

July 17, 2018

File No.: 8002.001

VIA EMAIL: KatieL@bcegg.com

Ms. Katie Lowe
Executive Director
B.C. Egg Marketing Board
Suite 250 - 32160 South Fraser Way
Abbotsford, B.C. V2T 1W5

Robert P. Hrabinsky
Direct Tel: (604) 800-8026
Direct Fax: (604) 800-9026
Email: rhrabinsky@ahb-law.com

Dear Ms. Lowe:

Re: Retroactive and Retrospective Application of New Rules Arising from the Quota Assessment Tools Supervisory Review

Question for Opinion

You asked that I comment on the temporal application of new rules arising from the Quota Assessment Tools Supervisory Review.

Assumptions

I understand that:

1. **On February 2, 2018**, the BCFIRB issued the following direction:

179. If boards cease to use LIFO (on all quota held by a producer) and 10/10/10 (on growth quota), these quota management rules are to be replaced with the following:
- a) 10/10 /0 is to be applied to the first transfer of all growth quota issued to date and going forward.
 - b) Quota holders are to have the option to refuse or accept growth quota.

- c) **Quota holders are not eligible to receive growth quota for 12 months following a transfer of any quota**, with one exception as follows:
 - i. If a quota transfer does not result in an overall change in total quota holdings within a business unit (e.g. within a corporation), quota holders within that business unit remain eligible to receive growth.
 - d) Receipt of growth quota cannot be deferred. Offer and acceptance of growth quota is a onetime opportunity
2. By letter dated May 15, 2018, the BCFIRB issued the following supplementary direction:

As set out in the majority panel's April 27, 2018 response to the Chicken Board, the majority made a considered decision concerning the eligibility of producers to receive growth quota allocations. **The start date for the direction set out in paragraph 179(c) is February 2, 2018 (the date of the Quota Review decision). A producer who transferred quota in the 12 month period prior to the issuance of growth quota is ineligible to receive growth quota. For example, if there was an issuance of growth quota in May 2018, those growers who transferred quota within the previous 12 months would not be eligible to receive a share of that growth quota.**

If the Egg Board decides to advance a case to change this start date it will need to provide a substantive sound marketing policy rationale as per paragraph 164.

164. If commodity boards decide there is a sound marketing policy rationale for change to these quota management directions, BCFIRB will require substantive, objective information with a supporting SAFETI analysis that includes considerations such as industry competitiveness and public policy objectives

3. The Board has not yet amended its orders to reflect the BCFIRB's directions.

Analysis

As a starting point, it is useful to articulate the distinction between laws that apply "retroactively" and laws that apply "retrospectively". This distinction in terminology was addressed by the Supreme Court of Canada in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 as follows:

The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections", ...has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past events. A retroactive statute *operates backwards*. A retrospective statutes *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statue changes the law from what it was a retrospective statue changes the law from what it otherwise would be with respect to a prior event.

The BCFIRB's direction, which was made on February 2, 2018 and is to be effective on February 2, 2018, does not have "retroactive" application (as would be the case if the direction was to be effective on January 1, 2018). However, the direction clearly has "retrospective" application, insofar as it would apply new consequences to past actions that preceded the date of the direction. For example, the BCFIRB notes that if a producer transferred quota in June, 2017, that producer would be ineligible to receive growth in May, 2018, as a result of the direction made on February 2, 2018.

I pause here to note that I do not think that the BCFIRB's direction can be regarded as an order of the Egg Board. In other words, I understand that on February 2, 2018, the BCFIRB had directed the Egg Board to implement new orders on some date following February 2, 2018. It is not clear whether the BCFIRB's expectation is that the Egg Board's order should be made effective February 2, 2018. However, any such order made by the Egg Board would clearly exemplify a "retroactive" application.

The question arises as to whether the Egg Board can properly make orders with either retroactive or retrospective application. In my view, the answer to both questions is clearly "no".

First, it is well established that no law may be interpreted as having retroactive application unless that intention is made express in the parent legislation. In Sullivan and Driedger, *Construction of Statutes*, (Butterworths Canada, 2002), the learned authors state:

It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law. As Raz points out, the fundamental principle on which the rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of the law are diminished by the frequent or unwarranted enactment of retroactive legislation.

There is nothing in the *Natural Products Marketing (BC) Act* that authorizes the BCFIRB or a commodity board to make directions or orders with retroactive application. As a general rule, express authority to make laws with retroactive application would be required to rebut the presumption. Consequently, the

BCFIRB could not make a direction on February 2, 2018 that is effective on January 1, 2018 (and it did not do so). More to the point, when the Egg Board amends its orders, it cannot make the amendment "effective" on a date that precedes the amending order itself.

Similarly, there is a common law presumption against laws having retrospective application. This presumption is particularly strong where the effect of the law is to take away or diminish a protected expectation or interest. Thus, if the Egg Board made an amending order on September 1, 2018 (and effective on the same date) providing that "quota holders are not eligible to receive growth quota for 12 months following a transfer of any quota" – the amending order would offend the common law presumption against retrospective application. For example, a quota holder who transferred quota on August 1, 2017 would be ineligible to receive growth that the producer was reasonably anticipating by reason of an order which did not exist when the quota was transferred. If that producer at least had knowledge of the content of the law, he or she would have been able to make an informed decision about whether to transfer quota.

In short, it is my view that the Egg Board is not authorized to make the kind of order proposed with either retroactive or retrospective application. If permitted by the BCFIRB, however, the Egg Board could make an order on September 1, 2018 (for example) as follows: "Effective September 1, 2018, a producer who transfers quota is ineligible to receive growth quota for a period of 12 months from the date of the last transfer of quota." Formulated in this way, the order has neither retroactive nor retrospective application.

Please let me know if you have any questions or comments concerning the above.

Yours truly,

AFFLECK HRABINSKY BURGoyNE LLP

Per:


ROBERT P. HRABINSKY

RPH/

Producer One

Delivered by Email July 24, 2018

Good Afternoon Joey,

We would first like to state that if this directive came into effect on February 2, 2018, then it does not affect our transfer of quota in week 41 of 2017. Meaning we are eligible for quota allocation. Rules or directives of this nature cannot be back dated, as that leaves us without the ability to plan for the future and tries to change history.

The quota that we transferred in 2017 is all part of our secession planning and to comply with and manage CRA tax rules for farms. We are currently starting into our 3rd generation of farming and plan to continue as a family run business for all of the foreseeable future. We intend to grow our operation and continue to expand by purchasing land, upgrading our grading facility and building new barns.

Referring to your paragraph 2 and with our stated intentions we feel that we are entitled to quota allocation as it comes available.

We cannot make future business decisions if the rules are going to be changed and backdated.

Thank you



Producer Two

Delivered by email July 24, 2018

Katie and Joey

I'm not 100% clear on the new transfer rules. But I know the need to change the system to make it more fair for all involved in the industry.

But it is your legal responsibility to notify producers of these changes ahead of time or at the time you make them. We, as, producer can only make decisions from the Standing orders that are present at the time of the that day. So to my experience you can not go back to change the Standing orders in the past and enforce them to that date. So I would like to see you do this legally and place the change for any new Standing orders for a date that we as producer can make sound decisions for our future plans for our farms.

I know that [REDACTED] is only one of the producers that is affected by this change. So if the others that I know of, get any new quota issuance and [REDACTED] or [REDACTED] don't. I will look at seriously taking legal action against the BCEMB.

If BCFIRB is not going to allow the approval of this new issuance without these new standing orders in place. Then the board has no option but to wait another year to issue it.

So this is how I stand on these changes.

I will try and work with the staff on this matter to be able to have this issuance insured as soon as possible and in a way that I will not be penalized.

To answer your questions.

1) That is a long winded question for me. But I will try to keep it short, [REDACTED] (purchased from [REDACTED] in 2004, 11,122 birds quota) and [REDACTED] have worked out of one site on '0' Ave. And the long term plan has always been the same, too have two separate farm locations. We have three sons and all have showed interest in farming. So as the new issuances that where issued in 2009 and the barn that I build in 2005 which was filling up. So in 2014 we made as a family decision to build two farms. But at that time, the industry was pushed to make bird house standards changes. So United Agri and Ritchie Smith Feeds sent out a invitation to the egg producers to go to Amsterdam to see the industry in Europe. The two younger sons R [REDACTED] 25 and S [REDACTED] 23 where happy to learn and attend.

Decision made, property purchase Sept 2015, three new barns built (1pullet barn 12,000 birds, two free run lay barns 12,000 birds each) and finished Sept 2017.

[REDACTED] only had quota for 7600 bird because of barn size at '0' Ave.,(did quota lease agreements, then quota transfer, as Standing orders changed)

The March 2017 quota transfer was to change back the quota holding of [REDACTED] farms to its original quota holdings at purchase in 2004.

The Jan 22, 2018 quota transfer was to get a building permit from the city of Abbotsford for a second resident on [REDACTED] location on [REDACTED] Bradner Rd. (THE CITY DECIDED TO CHANGE THEIR BYLAWS FOR HAVING A SECOND RESIDENT ON A PROPERTY and that was a layer farm has to have 20,000 layer on it. [REDACTED] had the birds at the location at the time, but was using 6400 birds on quota credits) The city needed a copy of the farm production license.

2) Our son Steven manages [REDACTED] and eventually will be take over the company. [REDACTED] has a empty barn (from March 2017) build 1996 (still in new concussion) with the capacity to house another 7600 layers, after that we will need to build another barn. But the bigger question is what type of produce will the market need and will there be quota available to purchase or farms (the Egg Grader encourages us to have share holders in the different types of production so that when the time comes that the demand changes occur, we could change production to that type of egg.)

3) I myself am slowly easing out of farming and our son S [REDACTED] is already taking over most of the operation of [REDACTED]. R [REDACTED] is doing the same for [REDACTED].

4) I think that you already know the answer to this question. I never build a barn to just fill the farm needs. I always build for future expansion.

I would like to sit down and discuss this with you both, tomorrow or Thursday, after that I'm not sure, for we are busy with the blueberry harvest.

[REDACTED]

Producer Three

Delivered by Email July 25, 2018

██████████ is owned by ██████████ and ██████████. Several years ago the company owned an outdated production facility on ██████████. This property was sold and ██████████ constructed production facilities at ██████████ and ██████████ at ██████████, knowing that the long-run plan was for each family to own their 50% of the quota. Due to intermingled financing, the quota was leased for several years to ██████████ and facilities rented from ██████████. With the quota leasing rules disappearing, and finally getting bank approval to do a split, the majority of the quota was transferred in an equal amounts to each of these companies. After an initial transfer and with density rule changes and additional allocations, it was discovered that ██████████ did not have enough space to house all the birds so another transfer of 1,500 birds was done, some to ██████████ and ██████████.

All selling companies and receiving companies were owned and continue to be owned by the same individuals, such that no change in industry quota holdings took place. 50% of the quota transferred (50% of ██████████) was transferred to companies owned 50% by ██████████.

Another consideration, is that now that the quota is held by a family farm, the shares of the company can be transferred to a child tax free, while held in a company (50% unrelated to each other) is not eligible for the family farm rollover rules.

For the foreseeable future the company plans to farm the quota at its ██████████ location, but long-term plans are for the ██████████ and the ██████████ to each build new facilities to house the quota.

The plan is for the ██████████ and the receiving farms to be farmed by ██████████ until their retirement. Both families have children involved in the day to day operations and the plan to pass these farms on to the next generation.

As producers we still plan on expanding with new allocations and bids on quota exchange.

Producer Four

Received by Email July 25, 2018

Hi Joey,

As discussed on the phone, below are responses for the questions provided in order to give you information of our situation. The questions provided to us for response were:

- 1) Why did you transfer the quota?
- 2) What is your history of expansion of your facility?
- 3) What are your plans for the future of your facility?
- 4) How long are you planning on remaining involved in the industry?
- 5) Are you still planning on growing as a producer?

First a bit of history. While still dairy farming we purchased our first layer farm in 1994 ([REDACTED]). For four years we farmed both dairy and poultry. Following the sale of our dairy farm in 1997 we purchased our second layer farm ([REDACTED]). In 2010 we began the building process on our third layer facility ([REDACTED]). This is when we began producing organic eggs. In the following 3 years we built 4 organic egg layer barns on that property. In 2014 we purchased another parcel of land (also part of [REDACTED] and at the end of that year began building 2 more organic egg layer barns there, in addition to retrofitting an existing broiler barn to become our pullet raising facility. The plan for this latest property is to expand with another possible 6 layer barns in the near future.

[REDACTED] and [REDACTED] are owned by [REDACTED]
[REDACTED] is owned by [REDACTED]

In response to the questions given:

- 1) Why did you transfer the quota?

In the past we have been able to lease quota between the farms in order to accommodate the grader's demand for a specific commodity. In the past few years the practice of leasing quota was no longer allowed. At that time we were told by the BCEMB that we would be allowed to transfer quota between farms without penalty. The latest transfer of quota happened on April 23, 2018. It was a transfer of only 2000 birds from [REDACTED] to [REDACTED] (same owner). Again, there was no mention of a penalty for this action. The only reason for this transfer was to continue producing as many organic eggs as possible in order to meet market demand for this commodity. This also allowed us to decrease bird numbers at [REDACTED] our oldest facility, in order to better position us for possible rebuilding on that property in the near future.

- 2) What is your history of expansion of your facility?

As mentioned above, we have nearly constantly been in a period of expanding our farms. Our latest building project shows our desire to expand in the area of organic egg production.

- 3) What are your plans for the future of your facility?

In terms of the facility at [REDACTED] our plans are to build another two organic egg layer barns within the next 3 years. Following that there is room and plans for another 4 barns. At [REDACTED], our oldest facility, our plan is to convert to a cage-free farm through rebuilding. Throughout this expansion time we plan to acquire more quota. Recently we have applied to purchase more quota through the quota exchange program but were unsuccessful. We plan to continue to bid on future quota offered on the exchange.

4) How long are you planning on remaining involved in the industry?

As mentioned above our family has been involved in the egg-layer industry for 24 years. During this time our children have grown up and are very involved in operating all of the farms. They have also shown an interest in continuing their involvement in farming as their long-term plans. Even our grandchildren are beginning to get involved and show interest in helping on the farms.

5) Are you still planning on growing as a producer?

As mentioned above, our plans are to continue growing our farms, both in terms of quota and buildings. During this growth time we are also committed to further our efforts in producing less conventional eggs and more cage-free and organic eggs to meet market demand.

Throughout our years of farming we have always strived to do what is best for our industry. We feel that to penalize us for our desire to produce more organic eggs for the market through a small quota transfer is quite harsh and unfair. If you need any other information, please do not hesitate to contact us.

Thank you!

[REDACTED]

Producer Five

Delivered by Email July 26, 2018

Dear BCEMB:

July 26th, 2018

Thank-you for the opportunity to provide input and to have a dialogue in what we find an astonishing direction by FIRB, which by appearance would be in breach of their own SAFETI principals as well raise many more legal questions therein. Simply put, we are quiet shocked by the short sightedness and lack of understanding of the current state of our Egg Industry and the transitions we face and how the Industry is attempting to respond to the Markets in general.

In response to your query:

BCFIRB has provided the Boards with additional clarification regarding their quota assessment tools directive that may affect your farm. The directive is that: Quota holders are not eligible to receive growth quota for 12 months following a transfer of quota with one exception as follows: if a quota transfer does not result in an overall change in total quota holdings within a business unit, quota holders within that business unit remain eligible to receive growth.

Our response begins with..."if only life were that simple"....

First and foremost....the Direction given is seemingly targeted to persons selling, reducing or exiting the business. All be it, FIRB is giving an exit strategy to "deemed" sellers by permitting or eliminating the 5% clawback. They are not however, by given this Direction without "exemption to family" ...a way to expand, update and modernize; adapt in meeting new markets and allowing expansion without realizing the effects and stifling progress. This ruling will cause and inflict pain, disparity and unequal opportunity amongst discrimination to the fullest degree to those it affects and as a result would be collateral damage at best.

Background:

Our family has been involved in the Egg Industry since 1984; undergone quota cutbacks after cutbacks which had to be repurchased in order to keep the barns full and warm. In the early 2000 era, we began to convert a small portion of our caged production into cage free production as the market was expanding. As it was a new unknown venture; there were a lot of variables and many unknowns, and thus a lot of “dart throwing” in respects to what type of equipment would work and provide the “best in class” or stellar results. We did however make best efforts in doing the right things for the market and as a result, lost capacity in doing so and thus created a much necessary expansion mode of our farm and as a result needed to lease space on an interim basis. In 2014 this became very clear as the Industry deliberated the issue of phasing out of the conventional housing systems. As we had reached capacity and our cage systems moved from 60 square inches to 64”...then 67” we were by default forced to house one less bird a cage which due to our configuration, brought us to 80” per bird. With a period of growth upon us....as well as the demand for more free run and other cage free production...we acknowledged the fact that we were land locked and in desperate need of additional barn capacity. In 2014 we began planning to build a new farm, with 100% freerun (caged free production) on our second title. This was necessary due to the increased footprint required with allowing for range access if the market conditions required more of that production type. (This was not achievable on our other site).

Our building program began in the fall of 2014 with a new pullet barn which was required to enable the best and newest equipment specializing in raising freerun chics in the environment necessary to provide pullets to the layer barn which had complimenting equipment for the layer environment. Chics were placed in late winter as we began construction of the new layer barn in March of 2015 and housed our first flock in the summer of 2015 just as the EFC along with the Provinces banned any further new conventional housing.

Markets continued to change and further demand on free range and organic was urgently needed. As a result, once again we were land locked (via new setbacks etc.) and realized that we would need to purchase yet another parcel of land in order to accommodate the growth and space requirements of the organic market. I did not have adequate land so i needed to purchase yet another title, which we did in 2016 adjacent to our farm. As i was farming with my wife, I decided to put her on title and being a new production unit, which made more sense than trying to get her involved and many costly changes to share structures on my current production unit. Seeing as the rules of the day did not have any constraints or penalties, we chose to begin a new unit and we purchased the title next door. There were some old facilities on that title which we utilized immediately upon its first quota purchase.

In short, we planned to tear down and rebuild that farm completely. My wife purchased quota for that farm on the quota exchange in 2015, but did not have enough quota to fill a barn. As a result, I... the spouse transferred some quota to at least fill the barn that we were using as there were no dire consequences in doing so within the Boards Consolidated Orders. We began demolition in the summer of 2016 while we leased some facilities to house the layers along the while construction commenced of the new farm (in my spouse's name) in the fall of 2016. This farm was built to house organic production standards ...as well as free range and thus required a large land base for the outside access field requirements. The second phase/half of the barn was completed in July of 2017 at which point I again transferred quota to my Spouse in order to fill the barn and meet the market. (August of '17). Both new farms are at a reasonable capacity with room for growth which we planned for, built for and were financed for on that same premise.

As a result of the transfer, I had to shut down production of one of my conventional layer barns on the homestead that is now vacant at our location, as we continue to focus on the specialty markets. We are in the planning stages to use that barn and am in the process of gutting the barn for further cage free production as the markets permits.

The Problem:

Here in lies the problem and greatest concern...

We have expanded to meet new markets, built up two new farms in order to meet these markets and are not the least bit interested in selling any quota. We have however each invested heavily within the Industry over the last 3-4 years and plan on continuing to do so for the foreseeable future. No quota was sold at arms length, no profit was made on any sale of quota. In fact the banks are very concerned that we would be ineligible for growth as we financed "based" on the growth that was coming. As it was a new title, it made sense to make my spouse an owner as she was not yet on title on my farm and i had intentions to bring her in regardless. Our decision was made on the rules of the day. Which in fact did not punish either of us, nor benefited us. As a result the new farm acquired quota along with transfers from myself totalling 3 times since inception over a period of 2 -2.5 years. To now be penalized on a retroactive basis is extremely biased and truly unfair.

Had one had a crystal ball and know of this potential change...i would have simply kept the farm name in my name, acquired the land and build the barns and simply add her name as a Shareholder. All the actions, growth, expenditures, financing, meeting the markets would remain the same. All roads lead to the same result till "retroactivity" comes into play.

So my question is: Why am I being punished for bringing my Spouse along in the growth of our farm? I am just trying to bring notice to having more women involved in the Industry... (She owned a Broiler farm previously and subsequently sold) and now feel it has come to bite me in the rear end. As a result, barn space will be under utilized, the free range markets we committed to fill will have unplanned shortfalls. Financing pressure will rise as the banks re evaluate cash flow projections.

Proposed solution:

As no arms length selling occurred and indeed proof is shown that we are both actively farming with no intentions to sell...be it that an exemption be granted or extended to us to avoid such rampant discrimination and prevent collateral damage which could have easily been avoided had the rules been upfront, transparent and in a timely fashion. The legality of this retroactivity need to be further investigated as it is unprecedented in both the Federal and Provincial laws.

Another simply solution ...if one believes in legal“retroactivity” ...we would request to “retroactively” change our 2nd transfer amount date to the first transfer amount date and a simple quota lease permitted between parties (permitted while building)would have prevented such an atrocity and unfairness.

Clearly we need to educate what all types of aspects are involved in meeting today's Market in an every changing world, with such a heavy demand on land, resources and space requirements which will truly lead our Industry as compared to the rest of the Country.

Respectfully,

[REDACTED]

[REDACTED]

Footnote : Factoid

BTW. ..did you know that we could have simple housed all of our combined Production quota that we both have to date in one new conventional barn on our original homestead property??? That gives a small glimpse into what it takes and to the extent investments are required in order to “meet the specialty Market”!