



August 14, 2014

File: 44200-70 POULTRY INS

**DELIVERED BY E-MAIL**

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Dear Chairs:

**SUPERVISORY DECISION – SOUND MARKETING POLICY AND BOARD AUTHORITY – MANDATORY POULTRY DISEASE INSURANCE**

Thank you for your June 9, 2014 subsequent Joint Poultry Industry Submission in response to the BC Farm Industry Review Board's (BCFIRB) request for further clarification related to disease insurance for the poultry sectors (May 6, 2014). BCFIRB has carefully reviewed and assessed all the submissions it has received from the boards and stakeholders to date. BCFIRB has also assessed the larger legal and policy questions arising from this matter, and how to most effectively move this issue forward.

The 2004 high pathogenic avian influenza outbreak was devastating to BC's poultry industries and associated value chains. BCFIRB recognizes and commends the extensive work and resources invested to date by all stakeholders to prevent future outbreaks, as well as following up on potential measures (e.g. insurance options) for managing industry recovery should another event occur.

Currently a group of BC poultry producers seeks to establish a captive insurance company (to be owned and operated by the producer associations) which would provide insurance coverage to licensed producers against low and high pathogenic avian influenza outbreaks. The proposal is based on the poultry boards using an assumed authority under the *Natural Products Marketing (BC) Act (NPMA)* to: (a) make avian influenza insurance mandatory for licensed producers; and, (b) collect levies for the purposes of producers' premiums as well as capitalizing and operating the captive insurance company.

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Neither the poultry boards nor BCFIRB would have regulatory or supervisory responsibilities related to the proposed captive insurance company (or another approach to insurance) if it did not involve the exercise of authority under the *NPMA*.

BCFIRB continues to acknowledge insurance as an important risk management tool for producers and recognizes insurance can be part of sound marketing policy. Poultry sector efforts to address potential gaps in insurance coverage are a good example of proactive stakeholder action for the benefit of BC agriculture.

Given the proposed approach to insurance involves exercise of poultry board authority under the *NPMA*, the questions for BCFIRB to initially determine under s. 9<sup>1</sup> are:

- whether mandatory insurance falls within the poultry boards' legal authority, and;
- whether mandatory insurance accords with sound marketing policy.

In considering these questions, BCFIRB notes that the policy and legal implications<sup>2</sup> of mandatory insurance extend well beyond the immediate purpose of providing one of several means of establishing insurance coverage for avian influenza.

## **BCFIRB Findings**

### **Mandatory insurance and poultry board authority**

BCFIRB has concluded that the high level of legal uncertainty and prospect of challenge is such that proceeding to implement mandatory poultry insurance in the absence of clear legal authority under the *NPMA* is not in the best interest of the BC regulated poultry sector.

### **Mandatory insurance and sound marketing policy**

Based on the arguments to date<sup>3</sup>:

BCFIRB remains unconvinced that mandatory insurance (an extra level of regulation) *for the purposes of establishing and operating a captive insurance company* to provide coverage for avian influenza contributes effectively and strategically to orderly marketing beyond the authorities and tools already in place.

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<sup>1</sup> 9 (1) The Provincial board 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 the Provincial board under this Act or a federal Act and to make any order permitted to be made.

(2) Without limiting subsection (1), the Provincial board has exclusive jurisdiction to inquire into, hear and determine whether a decision, order or determination of a marketing board or commission accords with either or both of the following:

(a) sound marketing policy;

(b) a scheme or the orders of the marketing board or commission.

(3) A decision, order or determination of the Provincial board under this Act on a matter in respect of which the Provincial board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

<sup>2</sup> Long-established federal-provincial supply management policies and authorities

<sup>3</sup> January 17, 2014 and June 9, 2014 Joint Poultry Submissions and other communications.

BCFIRB is not satisfied that the proposed captive insurance company, which would be established and operated with monies collected using poultry board authority under the *NPMA*, accords with sound marketing policy.

BCFIRB does acknowledge that as a matter of sound marketing policy, there are arguments supporting the boards being provided with limited authority to make poultry insurance mandatory in response to certain circumstances. Further examination could confirm that mandatory insurance of some kind may be necessary to complement regulatory and other measures currently available to address avian influenza prevention and production recovery issues.

## **BCFIRB Order**

For all the reasons outlined in this letter, and in the exercise of BCFIRB's supervisory authority under the *NPMA*, the boards are directed not to exercise their regulatory authority under their schemes at this time for the purpose of supporting the proposed captive insurance company.

Should one or more of the board propose proceeding with a more limited regulatory solution, that solution is to be submitted to BCFIRB, with rationale, for prior supervisory approval.

## **BCFIRB Reasons**

### **Mandatory insurance and poultry board authority**

In its May 6, 2014 letter, BCFIRB stated it would continue to examine the question of sound marketing policy, leaving it to the poultry boards' discretion on whether they wished to provide further legal opinion at the time. The May 6 letter also noted that:

The three legal opinions accompanying the Submission [January 17, 2014] appear to provide differing assessments as to whether the poultry boards can establish a proper link between mandatory insurance and the purpose of orderly marketing. However they do not provide substantive arguments addressing both sides of the legal question.

In the June 9, 2014 subsequent Joint Submission, the poultry boards confirmed their satisfaction with the August 29, 2013 legal opinion from Cavanagh LLP.<sup>4</sup>

Our own analysis still indicates that a significant degree of uncertainty exists as to whether any form of mandatory poultry insurance is currently authorized under the *NPMA*.

This level of uncertainty increases substantially as you move from: (a) boards simply making insurance mandatory; (b) to mandatory insurance intended to compensate for business interruption in addition to the costs directly associated with promptly returning the marketing cycle to full production; (c) to boards establishing, administering and funding insurance directly; to, (d) boards collecting levies for the purposes of producer premiums as well as capitalizing and funding the operation of a captive insurance company formed by the producer associations.

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<sup>4</sup> In summary, the legal opinion put forward that poultry boards have sufficient authority under the *NPMA* to make insurance mandatory and to collect levies for the purposes of the producer associations establishing and operating a captive insurance company (including the collection of levies for producer premiums).

Even if BCFIRB could be confident that mandatory insurance at its most basic level was within the jurisdiction of the poultry boards – and legal opinions differ on that question – the boards using their authority to support formation and operation of a captive insurance company is, in our view, clearly not contemplated by the *NPMA*.

In BCFIRB's view, legal challenge of the poultry boards using their authority under the *NPMA* to support establishment and operation of an association-owned captive insurance company is likely. Such a challenge, which may come from a single commodity producer, regional interest or stakeholder, could potentially impact the entire poultry industry's ability to deliver and administer an effective approach to risk management.

Following the 2004 avian influenza outbreak, BCFIRB was satisfied that there was scope within the *NPMA* for boards and commissions to address appropriate mandatory biosecurity standards as a matter of sound marketing policy. However, BCFIRB also pointed out to government and the boards (June 27, 2006) that as risk management work proceeded further legislative or regulatory support may be required.

Despite the detailed submissions to date from the boards, BCFIRB remains of the view that the high level of legal uncertainty and prospect of challenge is such that proceeding to implement mandatory poultry insurance in the absence of clear legal authority under the *NPMA* is not in the best interest of the BC regulated poultry sector.

### **Mandatory insurance and sound marketing policy**

As the June 9 Joint Submission of your boards notes, the core question is: *How to effectively and efficiently return the poultry industry to a system of orderly marketing?*

From a regulatory perspective, the next question that must be asked is 'do the tools already exist to support achieving the goal?' BCFIRB observes that any effective, efficient and strategic system is based on a combination of tools and approaches – not regulation alone.

At this stage BCFIRB believes existing tools – board authority over licensing and production including authority to require cleaning and disinfecting – would go a long way to providing a framework for a timely return to orderly marketing in the event of an avian influenza outbreak. BCFIRB agrees with the poultry boards that the Canadian Food Inspection Agency (CFIA) is the final authority in allowing a return to production in this scenario, but it also observes that CFIA would still be the final authority in allowing a return to production even if a producer holds insurance.

As the Submissions point out, requiring cleaning and disinfecting does not address potential financial challenges for producers in a disaster. These would include unexpected cleaning and disinfecting costs along with lost production and replacement costs. These costs in 2004 were managed through a variety of supports from government, processors and the poultry boards. Looking forward, these financial supports may or may not be available to the same degree in the future. Insurance is certainly one means to help cover some of these costs. If at least some of these costs are not covered through some means, there is likely risk that there would be a sufficient numbers of producers delaying return or exiting the industry such that a timely return to orderly marketing would be severely impacted.

From regulatory and supply management policy perspectives there may be a sound marketing policy argument in support of some form of mandatory insurance that would help cover unexpected costs directly influencing a timely return to production (e.g. cleaning and disinfecting costs, chick replacement costs). BCFIRB observes there could likely be some impact on a timely return to orderly marketing if these costs are not covered through some means (including but not limited to insurance).

As noted above, producers would also face temporary income loss and other business losses associated with business interruption. From a sound marketing policy perspective, BCFIRB has difficulty extending a regulatory requirement for mandatory insurance to business interruption losses. BCFIRB observes that while there may be impact on individual businesses depending on their financial situations, mandatory insurance coverage for business losses may not be a key factor in an overall timely return to orderly marketing. It is not clear to BCFIRB that there is a strong argument linking business loss and a timely return to orderly marketing.

Recently, high pathogenic avian influenza insurance became available to broiler and layer producers in Canada. Egg producers have additional coverage under a national Egg Farmers of Canada program (for which levies are being collected). Agri-Recovery (government program) is being used to compensate producers for some low pathogenic outbreaks and other government compensation programs are in place at this time. Although turkey and hatching egg producers are without the additional level of private coverage currently available to broiler and layer producers, it is clear that solutions to insurance gaps are developing.

Given the foregoing, BCFIRB assesses that it is premature to commit to a complex regulatory relationship with significant policy and legal questions between the poultry boards (industry regulators under the *NPMA*) and the poultry associations (non-profit interest groups) in connection with a captive insurance company (business regulated under the *Insurance Act* and the *Financial Institutions Act*).

Subject to the boards clearly establishing where regulatory gaps could be filled by mandatory insurance, BCFIRB does agree in principle that a limited authority to require mandatory insurance (i.e., as a condition of producer license) could accord with sound marketing policy. Such measures could also allow for boards and individual producers to assess and establish insurance requirements based on the needs of their industry, their region and other risk management measures over time. BCFIRB does not agree, in the face of significant outstanding policy and legal questions at many levels, that poultry boards participating in the proposed formation and operation of a captive insurance company accords with sound marketing policy.

### **Concluding comments**

BCFIRB acknowledges that there have been extensive resources invested to date by the proponents of the captive insurance company. However, for the reasons outlined in this letter, even if such a company could be established under the terms of other legislative and policy requirements governing such companies (a point not addressed in the materials), BCFIRB is not satisfied that the proposal satisfies the legal test and the sound marketing policy test of the *NPMA*.

BCFIRB is prepared to work with the poultry boards in discussing with the Ministry of Agriculture whether a near term change to the *NPMA* to allow limited authority to require mandatory insurance is

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feasible and necessary at this time. We assess, however, that a more substantive legislative change to accommodate any type of relationship between the poultry boards and a private insurance company may be a much larger – and longer term – policy and legislative question for government.

BCFIRB notes it does not have the jurisdiction to address the provincial legislation governing insurance in BC. We expect, however, that any initiative proposing a role for the poultry boards in insurance – directly or indirectly – would require equally careful legal and policy scrutiny from the authorities responsible for administering that legislation. In the end we would expect all relevant authorities would have opportunity for appropriate scrutiny and be jointly informed whether all authorities were satisfied.

### **Order**

For all the reasons outlined in this letter, and in the exercise of BCFIRB's supervisory authority under the *NPMA*, the boards are directed not to exercise their regulatory authority under their schemes at this time for the purpose of supporting the proposed captive insurance company.

Should one or more of the boards propose proceeding with a more limited regulatory solution, that solution is to be submitted to BCFIRB, with rationale, for prior supervisory approval.

In accordance with s. 57 of the *Administrative Tribunals Act*, “an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued.”

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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John Les  
Chair

cc: Derek Sturko, Deputy Minister  
Ministry of Agriculture

BCFIRB web site

Harvey Sasaki