

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND  
THE REGULATION OF SPECIALTY (ASIAN BREED) HATCHING EGG PRODUCTION

July 17, 2018

British Columbia Farm Industry Review Board  
Regulation of Asian hatching egg production  
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## INTRODUCTION

1. There is an extensive history behind the development of a strategic level of regulation for hatching egg specialty production (currently Silkie and Taiwanese Asian bird breeds). Much of this history can be found in the BC Farm Industry Review Board's (BCFIRB) March 29, 2016 decision *Skye Hi Farms Ltd. et al v. British Columbia Broiler Hatching Egg Commission* appeal decision (2016)<sup>1</sup>.
2. The appeals in that case arose out of producer issues with the Broiler Hatching Egg Commission's (Commission's) steps to regulate specialty production through enactment of Amending Order 11 the "Regularization Program" which established a regulatory framework for the Asian sector and the allotment of chick-based quota. The Regularization Program directly affected BC Silkie and Taiwanese (TC) hatching egg and chick producers. Specific appellant concerns included procedural fairness, whether Amending Order 11 was sound marketing policy, and how quota was to be allotted, and how quota was to be allotted to address minimum farm size considerations.
3. In its 2016 decision, BCFIRB directed the Commission to:
  - a) Cancel its specialty regulations;
  - b) Ensure specialty producers were compliant with basic biosecurity requirements (including disease management and food safety); and,
  - c) Conduct a transparent, inclusive, and informed process to determine the level of regulation beyond basic biosecurity requirements needed to achieve sound marketing policy objectives.
4. This supervisory decision considers the Commission's process and resulting June 28, 2017 recommendations for the regulation of specialty hatching egg production arising from the process noted above in paragraph 3.

## ISSUE

5. What regulatory tools are needed for the specialty hatching egg sector to achieve sound marketing policy objectives, including industry stability, innovation and diversity?

## LEGAL AUTHORITIES

6. Under the BC Broiler Hatching Egg Scheme (Scheme) s. 8(1)<sup>2</sup> the Commission has the general power to "promote, regulate and control in all respects, the production,

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<sup>1</sup> 2016 March 29. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and an Appeal From a Decision of the British Columbia Broiler Hatching Egg Commission Concerning the "Regularization of Historically Non-Compliant Silkie and Taiwanese Producers Program Rules"](#).

<sup>2</sup> British Columbia Broiler Hatching Egg Scheme

transportation, packing, storing and marketing, or any of them, of a regulated product<sup>3</sup>...”. Included in this section are powers to issue quota to persons marketing regulated product, regulate the price of broiler hatching chicks, and to exempt from determinations or orders a person or class of persons marketing the regulated product.

7. Under s. 7.1 of the *Natural Products Marketing (BC) Act (NPMA)*, BCFIRB is responsible for the general supervision of all marketing boards and commissions in the province, including the Commission. Section 7.1(2) of the *NPMA* provides for this supervisory authority to be exercised “at any time, with or without a hearing, and in the manner [BCFIRB] considers appropriate to the circumstances”. Under s. 9 of the *NPMA*, BCFIRB “has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined by [BCFIRB] under [the NPMA]”.

## INDUSTRY CONTEXT

8. BC is part of an integrated federal-provincial supply management system for broiler hatching egg production. Supply management is intended to support a fair return for efficient producers and ensure a continuous supply of product. BC’s Asian hatching egg sector developed over time to service specialty chicken growers filling an emerging market for Asian chicken. Today Chicken Farmers of Canada issues a provincial production share for Asian chicken in addition to the mainstream allocation. However there is no separate Asian hatching egg allocation to the provinces from the Canadian Hatching Egg Producers (CHEP). Regardless of the absence of a recognized national allocation, time has proven there are continuing Asian hatching egg production opportunities in BC.
9. BCFIRB’s 2005 Specialty Review<sup>4</sup> sought to encourage commodity boards, including the Commission, to recognize specialty production under the regulatory umbrella as needed to address factors such as biosecurity, fair treatment of producers, innovation, appropriate board representation and transferability of production rights.
10. The BC specialty hatching egg industry is a relatively small but important part of BC’s chicken industry. There are currently six producers. One business is fully integrated and produces specialty chicks for their own chicken production and processing operations. The other five businesses are partially integrated. Some producers have their eggs custom hatched by outside hatcheries. Others have their own hatcheries. The chicks go to supply the producers’ own specialty chicken operations and/or be sold to other specialty chicken producers. The panel does not know if some of these specialty chicks are exported.
11. BC’s specialty chicken production volume has grown over time but is now reported as "stable" by the BC Chicken Marketing Board (Chicken Board). Peak demand times are around Asian holidays such as Chinese New Year. There are currently just over 40

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<sup>3</sup> "regulated product" means a broiler hatching egg, a saleable chick or a broiler breeder.

<sup>4</sup> 2005 Sept 1. BCFIRB. [Specialty Market and New Entrant Submissions Policy, Analysis, Principles and Directions](#).

specialty chicken producers in BC, with Asian breed chicken making up about 3% of BC's total chicken production. The hatching egg producers supply chicks to these specialty chicken growers.

## REVIEW PROCESS

12. Following the March 2016 BCFIRB appeal decision, the Commission rescinded its Amending Order 11, and started the process of ensuring Asian hatching egg production facilities were compliant with biosecurity, food safety and animal care requirements that apply to all persons engaged in hatching egg production as per BCFIRB's direction.
13. On June 10, 2016 the Commission issued a memo to producers on various matters, including a draft work action plan. Attached to the memo was a letter setting out an agreement between five of the specialty hatching egg producers that quota could initially be allocated based on 2015 production as determined by the Chicken Board Chick Broker or Hatchery Reports.

The letter also set out the following requests:

- a) A third party cost of production analysis for TC and Silkie hatching eggs and chicks. The information to be used to determine a minimum chick price, and subsequently, a "minimum economically viable farm size".
- b) That the Commission recognize the right for specialty hatching egg producers to operate as "virtual hatcheries" (producers pay a hatchery to custom hatch their eggs).
- c) 2009 be the start date for 10/10/10 calculations (BCFIRB directed quota transfer assessment).
- d) That a Specialty Marketing Advisory Committee be formed, and composed of the six specialty hatching egg producers.

In its memo the Commission stated it was considering the specialty producer requests through the lens of BCFIRB's appeal decision.

14. On June 20, 2016 counsel for W. Friesen Enterprises (W. Friesen), Skye Hi Farms Inc. (Skye Hi), and V3 Farm (V3) raised questions regarding a communication from the Commission which in their view indicated a decision had been made by the Commission on May 27, 2016 about the appropriate degree of regulation for the specialty sector. BCFIRB replied on June 23, 2016 that its understanding was the Commission had complied with BCFIRB's direction that Silkie and TC breeder, egg and chick producers must comply with the Commission's Consolidated Orders with respect to biosecurity, food safety and premises identification as a matter of sound marketing policy.

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15. On June 24, 2016 the Commission sent out a "Recommendation Report" (the 2016 report) inviting email comments on its proposal to exempt Asian hatching egg production from price and production controls.
16. Skye Hi, V3, W Friesen, Coastline Chicks (Coastline) and Bradner Farms (Bradner) appealed these recommendations on July 22, 2016. BCFIRB dismissed the appeals on the basis that the Commission had not yet issued a final decision which could be appealed so the application was premature (August 16, 2016).
17. On August 19, 2016, the Commission requested that BCFIRB prior approve its proposal to exclude exempt Asian hatching egg production from regulation, with the exception of biosecurity, food safety, and premise identification requirements.
18. Skye Hi, V3 and W. Friesen (August 29, 2016) as well as Bradner and Coastline (September 9, 2016) appealed the Commission decision to seek prior approval for its decision from BCFIRB.
19. BCFIRB responded to the Commission with a September 15, 2016 letter reporting that BCFIRB had established a panel to review the Commission's request and its implications and that an "appropriate and transparent review process will be established and communicated - if indicated by the assessment - in order to ensure the necessary information for sound decision making."
20. On September 16, 2016, the presiding member of the appeal panel determined that the August 29, 2016 and September 9, 2016 appeals should be deferred pursuant to s. 8(8) of the *NPMA* until the completion of the supervisory review process referred to in BCFIRB's September 15, 2016 letter. In addition, the presiding member did not grant the remedial relief sought of a "moratorium on new entrants" given that the relief sought was not supported by relevant evidence and was a matter which would inevitably be considered during the course of the supervisory review.
21. On October 19, 2016, the BCFIRB supervisory panel met with the Commission and the Commission agreed to address outstanding process and information gaps through a BCFIRB-approved process.
22. On October 27, 2016 the Commission received a request from five of the six Asian hatching egg producers (Skye Hi, V3, W. Friesen, Coastline, and Bradner) that Amending Order 11 (the original Order appealed by three of the same specialty producers) be reinstated with specified changes related to how quota could be allotted and managed. K&R Farm Holdings Ltd. (K&R) did not participate in the proposal.
23. Counsel for the producers provided the joint request to BCFIRB. The Commission notified BCFIRB and the producers it would take the request into consideration as part of the supervisory review process (October 31, 2016).

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24. The Commission submitted its draft Work Plan to BCFIRB on November 30, 2016. On December 16, 2016 the BCFIRB supervisory panel approved the Work Plan, including time table, with the provision that the Work Plan be amended to reflect additional requirements. These requirements were intended to support the Commission in fully addressing:
  - a) Development of supporting information for consultation and decision-making processes;
  - b) Development and consideration of the full scope of potential regulation (including consideration of production controls and chick pricing); and,
  - c) Determine if production controls are necessary and whether or not chick price should be set.
25. The supervisory review panel subsequently suspended the review process in a letter dated January 13, 2017 following the resignation of the Commission's Chair. Although the Commission was prepared to move ahead in the absence of a Chair (January 11, 2017 letter), the panel felt "a quality process with positive stakeholder engagement through fresh leadership takes precedence over time." The panel reiterated this message again in a January 23, 2017 letter after re-evaluating its position based on a January 17, 2017 letter from the Commission asking that the review not be put on hold and that it was still ready to move forward.
26. Cabinet appointed a new Commission Chair on January 26, 2017. The Commission re-started its review process with the distribution of a final work plan and supporting documents to stakeholders on March 9, 2017.
27. The Work Plan set out a three Phase process that included several opportunities for stakeholders to provide input in writing and in-person. Stakeholders consulted included: BC Asian breeder producers; BC Broiler Hatching Egg Producers' Association, BC Chicken Growers Association, BC specialty processors, BC Chicken Marketing Board, Ontario Broiler Hatching Egg and Chick Commission; and, the Canadian Hatching Egg Producers. The Commission included the BC Egg Hatchery Association, but it did not respond. A major specialty processor may also not have responded. Throughout the process the Commission posted all documents from stakeholder input to the website and provided update reports to stakeholders and BCFIRB.
28. The Panel agreed to the scope of the Commission's review as follows:
  - a) Consider the full suite of regulatory approaches, including interfaces with Chicken Board regulation;
  - b) Develop specific regulatory options (including consideration of production controls and chick pricing);

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- c) Consider whether further regulation is needed to achieve sound marketing objectives including industry stability, innovation and diversification;
  - d) Consider if production controls are necessary, and
  - e) Consider whether or not the Commission should be setting Asian breeder chick price.
29. As part of Phase 1, the Commission requested specific industry information from stakeholders to fill existing gaps. Information requested included industry context (e.g. current and market demands, industry risks and instabilities) and regulatory implications (e.g. the pros and cons of regulation for the specialty sector and the regulatory interaction with the regulated chicken sector). V3, Skye Hi, W. Friesen, Bradner and the Chicken Board responded. The Commission scheduled and held follow-up face to face meetings and reviewed any regulation by other provinces in their interactions with specialty hatching egg production. The Commission provided an interim report to stakeholders and BCFIRB on April 18, 2017.
30. Following Phase 1, the Commission concluded, with BCFIRB's support, that it would be more effective and strategic to develop several regulatory options to consult on in Phase 2, rather than its original plan of consulting on draft final recommendations. In a document dated May 19, 2017, the Commission provided four regulatory options, including a summary of potential pros and cons for each option as a basis for consultation. The Commission stated unequivocally that for all options, provisions regarding biosecurity, food safety and premises identification programs that apply to mainstream production, would be mandatory and apply to specialty production.
31. The Commission's four options are summarized as follows:
- a) Full regulation - Production and price controls would be established through the issuance of quota and setting chick price by the Commission.
  - b) Exemption permit with limited regulation - While a permit would be issued by the Commission, there would be no production control. It was left open to discuss the potential for price setting, along with what other regulatory requirements may be necessary and strategic, with some ideas provided.
  - c) Exemption from regulation with a Memorandum of Understanding with the Chicken Board as the "de facto" regulator - No production control would be in place, nor would permits be issued. It was left open to discuss the potential for price setting and any other regulatory requirements that may be necessary and strategic.
  - d) Exemption permit - Production and price controls would not be established. No further regulatory requirements beyond food safety, biosecurity and premises ID programs.

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32. The Commission held in-person meetings with stakeholders on these regulation options.
33. On June 2, 2017 the Commission requested a short extension on its Work Plan timeline due to the need to defer a meeting with the Chicken Board where the Commission planned to discuss new information that had arisen out of the stakeholder meetings with the Chicken Board. In its June letter the Commission reported that it discussed the potential extension with the specialty producers and also provided the responses.
34. On the same date, BCFIRB accepted the amendments to the Work Plan schedule, extending the deadline for final submission of Commission recommendations to BCFIRB from June 11, 2017 to June 26, 2017.
35. In a document dated June 28, 2017, the Commission provided the supervisory panel its final recommendations. In its report the Commission summarized the information and stakeholder input it considered and provided the rationale for its recommendation including the results of the SAFETI analysis it completed in support of the recommendation.
36. On June 30, 2017, BCFIRB received a letter from counsel for Skye Hi, V3 and W. Friesen. The letter stated as follows:

The appellants have seen a copy of a document entitled BCBHEC Recommendation to BCFIRB Regarding the Asian Breeder Sector, dated June 28, 2017. The recommendation in that document appears in substance to be the same as the recommendations made by the Commission on June 24, 2016 and again on August 19, 2016. Given the lengthy delays in the Commission's process, the Appeals remain in abeyance over a year after the first Recommendation Report with the appellants having had no opportunity to be heard by BCFIRB either within the appeal or supervisory review processes.
37. The appellants continued to object to the substance of the recommendation made by the Commission and sought an opportunity to be heard by BCFIRB in that regard whether in the context of the appeals being held in abeyance or the supervisory review.
38. On July 4, 2017, BCFIRB received a letter from counsel for Coastline and Bradner. Their letter requested a hearing before BCFIRB as in their view the reasons given for the Commission's June 28, 2017 Recommendations displayed "an utter lack of understanding of the dynamics and challenges of the industry" and represented a "180 degree turnaround from the Commission's previous position - a position upon which our clients in the meantime have relied".
39. BCFIRB replied to the Commission and the parties on July 19, 2017. It stated that it required further information before it was prepared to issue a final supervisory decision and that it would send further procedural directions and timelines for submissions, including arrangements for receiving confidential business information should it be required.

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40. In a letter dated August 25, 2017, the panel provided additional questions for the Commission, and a related submission and response schedule. The schedule allowed for all stakeholders, including the appellants Skye Hi, V3, W. Friesen, Bradner and Coastline, to provide any "legal, factual or policy issues arising out of the Commission's June 28, 2017 recommendations and the Commissions' response to the panels questions...". The Commission had final opportunity to reply.
41. The Commission followed up with a request to BCFIRB on September 12, 2017 to extend the September 15, 2017 deadline for its response to the panel's questions to September 29, 2017 for resourcing and timing reasons.
42. On the same date, counsel acting for several of the Asian hatching egg producers did not oppose the extension request. The letter pointed out concerns with the length of the processes to date, the continuing business uncertainty faced by their clients and that any further extensions would be opposed.
43. BCFIRB took the position (September 15, 2017) that if a two week extension would support a sound and full response from the Commission, it would grant the extension. The panel also urged the Asian hatching egg producers to finalize their biosecurity and food safety audits as soon as possible.
44. The Commission provided its response to the panel's questions on the submission due date of September 29, 2017.
45. On October 3, 2017 the Commission sent out a letter in response to subsequent queries it had received about the Specialty Marketing Advisory Committee's role in the Commission's September 29, 2017 submission. In the letter it clarified a paragraph from the September submission.
46. The panel subsequently received a joint submission from Coastline and Bradner and a joint submission from Sky Hi, V3 and W. Friesen by the submission deadline of October 13, 2017. The parties continued to oppose the Commission's recommendations and advised of their preferred outcome.
47. Final reply was provided by the Commission in a letter dated October 20, 2017 reflecting that its recommendations remained sound marketing policy for specialty hatching egg production.
48. After reviewing all the submissions received, the supervisory review panel requested a meeting with the Commission "...for an open and frank discussion on outstanding questions regarding the Commission's rationale and recommendations" (May 11, 2018 letter, copied to stakeholders, including the Asian hatching egg producer appellants). In the letter the panel stated it would "...assess whether meetings are required with other stakeholders to address any further questions the panel may have."

49. The panel met with Commission representatives on May 31, 2018. On June 5, 2018 a summary of the meeting was sent to the Commission and copied to stakeholders, including the Asian hatching egg producer appellants.
50. Legal counsels for Skye Hi, V3, W. Friesen, Coastline and Bradner sent a joint letter to BCFIRB on June 26, 2018. The letter expressed a number of concerns including: lack of timeline for resolution; delays in resolution creating industry uncertainty and prejudice to the aforementioned specialty producers; no opportunity for input on the supervisory review process provided to industry stakeholders (including the aforementioned specialty producers); and, that the Commission appeared to be proceeding with its proposal to exclude specialty hatching egg production from supply management regardless of the outcome of this supervisory review decision or that the decision had already been made. These matters are addressed in this decision.

### **COMMISSION RECOMMENDATIONS AND RATIONALE**

51. The Commission recommended that its Consolidated Order not apply to specialty hatching egg production, transportation, packing, storage or marketing except for:
  - a) Section 1 of the Consolidated Order (Purpose of Order and Interpretation);
  - b) Schedule 5 of the Consolidated Order (Biosecurity, Food Safety and Code of Practice<sup>5</sup>) to that production;
  - c) The sector's portion of the costs of administering and enforcing Schedule 5; and,
  - d) The sector's portion of federal levies resulting from reported specialty production to the Canadian Hatching Egg Producers (CHEP).
52. It confirmed that all hatcheries remain subject to applicable provisions of the Consolidated Order. It also noted that in the future it may consider establishing a minimum price. Finally it stated that it intends further consultation with the Chicken Board regarding potential improvements to the effectiveness and accountability of specialty hatching egg and chicken production regulation by the two boards.
53. Additional points raised by the Commission included the potential that a quota system would increase barriers for future entrants. It also discussed the producer proposal that a Specialty Marketing Advisory Committee be formed (SMAC). Overall it raised the question of how many pricing and production advisory committees are required in the chicken sector. It was concerned about the suggestion that all six specialty producers serve on the SMAC. While this would ensure producer, hatchery and processor representation, it could be perceived as a closed shop.

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<sup>5</sup> National Farm Animal Care Council. Code of Practice for the Care and Handling of Hatching Eggs, Breeders, Chickens and Turkeys.

## ANALYSIS

54. The panel has before it a decision of a first instance regulator (the Commission) that it reached after a full process guided, and in part directed, by BCFIRB. As such, the panel respects the Commission's recommendations and focused its analysis on whether the review process was sound, and what, if any, issues it had with the Commission's determination of what constitutes sound marketing policy.

### ***SAFETI-based Process***

55. Arriving at strategic and effective outcomes generally depends on a sound process. BCFIRB expects all commodity boards, including the Commission, to take a principles-based approach to regulation, including the application of SAFETI<sup>6</sup> to processes and outcomes.
56. The panel observes it took the Commission several attempts, followed by additional support from BCFIRB, to develop and deliver a SAFETI-based process coming out of the original BCFIRB appeal decision. However, what is relevant for the outcome of this review, and what is discussed here, is the process that led to the Commission's final recommendations to BCFIRB. We turn now to the SAFETI analysis.

### Fair

57. In the appeal leading to this supervisory review, a particular issue for the parties was the fairness of the process. The duty of fairness to individuals increases as the consequences to those individuals from a decision increase. Decision makers are expected to use their discretion to consider the individual circumstances they are dealing with. Leaving aside the legal question of whether procedural fairness applies to a policy process like this<sup>7</sup>, there was a clearly established process which provided multiple opportunities for interested parties to be heard.
58. The Commission's March 2017 Work Plan established the scope of the review and the decision making process that would be followed, along with timelines that allowed for information collection, consultation, reporting and analysis, but kept the process moving along in a timely manner. Throughout this process, industry stakeholders, including all hatching egg specialty producers, had multiple opportunities to be heard by the Commission through different avenues.
59. At the close of the process, the panel's final questions to the Commission and related submission process provided the opportunity for interested parties to be heard directly by the panel on the Commission's recommendation. The recommendations have direct consequence for specialty hatching egg producers – the panel recognizes the importance for those with a direct interest to be fully heard. The Commission's responses to these

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<sup>6</sup> Strategic Accountable Fair Effective Transparent Inclusive

<sup>7</sup> *Dairy Farmers of Ontario v. Denby*, [2009] O.J. No. 4474 (S.C.J.)

questions, including the final reply elaborated on the reasons for the recommendations being made.

60. Counsel for the five specialty producers have been critical of the process pointing out that it was unduly long, causing sustained uncertainty. The panel agrees. Some of these delays such as the time taken in establishing a sound process could have been shortened. Other delays, such as the one involving the transition to a new Commission Chair, were unavoidable. The panel had determined at the time that it was important for a sound outcome that a new Chair be leading the process. Overall, the panel is of the opinion that the Commission process (once underway with the guidance of the new Chair) and BCFIRB's final process steps provided an appropriate level of procedural fairness.
61. Other criticisms included that the Commission was biased in making its recommendations by work it had completed and reported on before the process for this review was underway. It was argued that the Commission's decision-making demonstrated confirmation bias, given the similarity of the Commission's recommendations to those originally made in 2016. In the panel's view, the final SAFETI-based supervisory review process – including the opportunity for the producers with a direct interest to make submissions directly to BCFIRB, plus BCFIRB, not the Commission making the final decision – addresses any concern that there was a reasonable apprehension of bias regarding the Commission's actions and decisions.

#### Inclusive

62. The Commission included all immediately relevant value chain stakeholders in its process, including hatcheries, BC hatching egg and chicken producers, the hatcheries involved in the sector, the Chicken Board and chicken processors.

#### Transparent

63. The overall process was transparent. The Commission established a webpage where process letters, documents, reports and stakeholder input were posted in a timely manner. The Commission's Work Plan and subsequent reports informed stakeholders of timelines and review progress. The Commission followed its work plan, consulting with BCFIRB as necessary, and seeking approval for any process changes which the Commission promptly communicated.

#### Effective

64. An effective process supports reaching clearly defined outcomes. The Commission's work plan guided information collection and process and participant feedback, culminating in a consultation on specific regulatory options. The Commission proactively sought adjustments to the process where it decided those adjustments would better support sound decision making – for example deciding to consult on regulatory options rather than its draft recommendations, and consulting with interested parties and BCFIRB on this change.

The panel did need to follow up with the Commission on the need for full consideration of the implications of regulatory choices made regarding production and pricing controls.

### Strategic

65. A strategic process approach puts decision makers in a place where they can identify key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities. The Commission collected the immediately available industry context information and also information regarding potential out-of-province competition. This information enabled the Commission to more fully consider systemic gaps, challenges and opportunities. In relation, the Commission also considered administrative and regulatory connections with the chicken production which enabled the Commission to look at key specialty sector regulatory options.
66. The Commission's knowledge and understanding of the specialty hatching egg sector was none-the-less limited given it had not yet been directly engaged in regulating specialty hatching egg production. Without operational knowledge and the lack of long-term vision for this sector, its ability to make a strategic assessment of what regulatory tools are needed for sound marketing policy was limited. There is further discussion on this point in the following "Sound marketing policy" section.

### Accountable

67. Accountability is about maintaining legitimacy and integrity through understanding and discharging responsibilities. The Commission is clearly grappling with how to manage its relationship with Asian hatching egg producers while maintaining its accountabilities with other members of the supply chain. The Commission met its responsibilities to carry out a review of specialty regulation and provide its recommendations to BCFIRB as directed using a SAFETI-based process. It also, in keeping with expectations of a first instance regulator, sought out contextual information, looked beyond provincial borders, took into account the various pros and cons associated with different regulatory options, and considered the future of the sector as part of its process.
68. Overall the panel finds no serious flaws with the Commission's process. Any concerns about Commission procedural fairness and bias are remedied through this supervisory review.

### ***Sound marketing policy***

69. The panel assessed the Commission's rationale and recommendations in light of sound marketing policy.
70. It also took into consideration that the Scheme grants the Commission authority to use a suite of regulatory tools to ensure sound marketing policy and fulfill the intent of supply

management. These tools range from exempting production from regulation to full production controls (quota) and minimum price setting.<sup>8</sup>

71. The panel does accept the Commission's recommendations regarding specialty producers contributing to the sectors portion of the costs of administering and enforcing Schedule 5; and the sector's portion of federal levies resulting from reported specialty production to CHEP.
72. The panel does not accept the Commission's regulatory recommendations that specialty hatching egg production be exempted from regulation with the exception of Section 1 and Schedule 5 as an adequate long-term solution for the sound marketing policy reasons discussed below.

#### Production control

73. The Commission was satisfied that reported concerns with future production stability can be addressed through other existing means and without the addition of direct production controls. Some value chain stakeholders also shared this view. The majority of specialty hatching egg producers held to the view throughout the review process that management through the issuance of quota is the only reasonable regulatory option for the benefit of the sector. Arguments included that without the security of quota, market stability is at serious risk in terms of potential "in-fighting" between current producers and competition for existing marketing share from potential new producers. In relation, these five producers argued that without an assured share of production, some may be reluctant to further invest in their businesses, limiting opportunities for innovation and industry development.
74. Other considerations discussed by the Commission and stakeholders included that in the future, the BC specialty chicken and specialty hatching egg sectors must be able to quickly respond to potential market challenges and opportunities. These include inter-provincial competition should a federally-licensed processing plant for specialty chicken be established in Ontario. Ontario is already aggressively pursuing expansion of the specialty chicken sector which will require BC to be able to respond if it wants to maintain and expand the market for BC specialty chicken. There may also be the potential for growing export markets for specialty chicken and breeder production. As such, the Commission is reluctant to put in place regulatory controls that may hinder the sector's ability to continue to evolve and quickly respond to markets.
75. The panel observes that hatching egg producers do benefit from a significant amount of overall production stability given they supply a pre-determined market set through the chicken supply managed system. There may be ways to improve on this through better coordination between the Commission and the Chicken Board. Specialty hatching egg producers themselves spoke to export opportunities they would like to take advantage of,

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<sup>8</sup> BCFIRB in 2005 (and confirmed in 2016) limited the power for full exemption of specialty production from regulation in its Specialty Review Supervisory Decision by requiring that biosecurity requirements, including property identification, be established for all poultry sectors.

however they provided no specific market information. While exports are allowed under supply management, the system is primarily intended to service domestic markets.

76. That said the Commission's rationale does not take into account related considerations. For instance, whether there may be tension between the goal of having a diversity of production and producers, and a decreasing number of producers potentially capturing the majority of the market. Another consideration is, as reported by some of the specialty producers, whether the related climate of production share uncertainty could result in a reluctance to invest, or conversely, act as an incentive for a few to invest to capture greater market share. These tensions would likely become more evident in a stable or declining market than in a growth market. The panel observes that it was not provided with substantive evidence that producers have been reluctant to invest to date.
77. In several places the Commission alludes to the lack of market and sector information being a barrier to making further regulatory decisions about production controls at this time. The panel agrees lack of information presents a serious challenge. However, the panel is not satisfied, given the importance of the specialty sector, that vague promises of future action by the Commission to collect information to inform future regulatory decisions are sufficient.
78. The panel agrees with the Commission that it is premature to issue quota at this time in the face of the limited understanding of production cycles, sector and market information gaps, potential competition from Ontario, and interest expressed by some of the specialty producers in pursuing export markets. The panel also agrees there is little evidence to date of orderly marketing being at serious risk if quota is not issued. It does acknowledge the current "informal" agreement in place between five of the six specialty hatching egg producers may play a role in the current state of stability.
79. However the panel is left with significant sound marketing policy questions. These include: whether the Commission would be adequately fulfilling its responsibilities for managing production under its recommendation in light of the intent of supply management and the goals of the 2005 Specialty Review, the service that would be provided in return for the payment of national levies, and how the Commission would collect (and ensure it could collect) sector and market information from specialty producers in the future.

#### Minimum Price

80. The Commission's main rationale for not recommending establishment of a minimum price for specialty hatching eggs/chicks at this time is that it has not seen evidence to date that pricing is an on-going or systemic issue. It does acknowledge that one of the policy objectives of supply management is for efficient producers to receive a fair return. Minimum price gives producers leverage in an otherwise top-down system. The majority of specialty hatching egg producers saw price as an important regulatory tool to prevent price undercutting, particularly in light of potential new vertically integrated competitors.

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The Commission did note that minimum pricing may become an issue in the future and is prepared to respond as necessary.

81. As with the implementation of any regulatory authority, the challenge is assessing to what degree the past can reasonably inform the future. When setting up an initial regulatory structure, decisions must be informed both by the past and assessment of future risks and opportunities. The panel is very aware that pricing is a core component of the benefits provided by supply management for producers, and how it is set can be very contentious and have implications for the full value chain and BC's competitive position nationally.
82. The panel agrees with the Commission that it is premature to establish a minimum price for specialty hatching eggs/chicks in the absence of an immediate issue and in the face of industry information gaps. However, the panel is concerned whether the Commission, given its level of understanding and knowledge of the sector, would have the necessary administrative structures and information in place in order to respond in a timely manner if pricing controls are needed.

#### Analysis

83. In evaluating the Commission's sound marketing policy rationale, the panel faced several fundamental challenges, despite the extensive processes and consultations conducted to date:
  - a) Continued lack of data, industry knowledge and market information pertaining to the Asian hatching egg sector available to the regulators; and,
  - b) Absence of a vision and strategic direction for the specialty hatching egg sector from either the Commission or the sector itself.
84. There is no substitute for industry information and a stated vision and strategic direction when determining what regulatory tools are needed, beyond enforcing food safety, biosecurity, premises identification and animal care, for sound marketing policy outcomes. For the panel to affirm the Commission's recommendation or direct other long-term regulatory tools in this vacuum would not be sound decision making. The panel recognizes that the Commission evidently did its best with what it could collect to generate its recommendations, as did those who provided their input as part of this supervisory review process.
85. As such, this decision is the next step in the process of bringing specialty hatching egg production under active regulation as part of the supply management regulatory system. It also helps ensure the objectives of the 2005 Specialty Review are being met, and provides specialty hatching egg producers with some predictability.
86. Based on the policy objectives of supply management, establishing production controls through the issuance of quota and price setting should be the overall long-term goal.

87. While the panel expects application of production and pricing regulation to the sector is currently the goal, it reminds specialty producers that BCFIRB cannot provide a guarantee. The final regulatory outcome will be determined by what is needed to achieve sound marketing policy for the sector as a whole, and a successful, collaborative process to determine the appropriate long-term regulatory framework. In relation, the panel reminds the Commission that it needs to take care it does not apply a double standard to the regulation of mainstream and specialty hatching egg production. On this basis, the panel is not directing that the regulatory development process must result in the issuance of quota and minimum price setting.
88. A strategic regulatory outcome for the benefit of the sector requires close coordination and collaboration between the Commission, all specialty hatching egg producers and other value chain members. With any increased level of regulation, including potential production and price controls comes the need for accurate, timely industry information for the regulator alongside increased producer responsibilities and related accountabilities.

***Question regarding pre-determination***

89. As reflected in the panel's June 5, 2018 letter, at its May 31, 2018 meeting with the Commission, the Commission provided a general overview of its priorities and strategic objectives, taking into account the February 2, 2018 BCFIRB "Assessment Tools Evaluation Supervisory Review". The Commission commented on its plans to take a serious look at new entrants, regional development and specialty diversification as part of what is needed for a competitive and sustainable hatching egg sector. These plans were also communicated by the Commission at a May 22, 2018 broiler hatching egg producers' meeting.
90. The Commission then sent a copy of the draft work plan to stakeholders, including specialty producers, for input on June 7, 2018. The 2018-2023 Growth Allocation Strategy – Master Work Action Plan" (Master Work Action Plan) includes BHEC implementing regulatory changes for specialty hatching egg production by July 2019.
91. In their June 26, 2018 letter to BCFIRB, five specialty producers expressed concern that the Master Work Action Plan either reflected a pre-determined decision by the supervisory panel or that the "...Commission has determined it will exclude the specialty hatching egg sector from supply management regardless of the Supervisory Review process."
92. At the May 31, 2018 meeting the Commission did not seek input on its overall plans for the hatching egg sector as a whole (mainstream, specialty, new entrants, regional etc.), nor did the panel provide specific comments related to regulation of the specialty sector. The May 31 meeting was held to help the panel reach a full understanding of the Commission's rationale and recommendations as the panel was unable to come to a consensus given differing understandings of the Commission's submission and information gaps. Regarding concerns that the Commission will set aside the panel's decision, it is important

to recognize that the Commission does not have the authority to do so. BCFIRB has clear authority under the *NPMA* to both provide and enforce directions.

### ***Next Steps***

93. Before long-term regulatory tools can be finalized by the Commission, information gaps must be filled, a vision and strategic direction for the sector established, outstanding hatchery and producer regulatory requirements met, and necessary administrative structures and accountabilities (Commission and producers) put in place.
94. What is clear is the Commission is planning on incorporating specialty production into its overall production management planning. In doing so, the Commission is to take into account the diversity of business structures present in the industry, and the possibility of additional fully integrated business operations or others joining the sector.

### **Production Permit**

95. The Commission is to immediately establish a condition-based transferable production permit for Asian hatching egg production. This is a reasonable interim regulatory measure intended to fill the immediate sound marketing policy gaps.
96. A production permit brings accountability to production management by producers and the Commission, it leverages the Commission to collect sector and market information, it can continue to allow flexibility to respond to market changes, and provides an enforcement tool (rather than the Commission relying on the yet to be enacted administrative penalties clause in the *NPMA*). Depending on how it is established and evolves, a permit system allows flexibility for the Commission to establish a vision and strategic direction for the industry based on actual data while starting to address immediate current producer concerns about infighting and undercutting by potential new producers.
97. At a minimum, the interim production permit conditions must include:
  - a) requirement that transfers be approved by the Commission;
  - b) biosecurity, food safety, premises ID, and animal care requirements; and,
  - c) current production volume by the permit holder including strain and volume of strain by production cycle, which at a minimum is to ensure that the Commission obtains up to date production information.
98. Production permits are not to be issued to a producer until the producer is in full and current compliance with the Commission's biosecurity, food safety, premises identification and animal care Orders.

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99. Specialty hatching egg producers must be in compliance with the condition set out in paragraph 98 above within 60 days of the date of this decision to be eligible to receive a production permit.
100. Once industry information gaps are reasonably addressed and a vision and strategic direction for the industry are agreed on, the Commission is to revisit the question of regulatory production controls unless a situation arises where it needs to be addressed sooner. At this time the panel expects the “interim permit” would be revisited no later than fall 2019. The panel acknowledges it has received information from the Commission proposing a specific date as part of its Master Work Action Plan to make regulatory changes for the specialty sector. The Commission should revisit that date and adjust it as necessary to respond to this decision.

Strategic Planning

101. The Commission is to include the Asian hatching egg sector as part of its strategic planning work starting in fall 2018. The panel expects there will be, at a minimum, a draft vision and strategic direction in place for this sector for 2019. Given the extensive work already done with the sector to date as part of this review process the panel anticipates this to be a reasonable time frame.

Industry Information

102. The panel agrees with the Commission that information sharing with the Chicken Board is an important piece of regulating all hatching egg production, including specialty. It encourages effective information sharing between the two boards and ongoing improvements. However, this does not preclude the Commission from taking responsibility for its own information collection and determining how to best use it for the benefit of the mainstream and Asian hatching egg sectors.
103. The panel expects the Commission to work with specialty hatching egg producers and other value chain members to gather reliable information over the next year such as: chick placements, production volumes, cycle timing, egg/chick prices, demand for different Asian breed genetics, growth rates between mainstream and Asian specialty hatching markets, and barn specifications and densities.

Hatcheries

104. The Commission is to proceed with licensing those hatcheries handling Asian hatching eggs that are not yet licensed. In relation, the Commission is to ensure all hatcheries handling Asian hatching eggs participate in and are compliant with reporting requirements under the Commission’s Orders.

Industry Entry

105. As reflected throughout both the appeal and the supervisory review process, producer diversity is seen as an important component of a successful Asian hatching egg sector. With the implementation of the production permit, the Commission will need to establish a framework for managing industry entry requests. This framework would be a stepping stone for management of new entrants as part of potential further production controls. The panel acknowledges that entry into Asian hatching egg production will be determined by the size of the market for Asian breed chicken.

Sector Representation

106. The Commission did not make a specific recommendation as to sector representation. Specialty producers requested a Specialty Marketing Advisory Committee (SMAC) composed of all the current producers. Reliable and consistent sector input is required for strategic and effective regulatory decision making. As noted by the Commission there are already a number of advisory Committees established in regulation as part of the chicken value chain. The panel agrees that the producer proposal of forming a SMAC composed of said producers adds a further level of complexity and could be perceived as a closed shop.

107. Section 9(a-c) of the Scheme sets out that the Commission Pricing and Production Advisory Committee (PPAC) be composed of:

- a) 3 producer representatives appointed by the commission after consultation with the British Columbia Broiler Hatching Egg Producers Association,
- b) 3 hatchery representatives appointed by the commission after consultation with the British Columbia Egg Hatchery Association, and
- c) further persons appointed by the commission to broaden the scope of experience available to the committee in its deliberations

108. Based on the flexibility provided by the Scheme, the panel directs the Commission to revise its PPAC membership to include at minimum one specialty hatching egg producer member. The panel expects all specialty hatching egg producers to cooperate to provide input to the selection of the PPAC member as well as information to PPAC. The Commission should consider including an Asian hatchery representation as part of PPAC as well.

109. Specialty producers also raised concerns about being barred from membership with the British Columbia Broiler Hatching Egg Producers Association. As with the Commission, the panel cannot direct producer associations to accept members. The panel is optimistic the association will recognize the benefit of gaining members to support its mandate and revise its membership bylaws accordingly to admit hatching egg producers who do not produce hatching eggs or chicks for mainstream production.

Federal-Provincial

110. Given the distinct Asian chicken market in Canada, and the separate national allocation by CFC, BCFIRB recommends and supports the Commission in working with CHEP to explore whether a separate national allocation for specialty hatching egg production is warranted.

**DECISION**

111. The panel does not accept the Commission's regulatory recommendations that specialty hatching egg production be exempted from regulation with the exception of Section 1 and Schedule 5 as an adequate long-term solution for the sound marketing policy reasons discussed in this decision.
112. The panel does accept the Commission's recommendations regarding specialty producers contributing to the sectors portion of the costs of administering and enforcing Schedule 5; and the sector's portion of federal levies resulting from reported specialty production to CHEP.
113. The Commission is to immediately establish a condition-based transferable production permit for Asian hatching egg production. At a minimum the permit must include:
- a) requirement that transfers be approved by the Commission;
  - b) biosecurity, food safety, premises ID, and animal care requirements; and,
  - c) current production volume by the permit holder including strain and volume of strain by production cycle, which at a minimum is to ensure that the Commission obtains up to date production information.

The Commission may set other conditions, as it sees necessary, to assist with management of the sector. Depending on the conditions, consultation may be appropriate.

114. Production permits are not to be issued to a producer until the producer is in full and current compliance with the Commission's biosecurity, food safety, premises ID and animal care Orders.
115. Specialty hatching egg producers must be in compliance with the condition set out in paragraph 115 above within 60 days of the date of this decision to be eligible to receive a production permit.
116. The Commission is to establish a framework for managing industry entry requests in conjunction with establishing rules for production permits.

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117. The Commission is to include the Asian hatching egg sector as part of its strategic planning work starting in fall 2018. The panel expects there will be, at a minimum, a draft vision and strategic direction for this sector in place for 2019.
118. The Commission is to begin work immediately with specialty hatching egg producers and other value chain members to establish baseline industry information for its use by fall 2019.
119. The Commission is to proceed with licensing those hatcheries handling Asian hatching eggs that are not yet licensed. In relation, the Commission is to ensure all hatcheries handling Asian hatching eggs participate in and are compliant with reporting requirements under the Commission's Orders.
120. The Commission is to revise the PPAC membership to include at minimum one specialty hatching egg producer member, and consider including related hatchery representation.
121. An interim report on the status of these directions is to be provided to BCFIRB and industry stakeholders no later than December 31, 2018. The Commission is to revisit the question of regulatory tools no later than fall 2019 in the context of the vision and strategic direction for the sector.
122. The panel expects that the Asian hatching egg sector will be included as part of the Commission's annual Public Accountability Report to BCFIRB.

Dated at Victoria, British Columbia, this 17<sup>th</sup> day of July, 2018.



\_\_\_\_\_  
Daphne Stancil  
Panel Chair



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John Les  
Member



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Diane Pastoor  
Member