

Hunter Litigation Chambers

KAARDAL/SMART/HUNTER

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File No: 1026.016

BY EMAIL

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

Attention: Peter Donkers
Chair

Olivia Mattan
Senior Manager

Dear Sirs/Mesdames:

Re: PPPABC's Confidentiality Application pursuant to the Chicken Board Long-Term Chicken Pricing Recommendation Review

We write on behalf of the BC Chicken Marketing Board (the "**Chicken Board**"), in response to the application of the Primary Poultry Processors Association of BC (the "**PPPABC**"), seeking a confidentiality order pursuant to s. 42 of the *Administrative Tribunals Act*, SBC 2004, c 25 (the "**ATA**").

Summary

While the Chicken Board is open to some form of confidentiality order to protect confidential information from publication on the BC Farm Industry Review Board's (the "**BCFIRB**") website, the Chicken Board opposes the PPPABC's request for the broad form of confidentiality order sought over Customer and Operations Information (as described in the PPPABC's application of December 15, 2023). The Chicken Board takes the following positions:

1. any Customer and Operations Information that was available prior to the Long-Term Chicken Pricing Recommendation Review (the "**Recommendation**"), dated October 30, 2023, that was not provided to the Chicken Board, ought not to be considered by the BCFIRB in its supervisory role;
2. any Customer and Operations Information arising since the Recommendation, ought to be provided first to the Chicken Board as the first instance regulator, particularly in light of the necessity that the Chicken Board be required to undergo a fair and transparent process which includes all stakeholders' interests;

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3. if any Customer and Operations Information that has arisen since the Recommendation, is provided to the Chicken Board, and is deemed confidential, the Chicken Board remains open to discussing and establishing a process to maintain confidentiality.

Discussion

Section 42 of the *ATA* is only engaged where the nature of the information or documents is such that one or more parties should be required to advance their case without seeing the information or documents in order to ensure the proper administration of justice.¹ In the context of a supervisory review where the first instance regulator has made a recommendation based on information and submissions made available by all stakeholders, it is difficult to conceive of a situation in which it would be in the interests of justice that a stakeholder be permitted to provide information to the BCFIRB without showing it to the Chicken Board.

Pursuant to the BCFIRB's "Protection of Privacy and Confidentiality in BCFIRB Supervisory Processes and Reviews", a supervisory panel, in deciding whether a non-disclosure order is consistent with the proper administration of justice, will weigh the following types of interests, along with any others a panel considers relevant or important:

- a) What is the importance of the individual's interest at stake?
- b) Is the order necessary to prevent a serious risk to that important interest, including a commercial interest, grounded in evidence?
- c) What is the impact on that protected interest by disclosure?
- d) Is there a public interest in maintaining confidentiality?
- e) Are there reasonable alternatives available to such an order or can the order be restricted as much as is reasonably possible while still preserving the commercial interest in question?²

The PPPABC has asserted that the disclosure of the Customer and Operations Information would be "detrimental to the Processors Association's members" and without a confidentiality order, such information will not likely be tendered "due to the potential impact doing so will have on their business operations".

¹ *Complainant v College of Registered Nurses of British Columbia*, 2009 BCHPRB 5 at para 41.

² BCFIRB, "Protection of Privacy and Confidentiality in BCFIRB Supervisory Processes and Reviews", May 22, 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/general-supervision/2020_may_22_final_supervisory_rule_on_confidentiality.pdf>.

The PPPABC, however, is silent on the public interest consideration, and no mention has been made as to whether a less restrictive alternative means of disclosing the commercially sensitive information while preserving its confidentiality exists. Further, the PPPABC's application is not grounded in any evidence, and merely makes blanket assertions that members' business operations will be impacted.

The Chicken Board submits that the PPPABC has failed to meet its obligations of establishing that a confidentiality order is required.

Information Available Prior to Recommendation

The Chicken Board submits that any Customer and Operations Information that was available prior to the Recommendation, and was not provided to the Chicken Board, ought not be provided to the BCFIRB, through a confidentiality order or otherwise. If processors have competitiveness issues they wish to have considered in the context of the pricing process, the Chicken Board believes the processors needed to raise and substantiate these issues to it as the first instance regulator in the context of making its Recommendation.

The Chicken Board has been engaged with industry stakeholders, including the PPPABC, since the initiation of the supervisory review in 2020. As noted in the Recommendation, the Chicken Board has, on numerous occasions discussed with processors the need for transparent and verifiable data in order to establish processor competitiveness and concerns. Processors in BC, however, have maintained that they are private businesses and will not publicly disclose information.³

The Chicken Board's view is that there needs to be consistent and transparent processes used to manage any future changes to the pricing formula. Achieving consensus on pricing has always been, and continues to be a challenge – the Recommendation is intended to take the challenges and conflicts over pricing and move forward in a constructive and strategic fashion that results in a stable and sustainable industry.

It would be against the interests of all involved, to allow the PPPABC to provide information through a separate process years after requests were made, and after significant efforts were made by the Chicken Board to obtain such information.

³ Chicken Board Long-term Pricing Decision, dated October 30, 2023, p. 12.
<https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/supervisory-reviews/2020-chicken-pricing/2023-10-30_cmb_final_pricing-submission-cop.pdf>.

New Information

Should the PPPABC wish to rely on information that has arisen since the Recommendation, that information should be provided first to the Chicken Board to consider whether there is any reason to reconsider its Recommendation. Should information be provided to the BCFIRB without first providing it to the Chicken Board, the BCFIRB will be in the position of having to evaluate the impact of this information without the benefit of the knowledge and perspective of the Chicken Board as first instance regulator. This approach would be contrary to the process contemplated in the *Natural Products Marketing (BC) Act*, RSBC 1996, c 330, the *British Columbia Chicken Marketing Scheme*, BC Reg 514/95, the supervisory review Terms of Reference, and further, is not consistent with sound marketing policy.

The Chicken Board remains committed to supporting and engaging with BC processors on issues including their competitiveness to enhance the effectiveness of the BC chicken industry. Supporting the collaboration of various industry participants, including the PPPABC and the Chicken Board, to work together to resolve BC chicken industry pricing for the longer term will enable the Chicken Board as a first instance regulator to address outstanding regulatory issues in the sector and balance the competing interests of all those involved.

Confidentiality Issues

The Chicken Board remains open and willing to engage in a process that ensures truly confidential information is protected as between industry stakeholders and from the public, as appropriate. If Customer and Operations Information has not been provided to the Chicken Board because it contains highly sensitive or confidential information, the PPPABC should suggest a means by which the information can be reviewed by the Chicken Board in a manner that protects confidentiality with due consideration of the public interest in the transparency of this supervisory process.

It is not at all clear from the PPPABC's submission that this information is truly confidential as much of the information sought to be protected is publicly available in other provinces. By way of example, existing plant capacity is information that is often publicly available in a number of other provinces. Even if there were some reason this information should be kept confidential as between the PPPABC's members or from the public, there can be no reason that this information need be kept confidential from the Chicken Board.


Conclusion

Section 42 should not be used as a back-door mechanism to frustrate the transparent process of the supervisory review. Section 42 should only be used to bar access to relevant information where there are clearly definable justice considerations in a case that outweigh the justice requirement that a participant should have a meaningful opportunity to exercise its statutory right of review. The Chicken Board submits that the application for a confidentiality order over the Customer and Operations Information be dismissed.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, K.C.

CEH/abr

cc: David Gruber, Legal Counsel, Primary Poultry Processors' Association of BC
Woody Siemens, Executive Director, BC Chicken Marketing Board
Stephanie Nelson, Executive Director, BC Broiler Hatching Egg Commission
BC Chicken Growers' Association
Ernie Silveri, Executive Director, BC Egg Hatchery Association