



BC Farm Industry Review Board

January 18, 2024

File: 44200-60\BHEC CMB

DELIVERED BY EMAIL

Claire Hunter, K.C.
Hunter Litigation Chambers
BC Chicken Marketing Board

David Gruber
Bennett Jones
Primary Poultry Processors Association of BC

Paul D. McLean
Mathews, Dinsdale & Clark LLP
BC Chicken Growers Association

Dear All:

BC CHICKEN MARKETING BOARD LONG-TERM CHICKEN PRICING RECOMMENDATION – NON-DISCLOSURE ORDER APPLICATION

Pursuant to section 7.1 of the *Natural Products Marketing (BC) Act* (NPMA), the BC Farm Industry Review Board (BCFIRB) is undertaking a supervisory process to determine whether to approve the BC Chicken Marketing Board's (Chicken Board) October 30, 2023 recommendation on long-term chicken pricing (Recommendation).

On November 23, 2023, the BCFIRB panel (panel) established a submission process to hear from eligible participants on certain questions, the responses to which would be taken into consideration in the panel's evaluation of the Recommendation.

On December 15, 2023, the Primary Poultry Processors Association of BC (PPPABC) applied for a non-disclosure order allowing for redaction of certain information as part of their submission related to:

- i. customers that have been lost since the Recommendation was announced, and the volume of excess capacity that producers have been left with as a result (the "Customer Information"); and
- ii. changes to business operations as a result of the Recommendation, including changes to plans for constructing new facilities or reductions in processing capacity (the "Operations Information").

Applications for non-disclosure are made pursuant to BCFIRB's May 22, 2020 Supervisory Rule, [Protection of Privacy and Confidentiality in BCFIRB Supervisory Processes and Reviews](#) (Confidentiality Rules) which provide that a supervisory panel will decide whether a non-disclosure order is consistent with the proper administration of

Web:

Email: firb@gov.bc.ca

Website: www.gov.bc.ca/BCFarmIndustryReviewBoard

Phone:

Info: 250 356-8945

Fax: 250 356-5131

Mail:

PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5

Office:

2975 Jutland Rd
Victoria, BC V8T 5J9

justice, and will weigh the following types of interests, along with any other interests 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?

Submissions of Participants

PPPABC Request

The PPPABC is seeking a non-disclosure order to redact the following in tendered evidence:

- i. customer names,
- ii. volumes of product supplied to existing or former customers, and
- iii. specific changes to processors operations as a result of the recommendation.

PPPABC notes the information it seeks to have redacted is highly confidential customer and operations information, and disclosure to competitors or existing or new customers would be detrimental to PPPABC members' businesses.

Reply of Chicken Board

The Chicken Board opposes the broad form of non-disclosure order sought by PPPABC over its customer and operations information, and submits that PPPABC has failed to meet its obligations of establishing the need for a non-disclosure order for the following reasons. Firstly, any customer and operations information that was available prior to the Recommendation, and not provided to the Chicken Board, should not be considered as part of BCFIRB's supervisory process. If PPPABC had competitiveness issues it wished to have considered in the context of the pricing process, those issues should have been raised and substantiated before the Chicken Board as first instance regulator in the context of making its Recommendation. The Chicken Board has discussed with PPPABC the need for transparent and verifiable data on several occasions since the start of the pricing review in 2020 and the PPPABC has maintained that as private businesses, its members will not publicly disclose information. The Chicken Board argues that in light of the need for consistent and transparent processes to manage any future changes to the pricing formula, it would be against the interests of all involved to allow PPPABC to provide information through a separate process years after the Chicken Board's efforts to obtain such information.

Secondly, the Chicken Board submits that any customer and operations information arising since the Recommendation should be provided first to the Chicken Board to allow it to determine whether it needs to reconsider its Recommendation. Providing

information to BCFIRB's review panel without that information first being placed before the Chicken Board puts BCFIRB's review panel in a position where it must evaluate the impact of the information without the benefit of knowledge and perspective of the first instance regulator contrary to the *Natural Products Marketing (BC) Act*, the *British Columbia Chicken Marketing Scheme*, and the Supervisory Review Terms of Reference, and would not be consistent with sound marketing policy.

The Chicken Board is open to discussing confidentiality for any customer and operations information that has arisen since the Recommendation and recommend that PPPABC 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 the supervisory process.

Reply of BC Chicken Growers Association (BCCGA)

The BCCGA adopts the Chicken Board's submission and opposes a blanket issuance of a non-disclosure order. It agrees that any information disclosed by PPPABC should first be directed to the Chicken Board as opposed to BCFIRB's review panel.

Reply of PPPABC

In reply, PPPABC argues the Chicken Board's position that confidential information ought first to be provided to the Chicken Board is misguided.

In response to the Chicken Board's argument that PPPABC's application is silent on the public interest, PPPABC submits that public interest considerations with respect to its concerns that disclosure of customer and operations information would be commercially damaging and lead to competitors gaining a competitive advantage over B.C. processors are self-evident. The public interest is not served if processor competitiveness is harmed as a result of processors' good faith participation in this supervisory process.

With regard to less restrictive alternatives for disclosing sensitive information, PPPABC submits its suggested process impairs the public interest in an open proceeding as minimally as possible given that it proposes not to redact entire documents or categories of documents, but rather only to redact names, figures, and customer identifying details.

PPPABC challenges the Chicken Board's position that its application was not grounded in evidence and argues that it is not possible to provide evidence of confidential information without a non-disclosure order already being in place. Further, it would have been difficult to provide full particulars of the confidential information and copies of all documents over which the order is sought in the limited the time frame established by the review panel.

Lastly, with regard to the Chicken Board's arguments that the PPPABC should not be able to rely on information available but not provided to the Chicken Board in its prior process, and that any new information should first be directed to the Chicken Board as

the first instance regulator. PPPABC says that those arguments are not connected to the non-disclosure application and as such, are irrelevant. The PPPABC add that the Chicken Board's position ignores the fact that this "appeal" is not a judicial review and not limited to the record that was before the Chicken Board. Any determinations about whether parties may or may not be entitled to rely upon certain documents, should not be determined in the vacuum of a non-disclosure order but rather they should be resolved in a manner consistent with Rules 21(4) and (8) of BCFIRB's Rules of Practice and Procedure for Appeals.

Decision on Non-Disclosure Order

PPPABC's application for a non-disclosure order is made in the context of BCFIRB's supervisory process to determine whether to approve the Chicken Board's October 30, 2023 Recommendation.

First, and in response to the PPPABC's submissions, the panel confirms that this is a supervisory process and not an appeal. Second, the panel acknowledges that certain of the customer and operations information identified by PPPABC in its non-disclosure application, potentially raises confidentiality concerns due to its proprietary nature.

However, the panel agrees with the Chicken Board on two threshold matters. First, that information that was available prior to the Recommendation should not be considered in this supervisory process. Second, that information arising since the Recommendation should be first provided to the Chicken Board as the first instance regulator, in order for it to consider whether that information would have any impact on its Recommendation. To proceed otherwise would deprive this panel of the perspective and knowledge of the first instance regulator. The panel is of the view that, more generally, all such information would have to be provided to the Chicken Board in a transparent and procedurally fair process before the panel continues with its consideration of the Recommendation.

In light of the above, and as both the Chicken Board and the PPPABC are represented by experienced counsel, the panel directs the parties to discuss a mutually agreeable mechanism by which the PPPABC could deliver information regarding processor competitiveness to the Chicken Board while protecting the confidentiality of any proprietary information.

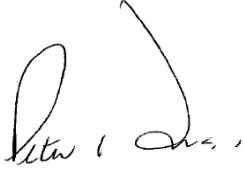
If the parties are unable to reach an agreement, the panel will convene a supervisory review management conference via videoconference on **January 31, 2023 at 10:00am** to hear submissions on this issue, after which the panel will issue directions.

Conclusion

The panel notes that the original deadline of December 22, 2023 has passed for making submissions pursuant to the panel's November 23, 2023 process letter. The deadline will be extended after the PPPABC's non-disclosure application has been determined. A revised submission schedule will be provided at that time.

If you have any questions please contact Olivia Mattan, Senior Manager by email at olivia.mattan@gov.bc.ca.

Regards,

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is stylized and cursive.

Peter Donkers
Chair
BC Farm Industry Review Board

cc: Bill Vanderspek, Chair, BC Broiler Hatching Egg Commission
John Franck, President, BC Egg Hatchery Association
Angela Groothof, President, BC Broiler Hatching Egg Producers Association
Craig Evans, Executive Director, Primary Poultry Processors' Association of BC
Ernie Silveri, Executive Director, BC Egg Hatchery Association
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