

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

REGULATION OF ASIAN HATCHING EGG PRODUCTION SUPERVISORY REVIEW

Submissions of Skye Hi Farms Inc., Casey van Ginkel dba V3 Farms and Bill Friesen and Lillian Fehr dba W. Friesen Enterprises

1. Further to BCFIRB's schedule for submissions and the Response of the BC Broiler Hatching Egg Commission (the "Commission") to BCFIRB Questions Regarding: Regulation of Asian Hatching Egg Production dated September 29, 2017 (the "Response"), the submissions of the Appellants Skye Hi Farms Inc. ("Skye Hi"), Casey van Ginkel dba V3 Farms ("V3") and Bill Friesen and Lillian Fehr dba W Friesen Enterprises ("W Friesen", collectively with Skye Hi and V3, the "Appellants") are as follows:

Background

2. This submission is the latest in a series of efforts by the Appellants since the Commission's November 2013 decision to enact Amending Order 11 to save their hatching egg operations from the harm threatened by various regulatory proposals of the Commission. Contrary to the suggestion of the Commission that the Appellants' position has shifted, these efforts of the Appellants have consistently sought the protection of price and production controls that would permit them—on the one hand, in the case of Skye Hi and V3—to protect the investment they have made in the industry by permitting them to continue to operate and grow to a the size of a new entrant grower, and—on the other hand, in the case of W. Friesen—to potentially retire and to realize on sale the value of the business in an industry they have spent decades building.

3. The Appellants believe the three pillars of supply management promote the interests of sound marketing of agricultural products in this province and that price and production controls are in the best interests of the industry and the Asian chicken value chain. In the 2015 appeal they took the position that a specialty quota system was not only desirable but was effectively mandated by the BCFIRB 2005 Supervisory Review. They objected—strongly—to the scheme proposed to be implemented by the Commission, not because the Commission would have issued quota but rather because the manner in which the Commission proposed to allocate quota was both procedurally and substantively unfair to them. They also argued that the manner in which the quota system was proposed to be implemented—ignoring the pillars of supply management of price and production controls—was not sound marketing policy. BCFIRB agreed, finding the Commission had made “significant errors of both policy and process”¹
4. BCFIRB commented particularly that the Commissioners’ “inability to speak in a meaningful way to their Reasons for Decision or the principles flowing out of the 2005 Specialty Review which created a template for this type of policy development” was “troubling”² and that they had “no hesitation concluding that the [Commission’s] process was flawed.”³
5. The Commission’s position at the 2015 appeal was remarkable in many respects. They argued that they owed no duty of fairness to the Appellants,⁴ declined to call any Commissioners to explain their decision as part of their case,⁵ and failed to make

¹ BCFIRB March 29, 2016 Decision (the “Decision”) at para. 141.

² Decision at para. 88.

³ Decision at para. 68.

⁴ Decision at para. 14.

⁵ Decision at para. 56, 87-88.

concessions to the manner in which the business realities of industry realities would be impacted by the proposed program.⁶

6. The evidence was that the Commission was being pressed by Mr. Donaldson of Bradner Farms in 2011 and 2012 to issue specialty quota.⁷ Bradner Farms and Coastline Chicks, the two most significant specialty/Asian hatching egg producers, intervened in support of the Commission's decision in the 2015 appeal. Part of the concern of the Appellants was that the manner of allocation of quota proposed by the Commission would effectively re-allocate market share from three of the smallest producers to the two largest producers. BCFIRB found that the Commission treated Bradner and Coastline preferentially to the Appellants during its decision-making process to the detriment of the industry sector.⁸
7. In response to the suggestion that the quota program as it was proposed was deficient, the Commission's Executive Director "used the analogy that this Regularization Program, as published, represented the torso, 'with the arms and legs to be added later'"⁹.
8. BCFIRB found that in designing the quota program, the Commission failed to take into account the manner in which the level of quota allocations issued under the program would impact the Appellants and that there was no mechanism by which a producer could increase their quota holdings to the level of a new entrant grower.¹⁰ However, the comment that "regulating a return to fewer producers of Asian chicks than now exist is not consistent with sound marketing policy" is relied on by the Commission in their most

⁶ See, in particular, Decision at para. 98 re: refusing to consider appropriate consideration of exceptional circumstances regarding the impact of the 10/10/10 rule on the proposed sale of W. Friesen Enterprises to facilitate the retirement of Mr. Friesen and Ms. Fehr.

⁷ Decision at paras. 54-62.

⁸ Decision at paras. 65, 72, 75, 78, 81, 121.

⁹ Decision at para. 108.

¹⁰ Decision at paras. 112-113.

recent Response to support the suggestion that BCFIRB and the Appellants took a position critical of the potential impact of a quota system on prospective new entrants¹¹. In this regard this comment is taken out of context—it is not the quota system that discourages diversity but rather a system of allocation of quota that would destroy the businesses of small producers and transfer their market share to the large producers which would have this effect.

9. In setting aside the Commission's decision, BCFIRB's March 29, 2016 Decision contemplated a process that would last 180 days in which the Commission would conduct consultations, perform a proper SAFETI analysis and propose and enact regulations as appropriate.¹² It is now over 18 months since BCFIRB's Decision and almost four years since Amending Order 11 was enacted.
10. Less than two weeks after receipt of BCFIRB's March 29, 2016 Decision, the Appellants came together with Coastline and Bradner—the two parties who intervened in favour of the Commission's position in the 2015 appeal—and agreed as to a fair allocation of quota in the specialty sector. This had been the most contentious issue in the appeal and the Appellants on the one hand and Coastline and Bradner on the other had taken diametrically opposed views on the issue in the appeal.
11. The agreement between five of the six specialty hatching egg producers was delivered to the Commission on April 7, 2016¹³. On June 24, 2016, the Commission issued—for after-the-fact review and comment by stakeholders—a report entitled “Commission

¹¹ Response at p. 1.

¹² Decision at paras. 136-137.

¹³ Aff. #1 of W. Friesen, made October 13, 2017 (“Aff. W. Friesen”) at Ex. A.

Recommendation Report on Asian Breeders”, which recommended exemption of the specialty hatching egg market from production and price controls. There was no indication that the Commission had meaningfully considered the April 2016 agreement between five of the six stakeholders and no explanation of the reason the Commission chose to completely disregard the common view advanced by the five producers.

12. In July 2016, the Appellants, Coastline and Bradner all sought to appeal the recommendation report but those appeals were dismissed as premature. In August 2016, the Commission requested that BCFIRB approve its proposal to exempt specialty hatching eggs from regulation, with the exception of biosecurity, food safety and premise identification requirements. This decision was appealed by the Appellants, Coastline and Bradner, but in September 2016, those appeals were deferred until the completion of a supervisory review commenced by BCFIRB on September 15, 2016.
13. A timetable for a supervisory review was agreed upon in October 2016, but that was later suspended following the resignation of the Commission’s chair. In January 2017 a new Commission chair was appointed and that Commission re-commenced its review leading to the June 28, 2017 recommendations, which were in substance the same as the recommendations made a year earlier. BCFIRB then provided questions to the Commission to identify areas requiring clarification or more detail and the Commission has now in its September 29, 2017 letter provided its response.
14. The Commission has now reversed its 2013-2016 position that would have implemented a quota system for Asian hatching eggs entirely and has decided that no quota should be issued.

15. The explanation for this about-face is that they decided to “wipe the slate clean”. The Commission does not explain in any meaningful way why the pillars of supply management of price and production control are appropriate for mainstream hatching egg producers but not Asian hatching egg producers. No plausible explanation is provided for the decision, after many years of insistence that quota would be issued for Asian hatching eggs, rather than tweaking the proposed regulatory scheme, to abandon it completely. This is notwithstanding that specialty production is recognized and allocated to B.C. through the national allocation.¹⁴

16. As set out above, since the 2015 appeal, five of the six Asian hatching egg producers have agreed that quota is appropriate for the specialty hatching egg industry and to an allocation of quota that they agree would allow all current producers to continue to produce at current levels to meet the needs of the market that has developed to date and to permit Mr. Friesen and Ms. Fehr to sell their farm and retire.¹⁵ With respect to the sixth producer, who is vertically integrated, it has indicated a lack of interest in participating in a supply managed sector, and it is proposed they would be grandfathered at 2015 production levels. Implementation of this agreement could accordingly satisfy all current producers in this industry sector.

17. There have been further developments in the now two years since the hearing of the 2015 appeal, certain of which are outlined in the affidavit of Bill Friesen included with this submission. Mr. Friesen describes the manner in which as a small producer, his business

¹⁴ See, e.g., *BCBHEC Report to BCFIRB: Quota Tools Assessment Review*, p. 4 “Currently, specialty production is allocated to B.C. but is not managed through issuance of quota”

¹⁵ Aff. W. Friesen at Ex. A.

has been vulnerable without the protection of regulation to practices that might be considered unfair competition practices.

18. Mr. Friesen describes feeling pressured to reduce his chick price because a larger competitor threatened to undercut him, not being paid by his chick purchaser (FVDG) for an excess of 120 days in some cycles, with no recourse to the Commission, and finally facing the potential loss of his business at a price that does not reflect the years of investment he made in it.¹⁶
19. The Commission acknowledges that concerns were raised by producers “about potential harm to their business in a non-regulated sector” and that “A supply managed system protects all industry participants and without it, all industry participants – but particularly smaller and non-vertically integrated operations – are at risk”.¹⁷
20. The Commission says that it “does not argue that there will be no further competition but it is not convinced that the sector and individuals are at significant risk from that competition given their overall success and/or longevity to date.”¹⁸ In what seems likely to be an allusion to the discussions between Mr. Friesen and Fraser Valley Duck and Goose described in Mr. Friesen’s affidavit, the Commission writes “We are aware of negotiations currently taking place between an existing producer and a potential entrant producer about the former selling his business to the latter. This may be a difficult negotiation but the decision to regulate or not to regulate should not be made for other reasons.”¹⁹

¹⁶ Aff. W. Friesen at paras. 6-19.

¹⁷ BCBHEC Recommendation to BCFIRB Regarding the Asian Breeder Sector at p. 14.

¹⁸ *Ibid.*

¹⁹ *Ibid* at p. 15

21. The Commission states in responding to BCFIRB's questions that part of the reason for the complete retreat from regulation was that their goal of "resolv[ing] conflict" was not realized²⁰ by their attempt to implement Amending Order 11. This is a curious comment given that the allocation proposed was stayed and then set aside in BCFIRB's Decision and accordingly there was no opportunity to observe whether a fair quota allocation system might resolve conflict. But it is particularly curious given that five out of six Asian hatching egg producers including both the Appellants and Bradner and Coastline who took radically different positions in the 2015 appeal, have been able since the Decision to resolve their conflict and come to an agreement.²¹ It seems that implementation of a fair quota system would resolve conflict, at least as between producers.
22. The other development since the Decision is that one of the Asian chicken processors (Fraser Valley Specialty Poultry, formerly Fraser Valley Duck and Goose) has indicated an intention to commence Asian hatching egg production and effectively to replace W. Friesen's production.²² There is a suggestion that if quota is issued and an exemption to the 10/10/10 rule granted, a purchase of the quota can be negotiated but that otherwise the production will simply be transitioned without any purchase of the ongoing business.²³

²⁰ Decision at p. 2

²¹ With respect to the sixth producer who wishes to be exempted from regulation, all producers made clear to the Commission there is no objection to an exemption for that producer.

²² Aff. W. Friesen at Ex. B, E.

²³ Aff. W. Friesen at Ex. B, E.

23. This information was provided to the Commission in advance of the Response but does not appear to have been considered directly, although there is reference to the fact that “more integration” may be forthcoming.²⁴

Failure to set price and production controls is not sound marketing policy

24. As is likely evident by the deferred appeals, the Appellants are of the view that the decision of the Commission not to set price or production controls in the specialty sector is not sound marketing policy.
25. First, the failure to apply these pillars of supply management is not consistent with and does not appear to take into account the policy framework and directions provided by BCFIRB as part of the 2005 Specialty Review.
26. While the Commission in its June 2017 recommendations refers to the 2005 Specialty Review, the Commission has not actually applied the policy framework set out in *Specialty Market and New Entrant Submissions: Policy, Analysis, Principles and Directions*, which provides that as a general matter “Specialty production and marketing should be managed using a distinct and restricted class of quota” (p. 7).
27. While it is contemplated in the Specialty Review that marketing boards and commissions will develop rules for personal use and small lot exemptions in the specialty sector, specific policy directions and principles are set out in respect of exemption (section 5.10), which also do not appear to have been considered or applied by the Commission,

²⁴ Response at p. 2.

notwithstanding the comment in the September 29, 2017 Response that “It must be noted ‘exemption’ as an alternative to the imposition of a quota system has been recognized by BCFIRB as a valid option as early as 2005, when it released its Specialty Review Report”, in reference to section 5.10 of the Specialty Review.

28. While exemptions are certainly contemplated in the 2005 Specialty Review for “smaller producers serving local or regional markets”,²⁵ there is no acknowledgment of the Commission of the significant growth in the specialty chicken and as a result hatching egg markets since 2005, which make the prospect of exemptions in 2017 quite different for this market. In particular, the Commission does not acknowledge the impact of the changes to the *Canadian Chicken Licensing Regulations*, to include enumerated classes of specialty chicken.²⁶
29. The producers are of the view that a proper application of the policies and directions set out by BCFIRB in the 2005 Specialty Review would require that the Commission manage Silkie and Taiwanese hatching egg production using a distinct and restricted class of quota. Such a program should be designed in a manner that supports industry innovation, for example by making provision for new entrants and exemption for small lot producers, as further contemplated by the 2005 Specialty Review, but creation of a specialty hatching egg quota class should be a starting point of regulation of this sector.
30. Second, the failure to apply price and production controls more generally robs industry participants and Canadian consumers of the benefits of supply management in this sector.

²⁵ 2005 Specialty Review, at 5.10

²⁶ *Canadian Chicken Licensing Regulations*, SOR/2002-22, Schedule 4

31. Supply management of agricultural products provides benefits to Canadian consumers as well as to those involved in the supply chain of regulated products. It ensures that Canadian market demand for agricultural products is met by local farmers while providing assurance to Canadian consumers as to the quality of agricultural products.

32. In other context, the Commission itself acknowledges the importance of supply management for the hatching egg sector. As the Appellants pointed out to the Commission in July 2016 submission, the Commission puts it clearly on its website, where under the heading “What is Supply Management?”, the Commission explains:

Starting the early 1970's the Canadian government realized that our market would be regularly oversupplied and this could trigger drastic reductions in producer prices. Supply Management is necessary to ensure Canadian farms can continue to contribute to our thriving nation.

Supply management has enabled hatching egg producers to become true partners with hatcheries and chicken growers.

Supply management enables provincial boards and commissions to regulate production and negotiate prices through the provincial governments. Stability of production and pricing has become invaluable to both producers and consumers. All pricing at the wholesale, supermarket or restaurant levels are not part of the supply managed pricing system. All hatching egg producers are paid at the farm gate only.

Today, six provinces have hatching egg marketing boards or commissions and work together in a joint body called ‘Canadian Broiler Hatching Egg Producers’ (CHEP).

Hatching egg production is regulated under supply management and this sensible approach to growth and expansion is much more environmentally friendly than the systems of other countries, where overproduction and concentration can be common. Thanks to supply management this serious concern is not the case in Canada.

Responsibility for supply is the cornerstone of supply management. The BC Broiler Hatching Egg Commission administers a quota system to ensure that BC Hatching Egg producers meet the required volume according to the National allocation system. BC's market share is 15.83% of the national system.

BC's Hatching Egg producers contribute 82.57% of the yearly provincial allocation and allow for 17.43% of domestic throughput for imports.

Managed Supply attributes to Partnerships between hatcheries and producers, is environmentally friendly by controlling overpopulation, and is a direct input from producers, working for producers.

(emphasis added)

33. The specialty hatching egg sector is no different from mainstream hatching eggs or other regulated products in terms of the potential benefits to industry participants and consumers (in this case specialty chicken growers) of a system of supply management. The Appellants are all of the view that sound marketing policy requires that the three pillars of supply management, control of imports, pricing and production, be applied to the specialty hatching egg sector.
34. While the Commission suggests in its most recent decision that the sector is operating effectively as an unregulated industry, the producers' view is that the current unregulated state of the specialty hatching egg industry is unstable and unsustainable. While producers have made do in a state of uncertainty for some time due to the Commission's changing position with respect to regulation and lengthy decision-making process, it is the view of the producers that regulation is necessary in the specialty hatching egg industry in order to assure continued supply to specialty chicken producers.
35. While the specialty hatching egg sector has developed as a free market, the market is sufficiently large and tightly integrated with specialty chicken production (which is of course subject to supply management regulation by the Chicken Board) that sound marketing requires principles of supply management be applied to specialty hatching egg production as well. To permit the industry to continue to operate outside of supply

management and without import or production controls risks creating instability for the supply of specialty chicken growers: either underproduction of the particular breeds required or conversely an oversupply of specialty hatching eggs in the province for which no specialty chicken quota is available to grow chicken.

36. Similarly, a lack of pricing control for specialty hatching eggs in a situation where specialty chicken is subject to pricing control by the Chicken Board is not sound marketing policy and deprives those producing specialty hatching eggs of the benefits of supply management.
37. The difficulties set out in Mr. Friesen's are examples of the risks to smaller non-vertically integrated producers in the absence of supply management. While the Commission alludes to certain of those difficulties in its recommendation report under the heading "Harm" on p. 14, it appears not to take seriously the problems faced by producers in this sector, particularly the vulnerability of smaller producers who have invested in the industry but lack the protection of quota.
38. As set out above, a contentious issue between the producers in the process to date has been the allocation of specialty hatching egg quota if such a system were implemented. That issue has now been resolved as between the five participating producers and all agree that it is in the interests of the industry that the specialty hatching egg sector be supply managed through the implementation of a specialty quota system, consistent with BCFIRB's directions in the 2005 Specialty Review.
39. In submissions to the Commission, the Appellants, together with Coastline and Bradner proposed that a class of specialty hatching egg quota be created and quota issued

commensurate with each producers' 2015 specialty hatching egg production. The only other industry participant, K&R, was not a party to those submissions but it was noted that those who are had no objection to K&R being grandfathered at current (i.e. 2015) levels. For those producers who have been in operation for longer than ten years (including W. Friesen Enterprises), it was proposed that this quota should be fully transferable, upon Commission approval. To the extent additional production is required going forward to meet increasing needs of specialty chicken producers, the Commission should coordinate with the Chicken Board and an industry SMAC in determining what additional quota is required and how and to whom it should be issued in order to ensure the needs of specialty chicken growers and processors are met.

Failure to Regulate Flow-Through Product is Not Sound Marketing Policy

40. In addition to the reasons set out above, there is an additional reason that the failure to implement price and production controls is not sound marketing policy which arises from the position of hatching eggs as a flow-through product that is part of a supply chain which is otherwise regulated.
41. Supply management of a portion of the supply chain disrupts ordinary market principles. Because there is pricing and production control over specialty chicken, the market for specialty hatching eggs is necessarily constrained.
42. Ordinarily, anti-competitive practices in the market place are constrained by application of the *Competition Act*. However, as a general matter that *Act* does not apply to industries regulated pursuant to the *Natural Products Marketing (BC) Act* because of the regulated conduct defense. That defence allows market participants to rely on their

compliance with a regulatory regime to excuse what might otherwise be considered anti-competitive. The Federal Court described the defence as follows:²⁷

... I accept counsel for the plaintiffs' argument that it is a regulated industry defence, not an exemption which is pertinent. Indeed as I read the cases it is a regulated *conduct* defence. It is not accurate merely to identify an industry as one which is regulated by federal or provincial legislation and then conclude that all activities carried on by individuals in that industry are exempt from the *Competition Act*. It is not the various industries as a whole, which are exempt...but merely activities which are required or authorized by the federal or provincial legislation as the case may be. If individuals involved in the regulation of a market situation use their statutory authority as a spring board (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statute then such individuals will be in breach of the *Competition Act*.

(emphasis in original)

43. In order for the regulated conduct exception or defence to apply, the actions in question must have been directed or authorized by a statute or regulation.²⁸ So for example, if the Commission were to set a price for hatching eggs and industry participants were to buy and sell at that price, the regulated conduct defence would protect market participants from liability under the *Competition Act* even if there were anti-competitive effects of that price.
44. The Commission suggests that it is not necessary to set price because the BCCMB COP for specialty chicken immediately captures the chick cost.²⁹ Elsewhere it expresses concern about the cost of funding a COP study, amongst other regulatory expenses.³⁰ It is unclear whether it is the Commission's position that price is already effectively set by the BCCMB's COP process (in which case, it would seem simple enough for the Commission to endorse and enforce that price in the specialty hatching egg sector) or that

²⁷ See, e.g., *Industrial Milk Producers Assn. v. British Columbia (Milk Board)*, [1989] 1 FCR 463.

²⁸ *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 77-79

²⁹ Recommendations at p. 12

³⁰ Recommendations at p. 13

it would be too difficult/costly to set price, in which case, the system is left vulnerable to anti-competitive pricing activities supply management is intended to control. It is worth noting that the fact that the BCCMB COP captures chick cost does not mean that those costs will necessarily be captured by the price. By way of example, in the past when feed prices were high, chicken growers have not always been paid 100% of COP.

45. Where, as is proposed here by the Commission with respect to specialty hatching eggs, price and production are not regulated, the regulated conduct defense would not operate to exempt market participants from operation of the *Competition Act*. As a result, if a large player in the market were to engage in abuse of their dominant market position for example through predatory pricing, the remedies ordinarily available under the *Competition Act* would be available.
46. The implications of a flow-through product being subject to the *Competition Act* when other parts of the supply chain are regulated under supply management are difficult to fully grasp in the abstract. Supply management is in some respects inherently anti-competitive. It is difficult to reconcile a specialty chicken sector subject to supply management with a specialty hatching egg sector that is subject to the *Competition Act*.
47. The Commission dismisses the concerns about anti-competitive practices in the specialty hatching egg sector and simply proposes to stand back and hope that the various industry participants will work matters out amongst themselves. The Commission appears unconcerned about the consequences to the regulation of the supply chain as a whole should this view prove unrealistically optimistic.

The Commission's Process and Decision Gives Rise to a Reasonable Apprehension of Bias

48. Finally, with regret, we are driven in these unusual circumstances and at the conclusion of a lengthy and convoluted process undertaken by the Commission to advance the position that the Commission's process and decision gives rise to a reasonable apprehension of bias.

49. The test for a reasonable apprehension of bias is well established. It was articulated by Grandpré J. in *Committee for Justice and Liberty, et al. v. National Energy Board* in the following terms:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

Committee for Justice and Liberty, et al. v. National Energy Board,
[1978] 1 S.C.R. 369 at p. 394

See also *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 37, cited in *K.P.B. v. A.S.R.*, 2016 BCCA 382 at para. 30 and *Zhang v. Cute-Go Novelty Inc.*, 2016 BCCA 451 at para. 6

50. There is a presumption of judicial and administrative impartiality. To be reasonable, an apprehension of bias must rest on serious grounds and is an inquiry that remains highly fact-specific.

Wewaykum Indian Band v. Canada, 2003 SCC 45 at paras. 76-77; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at pp. 638-639; *Team Transport Services Ltd. v. Klair*, 2008 BCCA 226 at para. 26

51. We start from the proposition that the Commission over the course of this process has made two diametrically opposed decisions, the only constant in which is the prejudicial impact on the Appellants.
52. First, the Commission proposed a quota system that would have seriously damaged the Appellants businesses. As set out above, in the March 2016 Decision, BCFIRB found that the Commission's process in arriving at the decision to implement that quota system was unfair to the Appellants.
53. As set out above, the positions taken by the Commission during the 2015 appeal, including taking the position it owed no duty of fairness towards the Appellants, further supported the already serious concern that the Commission was biased against them. The highly adversarial nature of the appeal proceeding and the extremely lengthy process that followed has only further exacerbated the perception that the Commission had pre-determined to make a decision that would damage the Appellants, whatever that decision ultimately turned out to be.
54. Following the March 2016 decision, a quota system that excluded the Appellants having been set aside, the Commission decided to abandon quota altogether. Taken together, the two decisions convey that the Commission is only prepared to regulate and issue quota if it may exclude the Appellants. That option having been denied by BCFIRB's decision, the Commission no longer wishes to regulate if in doing so it would be forced to regulate the Appellants. This impression is supported by the suggestion in the June 2017

Recommendations that the specialty producers are difficult to regulate and that the “cost” (quotes in original) of regulation would be too high.³¹

55. In response to BCFIRB’s question requesting that it explain its rationale for its change in recommendation to increase regulation of the Asian hatching egg market, the Commission starts from the proposition that its “February 27, 2015 recommendation conflicts with the Commission’s position with respect to the appropriate regulation of this production”³², comments (inaccurately) that “industry stakeholders have also had shifting positions on this question, including by way of appeal of the February 2015 decision to establish a quota-based system”, and then concludes that it has simply “wiped the slate clean”³³ and taken a “fresh look”.
56. In this regard, the Commission appears to have completely misapprehended the arguments advanced by the Appellants on the 2015 appeal. The position of the Appellants on that appeal was that the decision to issue quota in a manner that would exclude them and effectively destroy their businesses was not sound marketing policy, not that there were “inherent limitations to production under a quota system”.³⁴ In that regard, far from arguing that a quota system was inappropriate for the Asian hatching egg industry, Skye Hi and V3 sought an order varying the Commission’s Decisions to require that quota be issued to all specialty producers who were in production on November 28, 2013 based on production during the most recent quota period or in the case of those

³¹ Recommendation at p. 13.

³² Response p. 1.

³³ Response p. 2.

³⁴ Response p. 1.

producing below the new entrant producer level of 5000 breeders chick quota equivalent to 5,000 breeders per two year quota period (Decision at para. 12).

57. On the question of whether the Commission had substantively considered whether a wholesale rejection of the basic supply management tenets of price and production controls was sound marketing policy, the Commission commented that the objectives of the February 2015 recommendation of “increased stability and discipline to Asian hatching egg production”, compliance with biosecurity regulations, and “to resolve conflict” have not been achieved to date and that there were “serious concerns” by other stakeholders about over-regulating.³⁵
58. While the Commission in its June 2017 decision stresses that it undertook a consultative process, it is worth noting that the decision arrived at in June 2017 is in substance the same as the recommendation report arrived at in June 2016, in the absence of any consultation. Consultation is not adequate if it occurs after a decision is made.
59. The reasons provided by the Commission for the complete reversal of their prior decision do nothing to assuage the concerns of the Appellants that their interests have not been taken into account by the Commission. The recommendations convey the impression that the Commission has formed the view that the Appellants are difficult, exaggerating concerns about potential harm to their business and not entitled to the “privilege and responsibility”³⁶ of a regulated hatching egg sector.

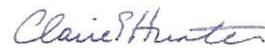
³⁵ Response p. 2.

³⁶ Recommendations at p. 14.

60. In the context of the Commission's disregard of the Appellants' interests prior to the 2015 appeal and its conduct during the 2015 appeal, the reversal of the decision in a manner that still manages to be harmful to the Appellants gives rise to a reasonable apprehension of bias.
61. The Commission has been give four years since Amending Order 11 was enacted to make a decision that would comply with sound marketing policy vis-a-vis the specialty hatching egg section. They have been unable to achieve that objective. In the circumstances, BCFIRB must exercise its supervisory jurisdiction to provide clear guidance to the Commission.
62. Sound marketing policy of the specialty hatching egg sector requires the implementation of supply management, including price and production controls. The long and sorry history of this matter speaks to the need to establish an SMAC to ensure stakeholder interests are appropriately considered in this future. It appears that the only way to achieve these objectives is by the clear and strong intervention of BCFIRB. The time for that intervention is now.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 13, 2017



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