, lacked candour, and were intended to obfuscate. He refused to acknowledge his prior sales of small eggs. He refused to provide any details regarding the table eggs for sale in his store, although the Panel now knows based on affidavit evidence that Mr. Wiebe sold 20 dozen table eggs to Mr. Cross the day before the inspection. While this may explain in part what eggs Mr. Cross was selling on January 22, 2021, it does not explain what he was selling before that date. Nor is it evidence that small eggs were not still being sold from the store on January 22, 2021.
83. Mr. Cross told the inspector that he was disposing of small and cull eggs either through the small egg program or composting. The evidence of the Commission is that Mr. Cross had not arranged for the necessary NHEP equipment to be dropped off. Further, the inspectors saw little evidence of composting of cull eggs or slurry in their inspection.
84. We find Mr. Cross's refusal to let the inspector enter his store constituted additional evasive conduct. In his evidence, he failed to offer a meaningful or compelling explanation as to why he would not open the door to his store to support his answer to the inspector's questions that the "eggs for sale" sign was now referring to the table eggs he was selling. We do not accept Mrs. Cross's evidence that she in fact invited the inspectors to look in the store. Ms. Neu's evidence is more believable in the circumstances when she stated if they had in fact been given access (invited in), they would have gone into the store to look for evidence of egg sales.
85. It is difficult to understand what possible reason there would be to not open the store's door, even if Mr. Cross had a honestly held view that the store was somehow offside the inspection or was simply an incident of inspector curiosity. The Panel finds that the only reasonable conclusion is that by not allowing the inspector access to the store, Mr. Cross was preventing the inspector from observing that there were still small eggs for sale despite his assurances to the contrary.

86. We have considered the Appellants' argument that it was incumbent on the inspector to do more, that she should have forcefully demanded entry to the store and made clear the consequences of failing to do so would be seen as a breach of section 41. Certainly, the inspector could have approached her inspection in a more forceful fashion and as part of the inspection she could have brought her investigative authority under section 41 to the producers' attention. However, it is very difficult to believe that Mr. Cross was not aware of the broad authority given to the Commission and inspectors to conduct investigations given his 28 years in the industry and his role as a Commission director.
87. Further, the inspectors' failure to forcefully demand entrance to the farm store or to explain the consequences of any refusal does not relieve the Appellants of their obligation, by virtue of the January 7, 2021 non-compliance decision and the Consolidated Orders, to demonstrate compliance to the satisfaction of the Commission. The Appellants had 14 days to demonstrate compliance and the evidence is that they took precious few steps to do so.
88. At the time of the inspection, the Appellants still had the same signage offering eggs for sale. They argue that nothing turns on the presence of their sign as Mr. Cross told the inspector that the eggs being sold as of January 22, 2021 were table eggs sourced from some unnamed registered egg producer. Despite offering no details to the inspector at the time, an affidavit submitted in these proceedings confirmed that a registered egg producer sold 8 flats of table eggs (20 dozen) to the Appellants on January 21, 2021.
89. The Appellants also continued to use their same website offering hatching eggs for sale. The website, which appears to have been created in 2020, discusses the benefits of broiler hatching eggs and offers them for sale at \$10 for 30 small eggs. Double yolk eggs, which are promoted as "rare and special", are offered at a premium of \$10 for 15 eggs. Mr. Cross's evidence is that it was an oversight to leave the website up.
90. In the face of the non-compliance decision issued by the Commission, it is difficult to understand the Appellants' decision to continue offering eggs for sale at all after January 7, 2021. Mr. Cross is silent as to what sales of eggs he engaged in between January 7, 2021 and January 21, 2021, although the evidence is he started selling table eggs from his store on January 21, 2021 so that his customers could still buy eggs. In the face of the ongoing compliance issues with the Commission, Mr. Cross's decision to start selling table eggs could be seen as an attempt to thwart or subvert the regulatory authority of the Commission by giving cover for continued sales of hatching eggs. Mr. Cross professes not to understand why the Commission would be concerned by table egg sales as they do not regulate them.

91. In the Panel's view, this is yet another example of Mr. Cross not taking the Commission's compliance concerns seriously. He did not take even the relatively minimal steps during the grace period to demonstrate that he had in fact removed signage, removed any mention of hatching egg sales from the website, stopped selling hatching eggs and either accept the equipment to participate in the NHEP or compost his eggs.

Opportunity to be Heard

92. The Appellants argue that the Commission erred by imposing licence suspensions without giving the Appellants an opportunity to provide any explanation or response to the inspection report, the presence of signage and the use of the website.
93. In our view, this argument misconceives the Commission's process. The Commission held an oral hearing in December 2020 where the Crosses had a full opportunity to respond to the Commission's concerns related to non-compliance, including their donations, sales, non-participation in the NHEP, signage and website. The Commission issued its written decision which, quite reasonably in our view, gave the Appellants a grace period to get into compliance instead of immediately suspending their licences.
94. The Appellants chose, as reflected in our reasons above, to do very little to satisfy the Commission that they understood its concerns. The Appellants could have conducted themselves in a transparent and respectful manner, acknowledged their historical non-compliance and provided evidence (not just bald assertions) of the steps taken to address the Commission's concerns. They chose not to do so before January 21, 2021. Mr. Cross's evening email on January 21, 2021 fell short of demonstrating compliance. Further, the Appellants were not forthright in the inspection and again failed to demonstrate their compliance to the Commission's satisfaction despite being given the opportunity to do so.

Proportionality and Section 24(6) Factors

95. The Appellants argue that a decision to suspend a licence or to cancel quota is at the most serious end of the disciplinary spectrum, as it threatens the existence of the farm and the livelihood of the farmer. They say the Commission imposed an indefinite suspension without giving the Appellants an opportunity to respond to the allegations of non-compliance after January 21, 2021. Section 27(4) gives the Commission discretion to "impose terms and conditions with respect to the marketing of a regulated product"; and it "may suspend or cancel the licences" if it found that the Appellants had failed to comply with s. 27(2). They argue the Commission breached its duty of fairness owed to the Appellants. In a related argument, the Appellants say that the Commission failed to consider the factors found in s. 27(6) before exercising its discretion to impose a penalty. These factors include a consideration of previous enforcement actions for similar contraventions;

the gravity and magnitude of the contravention; the extent of the harm to others; whether the contravention was repeated, continuous, or deliberate; any economic benefit derived from the contravention; and efforts to correct the contravention.

96. With respect to these factors, the Appellants say they have never been subject to enforcement action. There is no evidence of small egg sales after January 21, 2021. The sales before that date were well intentioned and only amounted to \$100/week. No harm has been alleged and any threat of SE is low due to the Appellants' high biosecurity standards. As to whether the contravention was continuous, the Appellants say they took the necessary steps and stopped all donations and farm gate sales after January 21, 2021. The contravention was not deliberate, and they derived little benefit (\$100/week). They attempted to comply with the Commission's demands, but compliance was a moving target and even if there was a contravention, weighing the factors under s. 27(6) should result in a minimal, if any, penalty being imposed, much less one at the most severe end of the spectrum.
97. The Appellants argue that the suspension decision was unprincipled and unwarranted and inconsistent with SAFETI.⁴ The decision is not strategic as it does not rely on historic precedents. The Appellants point to the decision in *Alfred Reid v. BC Broiler Hatching Egg Commission* (March 24, 1997) as an example of a penalty assessed upon finding egregious on-farm conditions. We find that decision unhelpful because the sole issue it addresses is the determination of costs awarded to Mr. Reid following his successful appeal to the British Columbia Supreme Court. It appears that the Appellants are relying on the underlying appeal decision where the Commission's Standards Committee found Mr. Reid's farm demonstrated a marked failure to meet basic industry standards. Ultimately, his hatchery decided to not place birds on the farm. The Commission asserted that the appeal did not concern a decision of the Commission and the real issue was whether it should have intervened on the producer's behalf with the hatchery. This case is not particularly helpful in assessing the proportionality of the Commission's sanctions in this case.
98. The Appellants also rely on *Mountainview Acres v. BC Chicken Marketing Board* (March 1, 2016) where the Chicken Board assessed a one period licence suspension (resulting in approximately \$21,000 in loss) against a chicken producer with a prior history of over production penalties. BCFIRB found that the penalty was consistent with sound marketing policy holding:
- 30Far from being a conscientious and diligent grower, he exhibited disrespect and disregard for the supply management system which confers upon him enormous benefits by way of quota and stability of price and production.

⁴ The "SAFETI" principles were developed by BCFIRB in consultation with the commodity boards it supervises to support a principles-based approach to decision-making by commodity boards to carry out their responsibilities. SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", "Transparent", and "Inclusive".

31. In these circumstances, we agree with the Chicken Board that the penalty imposed was consistent with sound marketing policy. It sends a strong message to the Appellants and industry that period-by-period compliance is both important and necessary to ensure that all B.C. chicken growers produce within the allowable tolerances. We do not agree that the penalty was excessive.
99. The Appellants point to the grower's repeat, deliberate and deceptive behaviour, which resulted in a finite and far less onerous penalty than that imposed by the Commission. Here, the Commission imposed an indefinite licence suspension, "until some future point in time at which the Commission determined it was satisfied the Crosses had demonstrated compliance with the Consolidated Order, which 'goal posts' changed almost daily".
100. The Appellants also argue the decision was not accountable as it should have given notice to other interested parties like the producer association. The process followed was irreparably unfair, and was not effective as the suspension was indefinite and the decision failed to communicate an intelligible standard for compliance. Transparency required an open, accessible and fully informed process where the appropriate interests including the public interest were considered. The Appellants say the suspension decision lacked transparency and required a more measured approach.
101. In response, the Commission argues that, starting in September 2020, it exhausted all reasonable efforts to coax the Appellants into compliance. It was entirely appropriate to suspend the Appellants' licences pending their appropriate assurances of compliance; mere assertions of compliance were insufficient in the circumstances. The Commission says its enforcement tools are limited to suspension or cancellation of licence or quota. It is not authorized to impose "penalties" for general non-compliance with the Consolidated Order. While section 16.2 of the *NPMA* allows for penalties for failure to comply with a biosecurity program, no such penalties were in force, and it is not clear that the non-compliance here falls within "a biosecurity matter". As such, the Commission argues that licence suspension pending appropriate assurances of compliance from the Appellants was the only reasonable enforcement measure available.
102. With respect to its consideration of section 27(6), the Commission points to its numerous communications with the Appellants which it says demonstrate consideration of these factors, including: the non-compliance decision, Ms. Nelson's small egg program compliance update to the Commission dated January 21, 2021; minutes from January 21, 2021 and January 27, 2021 meetings; the suspension decision and the February 2, 2021 email to the Appellants lifting the suspension.
103. The Panel agrees that licence suspension was the appropriate sanction in these circumstances. The infraction at issue is quite dissimilar to the *Mountainview* case, which involved period-by-period compliance supported by the strict regime of over

or under production penalties found in the chicken industry. Further, in the *Reid* case, it appears that the particular sanction imposed on the producer for non-compliance with industry animal welfare standards was a hatchery decision (not a Commission decision) to not place chicks on the farm, the result of which would have resulted in significant ongoing financial losses to the producer.

104. Although the Appellants argue that the punishment here was disproportionate to the infraction because it was “indefinite”, they did not demonstrate any significant financial impact of the four-day licence suspensions, let alone a disproportionate one. Instead, it appears that licence suspension was an appropriate mechanism to get the Appellants’ attention to address what the Commission felt were significant ongoing non-compliance issues in a timely manner. The suspension was not for an arbitrary period which could have continued for a longer period than the actual non-compliance. Further, had the Commission opted for a defined period and where the contravention was not in fact rectified within that period, the Commission had authority to cancel the Appellants’ licences. In this case, the suspension was only for as long as took the Appellants to get into compliance. The length of the suspension was entirely in the Appellants’ control and was avoidable had the Appellants chose to act sooner.
105. To assess the effectiveness of the penalty, one need only compare the Appellants’ inattention and disinterest in addressing non-compliance in the 14-day grace period with the steady stream of communication initiated once their licences were suspended.
106. We do not agree that compliance to the satisfaction of the Commission was a moving target. As stated above, all that was required of the producer was to take sufficient affirmative steps to show compliance. They could have taken the initiative during the grace period and sent an email acknowledging that they understood the Commission’s concerns relating to the public health risk of SE, their error in not participating in the mandatory NHEP, and confirming their intention to remain compliant and either use the NHEP or compost their eggs. This could have been supported by appropriate photographs as set out above. The Appellants could have invited the Commission to inspect their farm and store to confirm their oral representations that they were not engaged in hatching egg sales from their store and that they were composting and/or making appropriate use of the NHEP. None of that in our view would have been unduly onerous.
107. As for the s. 27(6) factors, the Panel has set out the communications between the Commission and the Appellants above which demonstrate that the Commission was very live to the impact of any possible sanction on the Appellants. The Commission considered where the Appellants were in their production cycle to minimize the impact of the licence suspension during the time needed to get into compliance. Further, while this was the Appellants’ first infraction, the compliance issue had been ongoing for several months and the Commission’s efforts to get the Appellants to voluntarily comply had been met with abuse and hostility. We find

that Mr. Cross was cavalier in his belief that the Commission was exceeding its authority when it sought to enforce compliance. In his view, he knew what was best for the industry and that complying with the NHEP was entirely unnecessary to avoid the threat of SE especially given his view that his own farm had very high biosecurity standards. This belief coloured his willingness to demonstrate compliance with the prohibition against marketing non-hatching or breaker quality eggs and ultimately led to the licence suspensions.

108. The Panel finds that the Commission's decision to suspend the Appellants' licence for non-compliance was reasonable in the circumstances and consistent with the SAFETI principles. We have already pointed out above that the Commission could have suspended the Appellants' licences in its non-compliance decision. Where there is a real risk to public health like SE, commodity boards may not have the luxury of time to undertake a graduated compliance and enforcement process. The Commission has long recognized the strategic need for hatching egg producers to manage public health risks associated with SE given the potential disruption an outbreak of SE could cause to both the table egg and broiler hatching egg industries. It is strategic, accountable, and effective to manage potential public health risks through appropriate and timely compliance and enforcement processes. One producer's idiosyncratic view of his own biosecurity standards is not determinative of what is in the public interest and what is needed to best protect the overall industry.

Suspension of Royal Feather's Licence

109. The Appellants take issue with the Commission's decision to suspend Royal Feather's licence as the Commission failed to refer to Royal Feather in either its non-compliance decision or its suspension decision. They argue that despite no notice, the Commission suspended Royal Feather's license on January 29, 2021. The Appellants point to this oversight as evidence of the Commission's hasty and flawed decision-making. They argue that the breaches of procedural fairness in connection with Royal Feather call into doubt whether the Commission met its responsibility as the first instance regulator and whether these breaches can be cured by this *de novo* appeal.
110. The Commission acknowledges that its communications were directed to Royal Columbian, Royal Greens, and Allan and Shelly Cross and not Royal Feather and it was an error not to identify Royal Feather as well. However, it argues that this error is without any material consequence, given that:
- a) the Crosses are the principals of all three corporate appellants, and had actual knowledge of the Commission's position with respect to non-compliance with section 27 of the Consolidated Order; and,
 - b) while it might be argued that the appellants could not have reasonably anticipated that Royal Feather's licence might be suspended, any deficiency arising from the failure to give proper notice has been cured by these *de novo* appeal proceedings:

Taiga Works Wilderness Equipment v Employment Standards (Director), 2010 BCCA 97 at paras. 28, 29, 36 – 38.

111. The Commission relies on this Board's earlier decisions in *Money's Mushrooms Ltd. and Pacific Fresh Mushrooms Inc. v. BC Mushroom Marketing Board*, (March 9, 1999), and *Stewart v. BCMMB* (February 29, 2009) for the proposition that a breach of natural justice by the first instance regulator can be rectified by BCFIRB reviewing the matter afresh in a *de novo* appeal hearing given its authority to confirm, reverse or vary the commodity board's decision made in the first instance
112. The Panel agrees that any procedural deficiencies caused by the failure of the Commission to include Royal Feather in its non-compliance or suspension decision have been cured by this appeal process. The Appellants have had an opportunity to lead all relevant evidence and make all relevant submissions with respect to the issues on appeal. Notably, the Appellants did not point to any prejudice suffered by Royal Feather resulting from its lack of notice. Nor did they suggest that Royal Feather was on any different footing than Royal Columbian or Royal Greens on the non-compliance issues or the steps taken to address those issues.
113. Accordingly, the Panel has treated Royal Feather in the same manner as the other two corporate Appellants in addressing the issues on this appeal.

Conduct Unbecoming a Regulator Supporting Award of Costs

114. In their reply, the Appellants argued that the Commission engaged in unbecoming conduct in its suspension decision and in this appeal which ought to support an award of costs. While they do not suggest the Commission has limited standing rights, they argue that the Commission is bound by its duty of impartiality even when acting in an adversarial position on an appeal. Where an administrative tribunal has full standing in an appeal of its decision, they argue it has a duty to refrain from litigating the merits of a decision in a way that calls into question its impartiality with the Appellants specifically and other producers generally. In support of this position, the Appellants rely on *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 and *18320 Holdings Inc. v. Thibeau* 2014 BCCA 494.
115. As this argument was advanced in reply, the Panel does not have the benefit of the Commission's submissions on this point. However, the Panel observes that the Commission is not an administrative tribunal. It is a first instance regulator of the supply managed broiler hatching egg sector created under the *NPMA*, the purpose and intent of which is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing. The *NPMA* does not create an adjudicative scheme or rules for the Commission; nor is it authorized to function as an adjudicative body and it does not do so.

116. In this statutory regime, BCFIRB is the specialized administrative tribunal expected to use its expertise in its adjudicative function. It is not required to grant deference to a commodity board or conduct appeals limited as to their grounds: *B.C. Chicken Marketing Board v. B.C. Marketing Board* 2020 BCCA 473 at para 14. As regulators, commodity boards are parties to an appeal and are subject to BCFIRB's Rules of Practice and Procedure. Commodity boards are expected to fully participate in appeals, call witnesses and make full arguments to demonstrate the sound marketing rationale behind their decisions and meet BCFIRB's expectation that their decisions be consistent with SAFETI principles.
117. The Appellants argue the Commission was overly partisan by attacking the Crosses' credibility, producing an affidavit from Ms. Loewen and not Ms. Neu, and taking "paltry advantage" of the Appellants' failure to appeal the non-compliance decision by advancing aggressive and untenable positions on this appeal.
118. The Panel observes that the Appellants' reply was made in advance of the oral hearing on September 21, 2021. As a result of that hearing, the Panel has come to its own view as the credibility to be afforded to the Crosses' evidence. We found Mr. Cross to be a less than forthright witness who failed to provide evidence of compliance despite being given multiple opportunities to do so. The Commission's failure to provide an affidavit from Ms. Neu was rectified by calling her as a witness. Ms. Neu's evidence was not determinative of any issues on this appeal and the failure to provide an affidavit from her was of little consequence.
119. Finally, the Appellants argue that the Commission was taking advantage of the fact that the Appellants did not appeal the January 7, 2021 non-compliance decision. This issue was addressed to some extent at the outset of these reasons. In short, the Panel does not accept this position. Mr. Cross is a sophisticated, long-time producer and former director of the Commission. If he wanted to appeal the January 7, 2021 non-compliance decision, he could have done so. Instead, he chose to appeal the suspension decision and argue that the Commission used the licence suspension to extract promises to cease activity which the Appellants maintained were permitted under the Consolidated Order (farm gate sales and donation of breaker quality eggs).
120. The Presiding Member left no doubt in his summary dismissal decision that it was not open to the Appellants to use this appeal to challenge the Commission's non-compliance decision:

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

If the appellants want to dispute the findings of non-compliance and the authority of the Commission to regulate "breaker quality eggs", they must appeal the decision

that made the findings of non-compliance. They have not done so. If the appellants wish to file an appeal of the January 7, 2021 decision, they will need to apply to BCFIRB and demonstrate what special circumstances exist to warrant extending the time for filing an appeal. [emphasis added]

121. Despite the Presiding Member inviting the Appellants to apply to extend the time for filing an appeal of the non-compliance decision, they did not do so. They chose, instead, to focus on what they described as the manifest unfairness of the suspension decision. They were critical that the Commission, instead of focussing on the suspension decision and its related findings, relied on the Appellants' failure to demonstrate compliance within two weeks of its non-compliance decision to defend this appeal. It argues that should this Panel find that the January 7, 2021 decision impacts its determination of this appeal, it should grant leave to appeal.
122. The Panel disagrees. The Appellants are sophisticated parties, represented by experienced counsel. It was up to them to make a considered decision about whether it was necessary to challenge the non-compliance decision given the matters they wished to put in issue. It is not appropriate to not take those steps, and then, when the Commission made what we have found to be a permissible and reasonable argument in response, try to seek leave to appeal the non-compliance decision.
123. For greater clarity, if a person has a complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period. This is especially so where it is the regulatory authority of the commodity board that is being challenged. Industry certainty and stability require that appeals be heard on a timely basis. Where the time to appeal is missed, it is incumbent on the Appellant to show special circumstances why the time to file the appeal ought to be extended. Here, the Appellants have not demonstrated any special circumstances and the Commission's reliance on its non-compliance decision should have been anticipated.
124. As the Panel has found that the Commission acted appropriately in circumstances to protect the integrity of broiler hatching egg and table egg industry, we dismiss the request for leave to appeal the January 7, 2021 non-compliance decision. Accordingly, there is no basis upon which we would award costs to the Appellants.

ORDER

125. The appeal is dismissed.

126. There will be no order as to costs.

Dated at Victoria, British Columbia this 23rd day of December, 2021

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Al Sakalauskas, Vice Chair and Presiding Member,



Pawanjit Joshi, Member



David Zirnhelt, Member