

November 27, 2020

File No.: 580206-2

Sent Via E-mail

British Columbia Farm Industry Review Board
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5

Attention: Kirsten Pedersen

Dear Ms. Pedersen:

Re: Chicken Sector Pricing Review Process

We write as counsel for the Primary Poultry Processors Association of British Columbia (the “**PPPABC**”) in relation to the Chicken Sector Pricing Review. We write this letter to raise procedural fairness concerns arising from the recent correspondence of the British Columbia Broiler Hatching Egg Commission (the “**Commission**”) and the British Columbia Farm Industry Review Board (the “**BCFIRB**”).

The first issue is that the Commission continues to take unilateral actions to advance a cost of production formula (“**COPF**”), without consideration to the impact on the British Columbia poultry industry and its stakeholders. From the PPPABC’s perspective, this contradicts the principles set out by the BCFIRB in the Chicken Sector Pricing Review and the commitments that have been made by the Commission leading up to this review. In pursuit of its predetermined objective to implement a COPF for hatching egg producers, the Commission has adopted the role of an advocate, closing its mind to other pricing options. The supervisory panel needs to ensure that the Commission participates fully, and in the best interests of the industry, in the current supervisory review.

Second, the November 13, 2020 decision of the supervisory panel to approve the Commission’s further reductions in the kill age breached the PPPABC’s procedural fairness rights. On December 23, 2019, the PPPABC appealed the Commission’s initial decision to reduce the kill age from 58 to 56 weeks. The BCFIRB deferred the appeal in favour of the supervisory review. However, on November 13, 2020, the supervisory panel issued a reconsideration decision and allowed the Commission to further reduce the kill age from 56 to 55 weeks. This reduction in the kill age impacts the PPPABC’s interests, by increasing the live price of chicken. The supervisory panel essentially decided an issue on the deferred appeal, without providing the PPPABC any of the corresponding procedural rights of an appeal. The actions of the Commission, enabled by the supervisory panel, have breached the procedural fairness rights of the PPPABC. We believe it to be appropriate to put this issue on record should judicial review proceedings be required.

Background

In considering the issues with the Commission's conduct, the procedural background to the supervisory review is important. There is now a clear pattern of the Commission taking unilateral actions to advance its predetermined goal to benefit hatching egg producers, to the detriment of the rest of the British Columbia poultry industry.

On November 27, 2019, the Commission advised stakeholders that it was amending the price linkage formula used to determine the price of Broiler Hatching Eggs and Saleable Chicks (the "**Price Linkage**"). On November 28, 2019, the Commission issued Amending Order 26, which unilaterally imposed two changes to the linkage formula:

- (a) the Commission removed revenue from spent fowl and salvage eggs from the Price Linkage; and
- (b) the Commission reduced the kill age of breeding stock from 58 weeks to 56 weeks in the Price Linkage.

(the "**Linkage Amendments**")

Both the PPPABC and the British Columbia Chicken Growers Association (the "**BCCGA**") appealed the Linkage Amendments in appeals N1911 and N1912, respectively, in the BCFIRB. The PPPABC maintains the grounds set out in its appeal, including but not limited to that the Linkage Amendments were made without legal basis or adequate consideration of the impacts on stakeholders. The Commission's removal of spent fowl and salvage egg revenue appears to be aimed at capturing for hatching egg producers a share of loyalty premiums. The reduction in kill age appears to be an attempt to remedy the Commission's prior decision to place breeders at 106% of base allocation in July 2018. Processors have paid most of the costs from the Linkage Amendments.

On January 27, 2020, the Commission reiterated its desire for an exit from the Price Linkage and to implement a cost of production formula ("**COPF**") pricing system. The Commission requested that the appeals of the PPPABC and BCCGA be deferred in favour of the BCFIRB's "supervisory consideration of a forthcoming 'evidence-based SAFETI rationale setting out why [an exit from the linkage] would be in the best interest of the hatching egg sector and the overall chicken supply chain". Nearly ten months later, it has yet to provide a SAFETI rationale.

On February 25, 2020, the BCFIRB granted the deferral request pursuant to s. 8(8) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 [**NPMA**]. The BCFIRB held that it was "not effective or strategic for any party to be dealing with core pricing questions on multiple fronts and on multiple levels". The BCFIRB held that the question of whether the linkage was sound marketing policy raised broader policy questions than the components appealed by the PPPABC and the BCCGA.

Supervisory Review and Interim Order

Shortly thereafter, the BCFIRB announced the current supervisory review. As a result, the appeals of the PPPABC and the BCCGA have not been heard. The legality, fairness, and soundness of the Linkage Amendments are still to be determined.

On July 3, 2020, the BCFIRB supervisory panel issued an Interim Pricing decision to prevent any further pricing formula changes by the Commission and/or the British Columbia Chicken Marketing Board (the “**Chicken Board**”) to support industry stability and orderly marketing while longer-term pricing solution discussions are underway (the “**July Order**”). The purpose of the July Order was to maintain a pricing status quo during the broader supervisory review process. The panel directed:

44. The Chicken Board and the Commission are directed not to change any aspect of the current pricing structures as defined in this decision, unless by the way of BCFIRB prior approval or until such time as BCFIRB determines otherwise.

“Current pricing structures” were defined in the July Order as including “the mainstream chicken live price formula, the price linkage formula used to set saleable chick price (“price linkage formula”) and the hatchery margin used to set the placeable chick price”.

In October 2020, the Chicken Board and Commission put forward a joint draft terms of reference for the supervisory review. The BCFIRB supervisory panel adopted these terms of reference on October 28, 2020. These draft terms of reference contemplate the supervisory review considering the pricing of hatching eggs and broiler chickens, as well as the desirability of maintaining the linkage. This is because the issues are ultimately connected in the chicken supply chain.

Unilateral Actions of the Commission

From its most recent correspondence, it is clear that the Commission seeks to implement a western-based COPF and remove itself from the Price Linkage, which will increase returns to hatching egg producers, at the expense of other stakeholders, particularly processors. In doing so, the Commission will be unsoundly prioritizing the interests of the hatching egg sector ahead of the broader interests of the British Columbia poultry industry. If both the Commission and the Chicken Board were to implement independent COPF pricing methods based on Serecon data and the Serecon model, the PPPABC estimates that the live price differential between British Columbia and Ontario would increase from the current level of 11 cents per kg to somewhere in the range of 28.4 cents per kg (both excluding catching). This would more than double the current differential and cost British Columbia processors approximately an additional \$41 million annually. Enclosed is a document created by the PPPABC to calculate the impacts of both the Commission and Chicken Board implementing their own COPFs.

In correspondence dated November 4, 2020, the Commission asserted, “it is in the best interests of the BC hatching egg sector to ensure that in the current supervisory review, the pricing concerns of the sector are separate and distinct from pricing issues between the Chicken Board, chicken growers and processors”. In other words, the Commission appeared set on exiting the Price Linkage and unilaterally revising the terms of the supervisory review.

On November 20, 2020, the Commission sent another letter confirming its intentions to implement a western-based COPF. On November 24, 2020, the British Columbia Broiler Hatching Egg Producers’ Association echoed the Commission, stating that they will “not offer pros and cons for each option” presented by the Chicken Board with respect to a live price formula. Like the Commission, the hatching egg producers are fixated on a COPF.

The position of the Commission and the hatching egg producers jeopardizes the ability of all parties to participate meaningfully in the Chicken Sector Pricing Review. It appears that the Commission has closed its mind to other options, including a fixed differential between Ontario and British Columbia to determine the live price of chicken. The Commission continues to repeat its unworkable and unfair proposal to place the burden of proof on processors and hatcheries in pricing determinations. At page 3 of its November 20, 2020 letter, the Commission explicitly states that it has been “advocating” for its preferred pricing option since April 2018. Given this, the supervisory panel must take an active role to ensure that the Commission, as a first instance regulator, remains neutral and open to persuasion throughout the Chicken Sector Pricing Review.

Breach of Procedural Fairness by the BCFIRB

On October 21, 2020, despite the July Order, the Commission announced that it was further reducing the processing age of breeder flocks from 56 weeks to 55 weeks, effective period A-166. Like its November 27, 2019 decision to reduce the processing age of breeder flocks from 58 weeks to 56 weeks, its further reduction of the processing age appears to be an attempt to externalize costs for its decision to place breeders at 106% of base allocation in July 2018.

On October 30, 2020, the supervisory panel determined that the Commission’s reduction in kill age was in fact a change to current pricing structures. The supervisory panel held, “[T]he Commission’s unilateral action to reduce the processing age contravenes the July Order and required the Panel’s prior approval”. The supervisory panel directed the Commission to put its decision in abeyance until it submitted a prior approval application, including its rationale.

However, on November 13, 2020, the supervisory panel “reconsidered” its October 30, 2020 and made a decision to allow the Commission to further reduce the kill age from 56 to 55 weeks. The “new information” underlying the reconsideration decision was from an undated letter from Serecon. The effect of the further reduction in kill age is to increase the live price of chicken, which is ultimately paid by processors. This engages the interests of the PPPABC.

Whether the Commission could unilaterally change the kill age was an issue in the PPPABC’s appeal filed on December 23, 2019. One of the Linkage Amendments under appeal was the reduction of the kill age from 58 to 56 weeks. As described above, this appeal was deferred in favour the current supervisory review. Despite this deferral, the supervisory panel has allowed the Commission to do exactly what was under appeal, without any of the procedural rights that would have been afforded to the PPPABC in an appeal.

Under an appeal, the Commission would have been required under s. 8(4) of the *NPMA* to “promptly provide the [BCFIRB] with every bylaw, order, rule and other document touching on the matter under appeal”. With the deferral, the PPPABC was deprived of these disclosure rights. Also, had this matter proceeded to appeal, the PPPABC would have had rights to make submissions, adduce evidence, and cross-examine witnesses. The combination of the deferral and the supervisory panel’s reconsideration decision is to deny the PPPABC these procedural rights.

The PPPABC is considering its options following the BCFIRB’s November 13, 2020 decision, including commencing judicial review proceedings.

While reserving its right to bring an application for judicial review, the PPPABC wishes to continue working within the Chicken Sector Pricing Review. To provide the PPPABC a meaningful opportunity to participate in the supervisory review, the supervisory panel should exercise its legislative powers to remedy the situation.

Under s. 7.1 of the *NPMA*, the BCFIRB has general supervision over the Commission and the Chicken Board. Subsection 7.1(2) permits the BCFIRB to “exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances”. Pursuant to these powers, the supervisory panel must act to control the Commission’s conduct and ensure the procedural fairness of the Chicken Sector Pricing Review, including the following actions:

1. direct that the Commission is to remain and fully participate in the current supervisory review, as defined in the final terms of reference dated October 28, 2020;
2. reverse its November 13, 2020 reconsideration decision and order that the Commission return the kill age to 56 weeks; and
3. alternatively, order that the Commission is not to change any inputs in the Price Linkage without prior approval of the BCFIRB and an opportunity for affected stakeholders to provide submissions, adduce evidence, and cross-examine relevant witnesses related to the proposed changes.

Although the recent breaches in the procedural fairness rights of the PPPABC are untenable, the PPPABC emphasizes its desire to participate in the Chicken Sector Pricing Review. The British Columbia poultry industry faces significant structural issues that must be resolved at a broader supervisory level. To achieve a successful outcome, all parties must participate in the process in good faith.

Yours truly,

Dentons Canada LLP



Morgan L. Camley

MLC/
Encl.

cc. Wendy Holm, BCFIRB Project Liaison
cc. Robert Hrabinsky, counsel for the British Columbia Broiler Hatching Egg Commission
cc. Claire Hunter, QC, counsel for the British Columbia Chicken Marketing Board
cc. Paul McLean, counsel for the British Columbia Chicken Growers Association
cc. Luke Zacharias, counsel for the British Columbia Egg Hatchery Association

Increased Live Bird Costs in BC Using Serecon Cost of Production - (based on A-166 BC Broiler COP)

INCREASE IN BROILER COSTS

A	A-166 live cost	\$1.6903 / kg
B	A – 166 live cost based of full recovery of Sercon COP	\$1.8295 / kg
C	Increase in Live Bird costs using Sercon COP (line b – line a)	\$0.1392 / Kg
D	2019 Live Bird Kgs	238,662,171(1)
E	Annual Live Bird Increase using Serecon COP (line c x d)	\$33,221,774

INCREASE IN CHICK COSTS

A	A – 166 live cost less catching (\$1.6903 - \$.0365)	\$1.6538
B	A – 166 live cost based on Sercon COP, less catching costs (\$1.8295 - \$.0365)	\$1.793
C	Increase in live Bird Costs using Sercon COP (line b – line a)	\$0.1392
D	Percentage increase in net revenue to grower based on Serecon COP	8.4%
E	A-166 Chick Price	\$.4094
F	Increase in chick price to match increase in Live Price (line E + 8.4%)	\$.0344
G	2019 Live Bird Kgs	238,662,171
F	Annual Chick costs increase using Serecon COP (line f x line g)	\$8,209,978

Combined Annual cost increases to Processors **\$41,431,752**

(1) BCCMB 2019 Annual Report

Live Price Differential Based on Serecon Model

Live prices – A-166

BC Reference Price – weight categories 2.021 – 2.100 kgs and 2.101 -2.170 kgs

\$1.690 /kg includes .0365 cents for catching

ON Reference Price – weight category 2.15 – 2.45 kgs

\$1.546 / kg before modular loading and AI levies

Differential

BC Live Price	\$1.690
Less catching	(\$0.0365)
Net BC Live Price	\$1.6565
ON Ref Price	\$1.546
Current Differential	\$.1105
Add:	
Live Price increase based on Serecon	\$.1392
Chick Price Increase based on Serecon	\$.0344
New Differential	\$.2841