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DELIVERED BY E-MAIL

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RE: THREE GATES FARM v BC CHICKEN MARKETING BOARD

Dear Sirs:

Attached, please find the decision of the British Columbia Farm Industry Review Board (the "Provincial board") in the subject appeal.

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

Yours truly,

Gloria Chojnacki
Case Manager

c.c.: Bill Vanderspek, General Manager
BC Chicken Marketing Board

British Columbia
Farm Industry Review Board

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IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY PAUL KUSZYK FROM A DECISION CONCERNING THE
DENIAL OF HIS REQUEST TO REMOVE THE TRANSFER RESTRICTIONS ON
THE INCENTIVE QUOTA OFFERED TO HIM AS A NEW ENTRANT GROWER ON
VANCOUVER ISLAND

BETWEEN

PAUL KUSZYK, THREE GATES FARM

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Sandi Ulmi, Panel Chair
Ron Bertrand, Member
Cheryl Davie, Member

For the Appellant:

Paul Kuszyk

For the Respondent:

Claire E. Hunter, Counsel

Intervener:

Lyle Young, General Manager
Island Farmhouse Poultry Ltd.

Date of Hearing

November 29, 2010

Place of Hearing

Nanaimo, BC

INTRODUCTION

1. The Appellant, Paul Kuszyk, operating a chicken farm under the name of Three Gates Farm, is appealing the July 26, 2010 decision of the British Columbia Chicken Marketing Board (Chicken Board) denying his request to remove the transfer restrictions imposed on new entrant growers accepting additional incentive quota.
2. This appeal arose from the June 16, 2010 offer by the Chicken Board to issue an additional 3,473 kg per live weight cycle of incentive quota to 17 new entrant growers on Vancouver Island and BC Interior regions. This offer was contingent on them accepting several conditions including:
 1. A grower receiving additional incentive quota under this proposal will be required to contract and ship ALL of his production resulting from new AND existing issuances of incentive quota to a specific processing plant (as directed or chosen by the Board) in his region as long as a processing plant remains in operation in his region. [emphasis in original]
 2. All quotas issued under the New Entrant Grower Program (incentive quotas) will be restricted to the region in which they were issued as long as there is a processing plant in operation in that region. These quotas will not be eligible for transfer to another region of the province by the new entrant grower or any subsequent transferee of the quota while there remains an active processor in their region.
 3. New entrants in the Interior and Vancouver Island regions who have been granted incentive quotas will not be permitted to apply to change processors unless by mutual agreement between grower, current processor and new processor or by exceptional circumstances as permitted by the Board.
3. On July 5, 2010, Mr. Kuszyk applied to the Chicken Board under Schedule 16 (Part 57) (Section 57.1) of the Chicken Board's *General Orders* requesting the Chicken Board to remove the transfer restriction encumbrances associated with the June 16, 2010 offer presented to New Entrant Growers on Vancouver Island.
4. On July 26, 2010, the Chicken Board reaffirmed the conditions contained in the June 16, 2010 letter and denied Mr. Kuszyk's request to revisit those conditions, giving rise to this appeal.

ISSUE

Did the Chicken Board err in its decision to deny Mr. Kuszyk's request to remove the transfer restrictions on the incentive quota offered to him as a new entrant grower on Vancouver Island?

BACKGROUND

5. The supply of chicken in Canada is regulated under the supply-managed system that is designed to fill, but not over fill the domestic market. A key component of supply-management is quota, which entitles a producer to produce and sell a certain quantity of chicken. The finite supply of quota has meant that it has become very difficult to acquire. Under the *British Columbia Chicken Marketing Scheme, 1961* (the *Scheme*), the Chicken Board has the authority and responsibility to “regulate and control in any and all respects” the production of chicken in BC.
6. There is a long history of regulatory changes to chicken quota on Vancouver Island. At one time, there were restrictions on the quota that had the effect of locking Vancouver Island quota to the Island. Vancouver Island growers at that time received a premium for their chicken in recognition of the higher costs of production on the Island. After the Lilydale Cooperative processing plant closed its Vancouver Island plant in 1999, the Chicken Board recommended removing the price premium that Island growers had been receiving and requiring them to assume the transportation costs involved in delivering their product to the Lower Mainland processors. At the same time, it also recommended removing the freeze on transfers of Vancouver Island quota off Vancouver Island. The BC Farm Industry Review Board (BCFIRB) endorsed these recommendations in its *Supervisory Review of the Vancouver Island Chicken Industry - 2004*. As a result, much of the Vancouver Island chicken quota was subsequently transferred off the Island, greatly reducing the amount of chicken produced on the Island.
7. In 2005, Island Farmhouse Poultry (IFP) began operating a processing plant on Vancouver Island to service approximately 350 small Island farms. It also purchases birds from larger Island growers. Its aim is to provide essential processing services for poultry and increase the Vancouver Island grown food supply, thus improving local food security and increasing jobs on the Island. Since its inception, IFP has had difficulty in accessing an adequate supply of chicken to make its operation viable.
8. In 2005-2006, the Chicken Board initiated a New Entrant Grower Program to attract new growers to the industry, where successful applicants received a grant of a block of quota to help ease the financial burden of becoming new chicken growers. This program was focused on Vancouver Island and the Interior, which in part supported the move of concentrated production out of the Fraser Valley, and encouraged specialty production to meet specialty product requirements and to aid local processors. The Chicken Board thought that the New Entrant Grower Program would supply sufficient product to IFP to ensure its viability. To date, this has not been the case because the program is less attractive on Vancouver Island than other places in BC due to the higher production costs on the Island. In addition, many large chicken growers have left the Island or transferred their quota off of the Island, thus further reducing the amount of chicken produced in the region.

9. Under the New Entrant Grower Program, a grower is granted 4,000 units, or 7,716 kilograms, of transferable chicken quota. This incentive quota is subject to a declining transfer assessment schedule of 100% in year one, (effectively making it non-transferable), which is subsequently reduced by 10% per annum until the 10th year at which point and onward transfers are assessed at 10%. This is referred to as the “10-10-10” declining transfer assessment. This assessment was put into place to ensure that new growers have a commitment to the industry and are not merely entering the program to realize a windfall profit by immediately transferring the new entrant or incentive quota they receive. The other condition on all new entrant and incentive quota issued by the Chicken Board is the “Last In, First Out” or “LIFO” requirement whereby the last quota issued must be the first to be transferred. This requirement works with the 10-10-10 declining transfer assessment to ensure a commitment to the industry.
10. Through feedback regarding the New Entrant Grower Program, the Chicken Board became aware that the new entrant grant of 4,000 birds was not large enough to be profitable on Vancouver Island because of the higher costs to grow chicken there. The Chicken Board also heard from Lyle Young, General Manager of IFP, that there was insufficient supply of chicken on Vancouver Island to supply the IFP processing plant. In response to this and the concern that new entrant chicken growers on the Island could transfer their quota at the end of nine years, thus putting IFP at risk, the Chicken Board determined that the best way to deal with this was to offer additional incentive quota to the new entrants subject to the condition that both the new and previously issued quota granted by the Chicken Board would be tied to Vancouver Island, under the conditions described in paragraph 2 above. This was already the case in the BC Interior and would remain so for those growers who accepted the quota offer there.
11. This 2010 incentive quota was offered to 17 growers – seven in the Interior and ten on Vancouver Island and Gabriola Island. Of the 17, 14 – including seven growers on Vancouver Island – accepted the offer, and three – including the appellant, Mr. Kuszyk, – did not. For those growers who chose not to accept the incentive quota, there was no effect on the transferability of their existing quota nor did any other conditions of the New Entrant Grower Program they had originally accepted change.
12. Paul Kuszyk is a chicken grower with a farm on Gabriola Island, located near Nanaimo on Vancouver Island. His production is considered part of the Vancouver Island production. He entered the industry in 2006 under the Chicken Board’s New Entrant Grower Program and was granted 4,000 units of quota, which has no restrictions to being transferred off of Vancouver Island, but is subject to the 10-10-10 declining transfer assessment. Mr. Kuszyk subsequently purchased 4,250 additional units of quota. This quota is not subject to the 10-10-10 declining transfer assessment.

13. Under the conditions of the June 16, 2010 offer of the Chicken Board, if Mr. Kuszyk accepts this offer, the 7,716 kg (4,000 units) of quota he received as a new entrant grower in 2006, and the additional 3,473 kg quota on offer would become tied to Vancouver Island. In addition, the new quota of 3473 kg would have to be the first quota sold under the LIFO rule and would be subject to the 10-10-10 declining transfer assessment.

POSITION OF THE INTERVENER

14. The Intervener, Mr. Young of IFP, states that the Chicken Board's incentive offer of quota that is tied to the Island will help his plant to have a continuing supply of chicken and is an important, if not essential component to the stability of chicken production and processing on the Island.

DECISION

15. The appellant has several objections to the Chicken Board's June 2010 offer of incentive quota. His arguments fall into two main categories including the legal authority of the Chicken Board to make this incentive quota offer, and the Chicken Board's failure to consider quota values when it crafted the offer.

LEGAL AUTHORITY

a) The Chicken Board 2010 offer fails to recognize that this offer creates a new class of quota.

16. Mr. Kuszyk argues that this 2010 quota offer creates a new class of quota that can only be sold on Vancouver Island. He maintains that the Chicken Board does not have the authority to create a new class of quota without the prior approval of BCFIRB, and as no prior approval was given, the Chicken Board is acting outside of its powers. He points to the *Scheme*, section 4.01 (b.1) under "Powers of the Board" which states that the board shall have the following powers:

(b.1) with the prior approval of the Provincial board, to classify and regulate producers by area of production within British Columbia;

17. The Chicken Board maintains that the *Scheme* permits the Chicken Board to "regulate and control in any all respects" the production of chicken in BC. In addition, it has a specific power under s. 4.01 (c.1) of the *Scheme* which gives the Board the power:

(c.1) to establish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board;

18. The Chicken Board argues that the June 2010 incentive quota offer, including the condition that if accepted both the new and previous new entrant grower quota would not be transferable from Vancouver Island, is clearly within the Chicken Board's powers as set out in the *Scheme*. Further, the Chicken Board argues that there have been restrictions on the transfer of quota in the Interior of BC for many years. BCFIRB is aware of this and has not directed it to change this policy. In addition, Vancouver Island quota was subject to transfer restrictions until 2005.
 19. In the panel's view, the legal argument being made by the appellant does not accurately reflect the language and purpose of s. 4.01(b.1) of the *Scheme*. All that section does is to require BCFIRB's prior approval for the creation or classification of regions within the province for regulatory purposes. It does not require BCFIRB's prior approval for every regulatory decision that is made once those regions have been established. The latter decisions, including the decision made in this case, are subject to appeal. It is only the larger "structural" decision that required prior approval.
 20. The Chicken Board has regulated the Vancouver Island Region, the Interior Region and the Fraser Valley Region, as separate regions for many years. On January 23, 2006, following its Specialty Review, BCFIRB prior approved the Chicken Board's new *General Orders* which, in Part 50, continued to recognize these three distinct regions.
 21. Within this regional structure, particularly on Vancouver Island, there has been considerable change and evolution in regulation – such change reflecting the flexibility that is so important in effective marketing regulation. The conditions applied to this June 2010 offer are an attempt by the Chicken Board to respond to the broader sound marketing goals of supporting regional processors, supplying local product, and reducing the concentration of animal agriculture in the Fraser Valley.
- b) The Chicken Board offer goes against the 2005 BCFIRB directions with respect to the New Entrant Grower Program that state that all quota must be transferable.**
22. The appellant argues that the June 16, 2010 offer that ties the quota to Vancouver Island violates BCFIRB directions that all new entrant grower quota should be transferable. He points to the BCFIRB September 1, 2005 *Specialty Market and New Entrant Submissions – Policy, Analysis, Principles and Directions*, Appendix 2 p. 4 which states:

BCFIRB's policy principles direct that all quota is to be transferable and subject to transfer assessment. Therefore, specialty quota and new entrant quota incentives need to be transferable just as regular quota is transferable.

Mr. Kuszyk alleges that tying the incentive quota offer to Vancouver Island goes against that directive and therefore should be struck down.

23. The Chicken Board argues that its *General Orders*, Part 5 state that at the discretion of the board priority will be given to specific regions based on the demonstrated needs of a particular region. It further argues that the incentive quota offered is still transferable, however, only on Vancouver Island. It maintains that this is no different from the situation in the Interior of BC where quota has been tied to the region for many years.
24. The panel notes that after the closure of the Lilydale processing plant in 1999, quota transfer restrictions on Vancouver Island quota were removed. However, section 5.01 of the *Scheme* still requires that “the board (set) aside quota exclusively for purposes of the production of regulated product on Vancouver Island in an amount equal to the amount the board permits disposed of or transferred off Vancouver Island”. We see the implementation of the June 2010 offer as being consistent with section 5.01 of the *Scheme*. The Chicken Board through this offer is distributing quota “exclusively for purposes of the production of regulated product on Vancouver Island” which it is expressly authorized to do under the *Scheme*.
25. Quota conditions are an exercise of regulatory authority and the panel accepts that the Chicken Board has the discretion to put terms and conditions on its offer. We also agree that this quota is still transferable, but only on Vancouver Island. In our opinion, the appellant has misinterpreted the BCFIRB directions to mean that all quota must be treated the same. For clarification, the 2005 BCFIRB directions were in response to the previous New Entrant Program quota that was non-transferable in any way except within immediate families and reverted to the Chicken Board when not being used by the original holder. Tying the quota offer to Vancouver Island is not the same as making the quota completely non-transferable.
26. In addition, we see this as consistent with s. 5.5 of BCFIRB’s 2005 Specialty Review directions which state that “Policies should generally be consistent throughout all quota classes, with procedural differences related to specific production or market requirements of the class.” In our opinion, the Chicken Board is responding to a specific market requirement. We regard the conditions put on the quota incentive as an exercise of sound marketing policy given the circumstances on Vancouver Island.

FAILURE TO CONSIDER QUOTA VALUES

- a) **The decision represents an unreasonable use of the powers granted to the Chicken Board under Part 21 of the General Orders.**

27. Part 21.1 of the Chicken Board's General Orders state:

As provided in the Scheme, the Board may establish, issue, permit transfer, revoke or reduce quotas to any person as the Board in its discretion may determine from time to time, whether or not these quotas are in use, and may establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the Board.

28. The appellant claims that while this section of the *General Orders* is well understood by producers, in this case the Chicken Board has not taken producer interests sufficiently into account. He argues that everyone in the industry is aware that quota has significant monetary value and the Chicken Board therefore has a duty to act in a manner that is fair to producers as well as the industry at large. He states that by accepting this offer, his financial interest in the quota he has already earned would be seriously compromised. He states that the value of quota tied to Vancouver Island would be negatively impacted if it could be sold at all. He notes that he has used the value of his new entrant quota as collateral for the quota he purchased and this could be in jeopardy if the value of his quota is reduced.
29. Mr. Kuszyk also argues that the Chicken Board's rationale behind this 2010 incentive quota offer – to ensure a consistent supply of product to regional processors such as IFP – is not a sufficient reason to compromise the value of growers' businesses and that it sets a dangerous precedent. He states that the Chicken Board must be fair and act within its *General Orders*.
30. In response the Chicken Board argues that its decision not to grant the appellant's request to remove the transfer restrictions in its June 2010 offer was both within its authority under its *General Orders* and consistent with sound marketing policy.
31. The panel accepts that the Chicken Board was within its authority under s. 21 of its *General Orders* to place restrictions on its June 2010 offer of incentive quota and subsequent refusal of Mr. Kuszyk's request to remove those restrictions. We do not find this an abuse of the Chicken Board's powers, nor would we expect the Chicken Board to consider Mr. Kuszyk's financial situation with respect to his quota value when making a decision based on sound marketing policy and the good of the industry as a whole. As has been pointed out, Mr. Kuszyk was under no obligation to accept the offer and has no financial consequences to his quota values if he refuses the offer.
32. The panel further notes that there is a difference between "earned" quota values, which Mr. Kuszyk refers to, and "owned" quota. Although Mr. Kuszyk has become vested in 40% of the value of the quota he was granted under the new entrant program, he does not own that quota. The Chicken Board maintains control over all quota and the conditions of its use as stated in the *Scheme*, s. 4.01(c.1) which gives the Chicken Board the power to:

... establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board;

33. As recognised by Mr. Justice Macdonald in *Sanders v. Milk Commission* (1991), 53 B.C.L.R. (2d) 167 at page 178, quota is not property, rather it is “a license to produce, which may be issued on prescribed terms and conditions (and) may be cancelled, that is annulled or abolished, also on prescribed terms and conditions”. This has been recently confirmed in the *Taylor v Dairy Farmers of Nova Scotia, 2010, NSSC 436* decision where Justice Patrick Duncan states:

[63]... In my opinion, quota and the “opportunity” it presents for profit in an open market, while capable of being used as security for borrowing purposes and for purchase and sale, is not “property” capable of being subject to expropriation. It is a revocable licence that provides a conditioned entitlement to produce milk, but with no right to renew or even retain the quota allotted.

b) The decision unreasonably and retroactively alters the terms that were used to attract producers into the new entrant grower program.

34. The appellant states that the rules regarding incentive quota, specifically the 10-10-10 declining transfer assessment, were very clear when the program was launched. The Chicken Board has identified concerns about the possible movement of quota off Vancouver Island upon maturity to justify imposing transfer restrictions on the incentive quota. However, the 10-year time line was considered to be a reasonable time over which incentive quota would be earned and everyone involved was aware that movement off the island was a possibility. Mr. Kuszyk claims that to change the rules midstream is unfair to those producers who entered the program in good faith.
35. In addition, he argues that the Chicken Board previously asked BCFIRB to remove all Vancouver Island quota transfer restrictions and is now reversing that request. Mr. Kuszyk states that the rules have changed since he entered the program and he wants the option to be open to him to retire in 11 to 13 years and to be able to sell his quota off Vancouver Island if he so chooses.
36. In reply, the Chicken Board argues that the rules have not changed. If Mr. Kuszyk chooses not to accept the June 2010 offer, nothing changes for him. It is only if he wants to accept this offer and receive the incentive quota that the rules change. The choice is his. The Chicken Board points out that through this offer the supply of chicken to IFP has increased by 35,000 kg per cycle, so the program has been successful and seven of the 10 new entrant growers on Vancouver Island have accepted the incentive quota under the conditions required.

37. The Chicken Board further states that in making this quota offer, it took into consideration how to best create a long term supply of chicken to IFP, how to enable people on the Island to buy local product and how to diversify chicken production away from the Fraser Valley. In the Chicken Board's opinion, the quota incentive offer was the best way to do this to benefit the entire industry.
38. The panel finds that the rules under which the appellant entered the new entrant program have not been changed and we do not accept that the offer has unreasonably or retroactively changed the rules for him. If Mr. Kuszyk chooses not to accept this offer, nothing changes for him. It is only if he accepts the offer of the incentive quota, which he has no obligation to do, that the rules change. In our view, the appellant would like the free incentive quota, but is not prepared to accept the conditions that come attached to it. The panel accepts the argument of the Chicken Board on this issue. Mr. Kuszyk cannot have it both ways. His existing quota is not adversely affected by anything in the Chicken Board's decision under appeal. Mr. Kuszyk cannot require the Chicken Board to create new quota that best suits his interests.

c) New entrant growers are not being treated equally because some growers are paying more and pro rata orders are being ignored.

39. The appellant claims that under the Chicken Board's June 16, 2010 offer, the Chicken Board failed to recognize that some of the new entrant growers have been in the program for several years and under the 10-10-10 declining transfer assessment, have "earned" a substantial amount of equity in the quota they were granted. He states that they are therefore "paying more" if they accept the Chicken Board's offer than someone who has recently entered the program and does not have any "earned" equity in the quota. He maintains that he would be relinquishing approximately \$72,000 in vested equity whereas someone new to the program would not give up anything and therefore the offer treats him unfairly.
40. Further, the appellant argues that this offer goes against the pro rata distribution which he was promised and maintains that since he has purchased quota, he should receive more of this incentive quota than another new entrant who has not purchased quota and therefore does not hold as much. Mr. Kuszyk states that purchasing quota shows that he has a commitment to the industry.
41. The Chicken Board argues that the new entrants were all treated equally as they were all offered the same amount of quota in this offer which was based on their original quota grant. The Chicken Board also argues that whether or not to accept the offer of additional quota is a business decision that growers have to make depending on their circumstances. It maintains that Mr. Kuszyk would not be giving up anything by accepting the offer as he did not pay anything for his initial new entrant quota and would not pay anything for the additional incentive grant.

Therefore, the choice of whether or not to accept the incentive quota is his to make and is fair to all new entrant growers. It states that it is not the job of the Chicken Board to consider individual quota values, but rather the needs of the industry as a whole.

42. Again, the panel agrees that it is not the job of the Chicken Board to maintain an individual grower's equity in his quota when the Chicken Board cannot assign value to quota; rather its job is to regulate the industry as a whole. As clearly outlined in s. 4.01 (c.1.) of the Chicken *Scheme*, the Chicken Board "shall not confer any property interest in quotas and such quotas shall remain at all times within the exclusive control of the (Chicken Board)."
43. We also do not accept the appellant's argument that he should have been offered more of this incentive quota on a pro rata basis taking into consideration the fact that he has purchased quota. The Chicken Board offered this incentive quota to all new entrants on an equal basis based on the grant of quota they received when coming into the program. In this case, the quota was offered as part of the New Entrant Grower Program in order to address specific regional requirements, making it different from an industry-wide allocation of quota which is commonly distributed to all producers on a pro rata basis.

ASSURANCE OF SUPPLY

44. The appellant also maintains that the Chicken Board argued before BCFIRB in early 2010 to have assurance of supply removed and then shortly after made this offer of incentive quota which ties Vancouver Island quota to a specific processor – effectively a forced assurance of supply on the Island. He claims that this is an about face and not consistent policy.
45. The Chicken Board's reply is that this is consistent with its arguments before BCFIRB in the recent Supervisory Review where it recommended that small processors, processing under two percent of the province's supply of chicken, would be protected and, in appropriate circumstances, could have a supply of chicken directed to them.
46. The panel accepts that this accords with the argument the Chicken Board made before BCFIRB and its directions to the Chicken Board in its June 9, 2010 *Supervisory Review of BC Chicken Marketing Board Pricing-related Recommendations*.

CONCLUSION

47. The panel has not been persuaded that the Chicken Board erred in refusing the appellant's request to remove the conditions of the incentive quota offer and re-offer it to him. We accept the arguments of the Chicken Board that under its

Scheme it had the power to offer this incentive quota and did so in the manner it considered best serves sound marketing policy. Situations change over time and regulations need to be adapted to emerging circumstances. The panel agrees that maintaining a viable chicken industry on Vancouver Island is sound marketing policy. The Chicken Board's quota incentive offer is an exercise of its discretion to create a regulatory means of supporting sound marketing policy for the good of the entire industry.

48. Further, we note that this June 2010 offer of the Chicken Board fits well with the BC Ministry of Agriculture's 2004 *Regulated Market Economic Policy*. This Policy expects that regulated marketing boards in British Columbia will ensure that their policies and decisions do not inhibit the economic viability of regional industries; that they consider the need for appropriate mechanisms to sustain regional industries; and that they strive to accommodate producers and processors who pursue innovative or specialized market opportunities which are available in a region because of the region's location or natural characteristics.


ORDER

27. The appeal is dismissed.
28. There will be no order as to costs.

Dated at Victoria, British Columbia this 24th day of December, 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Sandi Ulmi, Panel Chair



Ron Bertrand, Member



Cheryl Davie, Member