



October 20, 2017

Daphne Stancil, Panel Chair
BC Farm Industry Review Board
780 Blanshard Street,
Victoria, BC, V8W 2H1

Dear Ms. Stancil:

Reply to Submissions Regarding Regulation of Asian Hatching Egg Production

In its letter dated September 15, 2017, the BC Farm Industry Review Board (“BCFIRB”) directed that the Commission submit its final reply by 4:30 pm, October 20, 2017. This letter is that final reply.

As BCFIRB has already noted, there is “an extensive history behind the establishment of a strategic level of regulation for BC broiler hatching egg specialty production”. That history may be summarized, in part, as follows:

1. On November 28, 2013, the BC Broiler Hatching Egg Commission issued Amending Order 11 which contained its original Regularization Program. The Regularization Program created a mechanism for producers who had commenced production of Silkie or TC broiler hatching eggs by 2010 to apply for “regularized” quota based on their demonstrable market share.
2. This Amending Order was made the subject of an appeal to BCFIRB. The Appellants challenged the Commission’s process, as well as the substance of the Amending Order itself. Among other things, the Appellants argued that it was a “major flaw” for the Commission to base quota allotment on a historical production period which does not recognize more recent (or anticipated) market changes.
3. As noted in the resulting decision, the Commission was then of the view that a quota system of the kind proposed was necessary because:

“...there is no sensible way to legislatively define a special class with sufficient precision so that it is perfectly clear what falls into the class, and what does not. Though the “Silkie” bird (and the market it serves) is perhaps the most unique, it becomes considerably more challenging to articulate why a Taiwanese broiler breeder should be treated differently from a RedBro broiler breeder, or from a Hubbard ISA broiler breeder, or a Cobb Vantress broiler breeder, or Ross broiler breeder. Any lack of precision in the definition would have the potential to destabilize the entire regulatory underpinnings of regulated marketing.”



4. This rationale, which was a principal driver of the Commission's original decision to implement that quota system, was rejected by BCFIRB:

111. We do not find the Polderside rationale helpful in considering the decisions on appeal. The Commission says that Redbro chicken is not genetically distinct from conventional chicken production but what was distinct in the Polderside application was the intention to self-market chicken grown under quota from a strain of chicks not available from a BC hatchery. In contrast here, the appellants and their witnesses maintain that Silkie and TC chicken are distinct. They say that other regulators classify Silkie and TC as specialty and have no difficulty differentiating Silkie and TC from mainstream production. We share the appellants' concern that the Commission's unique approach appears inconsistent with federal regulatory rules and the Chicken Board's quota scheme. The Commission did not consider the potential implications of the differences in classification between the Chicken Board and the Commission in making its decisions.

5. Furthermore, the decision held that the substance of the Amending Order was not consistent with sound marketing policy because of the impact that production controls would have on producers who wished to grow their production beyond their current demonstrable market share.

117. The panel finds that regulating a return to fewer producers of Asian chicks than now exist is not consistent with sound marketing policy. In the current market, chicken growers have more choice of chick producers and there is increased opportunity for the development of variety within hatching egg breeds. We heard compelling arguments that diversity of producers in the Asian hatching egg sector provides for a more resilient marketplace, increased production efficiencies within the sector overall and protection in the event of outbreaks of disease or other disasters. In our view, the Commission's orders fail to give sufficient weight to the importance of diversity amongst producers **in the further development of this sector.** (emphasis added)

It is against this background that the Commission has looked at the matter afresh in accordance with the supervisory process administered by BCFIRB. The Appellants seem to argue that the Commission has made an abrupt and inexplicable "about face". In fact, the Appellants even go so far as to suggest that the Commission's change in direction is motivated by malice or "bias". This is simply not so. The Commission's current recommendation was developed in accordance with a supervisory process administered by BCFIRB, and the substance of that recommendation must be considered in light of the context and "extensive history" – a history which includes BCFIRB's findings regarding the substantive deficiencies of the originally proposed quota system.



More specifically, the Commission's concern with respect to its ability to "legislatively define a special class with sufficient precision" was a key driver behind the original decision to implement the proposed regularization policy. This concern was held to be unfounded. Furthermore, the implementation of any quota program will invariably have a detrimental effect on diversity of producers. Though it might be possible to satisfy the idiosyncratic demands of these Appellants by changing the amount of quota allotted to them, it is obvious the implementation of a quota system would continue to give rise to the same objections in principle that were raised by some of the Appellants in the appeal. In other words, these objections in principle would apply with equal force to other persons who might also wish to develop their production in excess of their current, demonstrable market share. A quota system would still have a limiting effect on the chicken growers "choice of chick producers", and would still stifle "diversity of producers in the Asian hatching egg sector."

Far from promoting diversity, the imposition of a quota system would essentially make the Appellants "the" Asian hatching egg sector, which in turn would make the marketplace less resilient; would decrease production efficiencies, and weaken protection in the event of outbreaks of disease or other disasters. Among other things, the Commission's current recommendation reflects a sincere attempt to address the substantive deficiencies identified by BCFIRB with respect to the originally proposed Regularization program, including BCFIRB's express finding that the proposed quota system "fail[ed] to give sufficient weight to the importance of diversity amongst producers in the further development of this sector." (emphasis added)

Furthermore, though the Appellants seem to argue that the Commission's current recommendation is inconsistent with the "pillars of supply management" and the 2005 Specialty Review, this is simply not so. The *Natural Products Marketing (BC) Act* ("NPMA") provides clear authority for the Commission to "exempt". Pursuant to paragraph 8(1)(a) of the *British Columbia Broiler Hatching Egg Scheme* and paragraph 11(1)(e) of the NPMA, the Commission is expressly vested with the authority "to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it". Furthermore, and as has been noted now on multiple occasions, BCFIRB has recognized "exemption" as an alternative to the imposition of a quota system a valid option since it released its Specialty Review Report in 2005:

5.10. Exemptions

Exemptions provide a tool by which Boards may authorize individuals, or groups of individuals, to produce and/or market outside certain of the Boards' Orders. Exemption does not necessarily (or even usually) mean exemption from all regulation. Section 11 (1)(e) of the Act provides a Board with the power "to exempt from a determination or order a person or class of persons engaged in the production, packing, transporting, storing or marketing of a regulated product or a class, variety or grade of it." It is important that any exemptions provided be clear regarding which parts of the Orders are included in the exemption.



As the markets for supply managed products have evolved, average farm sizes have increased and the number of producers representing a significant majority of the production has decreased. Smaller production units can experience greater difficulty remaining viable as market pricing established by the Boards recognizes scale efficiencies through productivity variables in cost of production models. Smaller and mid-sized producers may exit the industry, generally by selling their quota to larger producers seeking to expand and having greater financial capacity by virtue of higher productivity and therefore higher margins under a fixed price scheme.

Many specialty producers are smaller producers serving local or regional markets, often by direct marketing efforts. For them, regulation – particularly regulation that is not calibrated to the realities of the class of production being regulated – can constrain their ability to produce and market their products. The administrative burden imposed by the regulation may tempt small producers to operate illegally outside the system or to simply quit. In the first case, illegal operation threatens the integrity of the regulated system while enforcement of the regulations can subject the Boards to unconstructive criticism. In the second case, withdrawing from operation may result in local direct market segments not being served, innovation being constrained and regional economic activity being curtailed. Sound marketing policy as articulated by FIRB and the Ministry is clear that markets must be served and innovation must be fostered.

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The Commission may wish to provide, if it has not already done so, a specific exemption for Asian specialty breeders. This exemption could take the form of an annually renewable license to produce Asian specialty breeders in any amount subject only to certain requirements such as humane production practices and marketing only for Asian specialty production.

Indeed, the very purpose of the supervisory review is to determine the “strategic level of regulation” for this distinct sector in view of all the circumstances as outlined in the Commission’s June 28, 2017 and September 29, 2017 reports. “Exemption” is not inconsistent with the “pillars of supply management”; the NPMA; the Scheme; the 2005 Specialty Review; or even this supervisory review. On the contrary, exemption (apart from rules necessary to achieve the objectives of premises identification, biosecurity and food safety) has been an option on the table for at least the last 12 years. It is the Commission’s view that the “exemption” principles described by BCFIRB in its 2005 report remain applicable to this sector today.

It should be noted too, that the application of the *Competition Act* to some or all of the sector’s activities is not itself an indicator that greater regulation is required. Commodity boards do not exist for the purpose of providing stakeholders with a “regulated conduct” defence. It is simply common sense that the defence will apply where conduct is regulated, but not where it is not.

In closing, the Commission submits that this issue has been the subject of extensive consideration and consultation. The matter been the subject of appeal, and the Commission’s current recommendation is the product of a supervisory review administered by BCFIRB. Though BCFIRB found deficiencies in the Commission’s process which led up to Amending Order 11, the Commission conducted this review in a



supervisory process administered by BCFIRB. Consequently, significant weight must be given to the Commission's current recommendation **as the first-instance regulator**. Having regard to the extensive consideration and consultation that has taken place in the context of this supervisory review in which the Commission has carefully reviewed all issues before it, including those in the October 13, 2017 submissions of the appellants, the Commission should be permitted to fulfil its statutory mandate as the first instance regulator, both now and into the future as circumstances develop and change over time. A lack of consensus, or even the existence of opposing views, is not a sufficient basis to disturb the recommendation of the first instance regulator – particularly as that recommendation has been developed in the context of a supervisory process administered by BCFIRB.

Regards,

A handwritten signature in black ink that reads "J. K. Collins".

Jim Collins, Chair
BC Broiler Hatching Egg Commission

Cc: BC Asian Breeder Hatching Egg Producers
BC Broiler Hatching Egg Producers' Association
BC Chicken Growers' Association
BC Chicken Marketing Board
BC Processors
Canadian Hatching Egg Producers
BC Hatching Egg Commission Website