IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL (#05-05) FROM AN ORDER
DATED JULY 8, 2005

BETWEEN:

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

JOHN WOELDERS

INTERVENOR

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine J. Elsaesser, Vice Chair (Panel Chair) Wayne E.A.Wickens, Member
For the Appellant	Maria Morellato, Counsel Angela D'Elia, Counsel
For the Respondent	John Hunter, Q.C., Counsel
For the Intervenor	John Woelders
Date of Hearing:	October 27-28, 2005
Place of Hearing:	Abbotsford, BC

INTRODUCTION

1. The Appellant, the British Columbia Chicken Growers' Association ("BCCGA") is appealing a decision of the British Columbia Chicken Marketing Board (the "Chicken Board") dated July 8, 2005 concerning the allocation of future growth in the chicken industry.

2. The July 8 Order revises a previous Chicken Board order (Order #320) which set the basis for allocation of growth since 1997. Prior to Order #320, when the industry allocated growth it did so in 5000 bird increments to all growers; this allocation of quota was termed secondary quota. As the industry grew, growers were able to utilise a greater percentage of their secondary quota. Order #320 moved away from the secondary quota system and created "transitional quota" which was issued to eligible growers. Unlike secondary quota, transitional quota was not issued per capita; instead the largest amount (11,000 birds) went to the smallest grower (with 15,000 birds).[1] Larger growers received an allocation on a sliding scale with the largest grower receiving the smallest amount (5000 birds). The purpose behind transitional quota was to create a sleeve of production to meet changing market demands. According to Order #320, conversion to primary quota would occur once transitional quota became fully utilised. After that, growth would be allocated on a pro rata basis where growth would be distributed in accordance with quota holdings.

3. As a result of Order #320, there have come to be three different groups of growers – "faint hope", "primary only" and "regular" growers. Faint hope growers were growers who had transferred a portion of quota prior to Order #320 being passed and as such were deemed to be leaving the industry and ineligible to receive transitional quota. These growers were promised 5000 birds of primary quota when Order #320 completed its cycle and transitional quota was converted into primary quota. Primary only growers entered the industry after Order #320 and as such did not receive transitional quota. Regular growers were in the industry prior to Order #320 and received transitional quota.

4. The Chicken Board was of the view that Order #320 was fundamentally flawed in its implementation as it tied industry growth to those growers who were in production prior to 1997 and who had not transferred quota. Given that industry growth has slowed, if Order #320 was not amended industry growth would have been tied to this same group for another 3-5 years. New entrants and those growers that previously transferred quota could not participate in growth. In its July 8, 2005 Order, the Chicken Board sought to rectify these inequities and determined that effective June 29, 2005:

    - faint hope growers would be issued 5000 units (9644 kg) of transitional quota;

[1] As originally contemplated, the conversion of transitional quota was expected to occur in approximately 2004. It is now not expected to occur for another three to five, or more, years.

- all primary quota only growers will be issued an amount of transitional quota equivalent to their primary quota holdings, to a maximum of 5000 quota units (9644 kg);
- all transitional quotas including the new issuances referred to in the two proceeding bullet points will be converted to primary quota.

5. The July 8 Order came into effect in Period A-69 (the period commencing December 11, 2005 – February 4, 2006). At that time, all transitional quota converted to primary quota. However, given that transitional quota was not fully utilised, there is more quota allocated than BC's current allocation. Thus, growers can only grow their pro rata share of BC's allocation.

6. In its appeal, the BCCGA questions both the process and the merits of the Chicken Board's decision, including whether it was fair and equitable for all growers and whether it was the best way to manage growth in the chicken industry. The appeal was heard on October 27 and 28, 2005.

7. John Woelders, a chicken grower representing a number of the faint hope growers, was given Intervenor status in this appeal; he spoke on behalf of those growers at the hearing.

8. Shortly after the hearing, Counsel for the BCCGA submitted a document from the National Association of Agri-Food Supervisory Agencies for the Panel's attention. The Chicken Board and Intervenor took no issue with this document being put before the Panel.

9. On January 6, 2006, the BCCGA wrote to the Provincial board asking to make submissions regarding the impact of recent allocations by the Chicken Farmers of Canada ("CFC"). In response, the Panel, by letter dated January 16, 2006, directed that without having "yet made any decision as to whether this information is appropriate to consider in this appeal, or whether it is relevant to our decision-making process…we are prepared to receive submissions respecting this matter. We would appreciate if the parties' submissions could specifically address the following points (along with any other matters they consider relevant:

    1. Does the Board have authority to consider the information at this stage (i.e. after the conclusion of the oral hearing but before a decision is rendered)?
    2. What exactly did the CFC decide?
    3. If the Panel concludes this information should be considered, how does it relate to the matter at issues on this appeal and the positions of the parties as addressed at the oral hearing?"

10. In response, the Panel received submissions from the BCCGA dated January 20, 2006, from the Chicken Board dated January 23, 2006, from Mr. Woelders dated January 23, 2006 and a response from the BCCGA dated January 27, 2006. The Panel will deal with the impact of these submissions in our decision below.

ISSUE

11. Although this appeal was initially cast broader, it proceeded only with respect to the issue set out above at paragraph 4, bullet three: "effective June 29, 2005 all transitional quotas including the new issuances referred to in the two preceding bullet points will be converted to primary quota."

DECISION

12. The Panel wishes to expressly note that it has carefully considered all of the evidence and submissions of the parties including those related to the impact of recent CFC allocations, even though we do not refer to all of it in the course of this decision.

13. When dealing with a challenge to an order of a commodity board there are usually three main issues: the authority of the board to make its order; the procedure or process adopted by the board in making its orders; and the substance or merits of the order made. In this case, the BCCGA does not take issue with the authority of the Chicken Board to make its July 8 Order. It does however point out the recent decision of our Court of Appeal in *British Columbia Chicken Marketing Board v. British Columbia (Marketing Board)* [2002] B.C.J. No. 1930 where it was held that there is nothing in the legislation which requires the Provincial board to give any deference or any significant deference to the decisions of a commodity board.

14. Rather the BCCGA takes issue with the Chicken Board's process alleging that it was flawed, as consultation was inadequate and lacking in transparency. The BCCGA also takes issue with the substance or merits of the July 8 Order and argues that to the extent that it immediately converts all transitional quota to primary quota, its effect is to redistribute current actual production away from certain growers without compensation. As a remedy, the BCCGA seeks to have the July 8 Order amended to remove the impugned rollover provision while leaving the remainder of the Order intact. We will deal with the process issue first.

Process

15. In order to place the BCCGA arguments in context, some background is necessary. Prior to enacting the July 8 Order, the Chicken Board struck a Growth Committee to look at possible options for allocating growth. This Committee was struck in July 2004 and was comprised of a Chicken Board member as chair (Keith Fuller) and a number of growers.[2] Over the course of several months, the Committee met with anyone who wished to appear in person and also received and reviewed written submissions. The goal was to find a consensus and present that view to the Chicken Board. At its March 8, 2005 meeting, the Committee determined that it would not be

[2] There were 7 members. Of those there was a faint hope grower, a primary only grower and then growers representing the Interior, Vancouver Island and the Lower Mainland with both primary and transitional quota. One member of the Committee was also Chair of the Vancouver Island Chicken Growers Association and on the executive of the BCCGA, another was Vice Chair of the BCCGA.

able to reach a consensus on the subject of allocation of future growth and would instead submit three minority position reports to the Chicken Board advocating:

- Status quo – Order #320 should be allowed to run its course.
- 50/50 growth distribution – 50% of the growth should be allocated to primary quota and 50% of growth to transitional quota.
- Eliminate quota restrictions – convert “faint hope” quota holdings to transitional quota in A-71 and allow all transitional quota to become fully transferable in A-71.

16. At its May 26, 2005 meeting, the Chicken Board received the three options from the Committee and each faction made a presentation. On June 15, 2005, the Chicken Board received a confidential report from the Chair of the Committee, Mr. Fuller. The Chicken Board then held another meeting on June 28, 2005 where the authors or committee supporters of each option had a further opportunity to make a presentation to the Chicken Board. The Chicken Board held an in camera session on June 29, 2005 to discuss the three options. A further proposal, commonly referred to as Option 4, was also discussed. Ultimately, the Chicken Board decided to accept this option subject to staff assessing its implications.

17. On July 4, 2005 a discussion document was created for Chicken Board members as well as a table showing how Option 4 would have played out in the three preceding cycles for the various types of quota holders. The Chicken Board met on July 5, 2005 and tabled the discussion of this issue until the next meeting. On July 7, 2005, the Chicken Board met and reviewed the four options and determined two of the options (faint hope and 50/50) had the effect of substantially extending the time to achieve pro rata allocation and as such, neither option met the objective of pro rata allocation and equitable growth for all growers. The status quo option failed to recognise that approximately 30% of growers (faint hope and primary only growers) were excluded from industry growth and would continue to be excluded for the foreseeable future. The Chicken Board determined that Option 4 best met its objectives of pro rata growth and equitable treatment of growers taking into account a long term view of the industry and “best management practices”.

18. The BCCGA takes issue with the consultation process followed by the Chicken Board (and outlined above) in arriving at its July 8 Order arguing that it is fundamentally flawed, lacking in procedural fairness and transparency. It points to the following:

- Growers understood that the consultations of the Committee were about allocation of future growth, the domestic lease program and minimum and maximum farm size and not about discontinuing Order #320;
- At the end of this process, there was no recommendation on the domestic lease program and minimum and maximum farm size or the allocation of future growth;

- The Chicken Board's adopting of option 4 was inappropriate because:
  - The Chicken Board did not discuss Option 4 with industry, the Committee or the BCCGA and it was incumbent to do so;
  - Had the Chicken Board discussed Option 4 with industry, it would have realised that the immediate rollover or conversion of transitional quota to primary quota goes too far and is unnecessary;
  - In the rush to develop this Order, the Chicken Board did not consider the long term impact of Option 4 nor did it understand the significant losses for 144 growers;
- The composition of the Committee did not reflect the interests of all stakeholders; the Production and Pricing Advisory Committee was not consulted and the views of processors were not sought;
- Growth Committee members requested a copy of the Chair's confidential report to the Chicken Board but it was denied them.

19. The Chicken Board maintains that there was ample consultation with the industry over the course of the year the Committee dealt with the issue. The Growth Committee was struck in 2004 in response to concerns from faint hope and primary only quota holders about how Order #320 was playing out. Membership on the Committee included a good cross section of the industry with faint hope, primary only and regular growers as well as growers representing all regions of the province.

20. The Chicken Board argues that the real issue for the BCCGA is that it did not ultimately see the specific solution arrived at by the Chicken Board in advance of it coming into force. The Chicken Board maintains that it should be apparent from the evidence that it was impossible to arrive at a solution that would impact all growers present and future equally. Different sectors of the industry had different perspectives on the appropriate way to resolve this issue. The Committee could not agree to a solution after a year of consultation and this issue was therefore left open and incumbent upon the Chicken Board to resolve.

21. Further, the Chicken Board argues that it was problematic to take Option 4 back to the industry as suggested by the BCCGA. A high degree of confidentiality was required in dealing with this quota issue; if word of the specific changes got out, some growers would opt to organise their affairs in such a way as to advantage themselves.

22. The Panel has considered the BCCGA submissions with respect to the alleged flaws in the Chicken Board's consultation process and find them non-persuasive. The composition of the Growth Committee ensured that a cross section of views from the different groups of growers were heard. Further, we find that the broadly based Committee consulted all necessary stakeholders.

23. The Panel is also satisfied that given the content of the submissions received, growers were well aware of what was at stake. Various options of how growth should be allocated now and into the future were considered. Growers had the ability to make written and oral submissions to the Growth Committee. There is no

suggestion that the Growth Committee and the Chicken Board were somehow unaware of the particular view advanced by the BCCGA. With respect to the specific argument that the Growth Committee's mandate was intended to be more expansive and the criticism that no recommendations were ultimately made with respect to minimum and maximum farm size or the domestic lease program, the Panel does not accept these as flaws in the consultation process. Rather what is clear is that allocation of growth and how to deal with that allocation in light of Order #320 became the primary focus of the Growth Committee. This is an indication of the seriousness of the issue and is reflected in the submissions received.

24. If the Panel had any doubt that the Chicken Board was not aware of the spectrum of views on allocation of growth, this argument might have some merit. It is clear however that the Chicken Board considered a number of different options and determined that all but Option 4 perpetuated the inequities found in the current system. The Appellant alleges it was an error to not disclose Option 4 to the industry. However, the Panel finds that the Committee and the Chicken Board fully canvassed the underlying issues and all parties were given an opportunity to express their views on those underlying issues. This process afforded the Chicken Board ample opportunity to understand the views of its stakeholders and take those views into account when making its decision based on sound marketing policy and in the interest of the industry as well as in the broader public interest. The fact that the BCCGA was not agreed with does not mean it was not heard[3]

25. The BCCGA points to another procedural irregularity, the failure of the Chicken Board to consult with the Pricing and Production Advisory Committee ("PPAC"). This argument was not developed in the evidence by any of the parties and was only briefly mentioned in argument by the BCCGA. Further, there was no evidence that any party had raised with the Chicken Board prior to the hearing the issue of consultation with PPAC.

26. The *British Columbia Chicken Marketing Scheme, 1961* ("*Chicken Scheme*") creates the PPAC in s. 3.20(1). After setting out how the PPAC is to be comprised (three growers and three processors and further persons as appointed by the Chicken Board), s.3.20 provides:

> (2) The role of the committee is to advise the board, on the request of the board or on the initiative of the committee, concerning any matter relating to the pricing or production decisions the board has made or may make.
> (3) *The board must consult with the committee and consider the committee's advice before the board makes any decision relating to pricing or production.*
> [emphasis added]

27. The question then arises whether the failure on the part of the Chicken Board to consult with PPAC is a violation of s. 3.20 to the extent that the July 8 Order can be considered a decision relative to pricing and production. The Panel has considered

[3] Indeed, the fact that the Growth Committee was unable to reach consensus suggests that the BCCGA's point of view was heard and debated by the Committee and ultimately by the Chicken Board.

this issue in light of our historical understanding of the role of PPAC. We are not satisfied that the July 8 Order can be seen as relating to "pricing and production" as these terms are applied to PPAC. The PPAC was created at the recommendation of the Provincial board as a mechanism to facilitate consultation between producers and processors in what was then a highly fractious and dysfunctional industry. The BCCGA and processors simply could not agree on pricing or production (i.e. what the production requirements within the province were). The role of PPAC has been to offer advice on the pricing of chicken and production requirements within the province. The July 8 Order does not purport to deal with pricing, nor does it affect the total amount of chicken produced or the manner of production in such a way that is likely to have any material affect on pricing. Rather, the Order deals with how the right to produce in response to market requirements should be allocated among growers. While we are aware that each case must be considered on its merits, in these circumstances, we are satisfied that this allocation of growth is not the type of issue which needed to have been referred to the PPAC under the terms of s. 3.20 of the *Chicken Scheme*.

28. Moreover, if we are wrong with respect to our conclusion about the application of s. 3.20 and the Chicken Board did in fact err procedurally by not referring this matter to PPAC, we are not satisfied that had the Chicken Board referred this matter to PPAC that there would have been a material impact on the matters at issue on this appeal. We say this because of the extensive consultation that did take place through the Growth Committee, and there is no evidence to suggest that any party complained about the matter not being referred to the PPAC at any time prior to this appeal hearing. As a result, we would in the circumstances of this case have declined to direct this matter back to PPAC on this basis even if it did constitute a procedural error by the Chicken Board.

29. As for the Chicken Board's failure to take Option 4 back to the industry, the Panel accepts that a high degree of confidentiality is required when dealing with quota policy. We accept that if growers were aware of the specifics, some growers would manipulate their affairs to advantage themselves. The Provincial board has seen examples of this type of behaviour in the past, in this and other supply managed commodities. We do not have to look too far back into the history of the chicken industry to find an example. After Order #320 was enacted, despite its objective of increasing farm size and the non-transferability of transitional quota, certain growers opted to sell off all but one or two kgs. of primary quota to retain their registered status but yet still keep their transitional quota. Certainly this was not what was contemplated by Order #320 but it was a reality nevertheless.

30. As to the concern of "why the rush?", the Chicken Board argues that in the two long days of hearing of this appeal no new issues arose. While it does not take issue with the calculations presented by the BCCGA, it maintains it was well aware that there would be winners and losers as a result of its new Order. Moving to pro rata allocation of growth now would necessarily result in some individual growers being cut back in their current allocation. The larger the grower, the larger the impact. The

fact that the Chicken Board did not perform a five-year analysis does not mean it did not understand the consequence of the July 8 Order.

31. Another procedural irregularity raised by the BCCGA was the failure of the Chicken Board to give Committee members a copy of the Committee Chair's confidential report to the Chicken Board. The Panel does find it unusual the Committee members did not see this report or have the opportunity to comment on it. As Committee members it was a reasonable expectation that they would see this report. As a result, we find that the Chicken Board erred by not releasing the Chair's report to Committee members when so requested. By so doing, the Chicken Board created an unnecessary air of suspicion around what had been a good consultation process. However, despite our finding that the Chicken Board erred in not releasing the report to Committee members, we do not consider the error on the facts of this case sufficient to warrant changing the July 8 Order or to send this issue back to the Chicken Board to remedy the error. We note that the report was disclosed prior to the appeal, commented upon by all parties to the appeal, and that Option 4 did not flow from that report in any event.

32. Finally, in its cross-examination of the Committee Chair Mr. Fuller, there was some suggestion by the BCCGA that Mr. Fuller had either a real or perceived conflict of interest. This appears to have related to the fact that just prior to the July 8 Order, Mr. Fuller transferred his quota. The BCCGA did not pursue this issue in its closing argument but given the public nature of our hearings the Panel believes it is important to deal with this allegation. Having heard the evidence regarding the transfer of quota, we are satisfied that there was no real or perceived conflict of interest on the part of Mr. Fuller. He arranged to transfer his quota well in advance of the July 8 Order and the transfer was approved by the Chicken Board. Significantly, he did not benefit from the July 8 Order. In fact, had the transfer been delayed until after the July 8 Order, Mr. Fuller could have received a significant financial benefit. He rightly chose not to do so.

33. The other obvious point to be made is one that we have made before with respect to "process" type appeals. Appeals before the Provincial board are in the nature of a rehearing. We have now reviewed the entire issue in detail in order to give our independent decision; and as such if there was a flaw in the process leading to the enactment of the July 8 Order it has been "cured" by the rehearing process.

34. Accordingly, the Panel finds that in the circumstances of this case, the consultation process was adequate. The work of the Growth Committee, while not achieving an agreed upon result, did facilitate discussion and debate amongst industry stakeholders for over a year. As a result of this consultation, the Panel finds that the Chicken Board was fully conversant with the issues, it was aware of the position and interests of the parties, and it was capable of making an informed decision and fully appreciative of its impact and consequences.

Merits

35. The second issue on this appeal is that the Chicken Board's decision was flawed in substance. The BCCGA maintains that the premature conversion of transitional quota has a negative and divisive impact on the chicken industry and does not represent sound marketing policy. This is the first time that a Chicken Board order has redistributed *existing* production away from certain producers and given it to others.

36. The starting point for the BCCGA is Order #320, the order that created transitional quota. It argues that it should be allowed to run its course. Part of the "sell" of Order #320 by the then Chicken Board was that even though the smallest grower was getting the largest allocation of transitional quota, larger growers would get their share through pro rata allocations in the future. As Arne Mykle, former Chair of the Chicken Board explained in his evidence, Order #320 was designed to encourage larger, more efficient farm units by increasing minimum and maximum farm size and to move from a per capita to a pro rata allocation system where access to growth was based on grower investment.

37. The BCCGA argues that only when transitional quota becomes fully utilised and converts to primary quota, should the Chicken Board address issues of inequities in the allocation of growth. It should not address those concerns now. The BCCGA points to a number of flaws with the premature conversion of transitional quota:

- of approximately 280 growers, 144 growers will have reduced production;
- approximately 80% of the Interior growers produce over 45,000 birds and therefore will see a reduction causing possible cutbacks in supply to Interior processing plants;
- conversion is counter productive, even to faint hope and primary only quota holders. Growers with over 45,000 to 50,000 birds, (13/18 faint hope and 9/39 primary only growers) will be cut back;
- analysis of the comparative impact of converting and not converting on the seven previous periods of production demonstrates that faint hope and primary only growers at higher levels of production will lose the equivalent of one cycle of production over five years while those producing at a lower level gain one cycle over five years.

38. The BCCGA has proposed its own solution. It suggests that if the July 8 Order is left intact except for the removal of the premature conversion of transitional quota, faint hope and primary only growers would be accommodated. The BCCGA maintains that the redistribution of existing production is wrong. It says the Chicken Board ought to have concerned itself only with future growth and allocated that which growers have not yet produced and have not relied on or invested in.

39. As noted above, after the conclusion of this hearing, the BCCGA made further submissions regarding the impact of recent allocations by the CFC.[4] The BCCGA argues that as the Panel has not rendered a final decision in this matter, it is not *functus officio* and in the interests of bringing a "just and timely resolution" of the matter under appeal, it is appropriate in these circumstances to consider new evidence. The thrust of the new evidence is that the CFC allocations for A-69 through A-71 are not at the 2% growth rate projected by the Chicken Board in its analysis. Rather, the CFC allocation is at an approximate rate of 1% growth. Accordingly, the losses for growers holding quota in excess of 45,000 birds will be much more pronounced than the Chicken Board originally projected. Further, such dips in allocation will extend the length of time that growers will feel the inequitable effects of the July 8 Order. This is compounded by the fact that many growers who were required by the Chicken Board to build barn space for their transitional production now have less quota and therefore have unused barn space. The BCCGA argues that its revised analysis based on the impact of decreasing allocation provides further support for its proposal (accommodating the concerns of faint hope and primary only quota holders) and confirms that its proposal would achieve a much more equitable result than the July 8 Order.

40. The starting point for the Chicken Board's analysis is also Order #320. It maintains that this order is flawed because:

- it allocated approximately twice the volume of transitional quota than had previously been allocated in 1992-1996 as secondary quota;
- had a similar amount of transitional quota been allocated in 1997, it would have been fully taken up and utilised by 2000;
- given that transitional quota was issued at twice the volume, it will take until 2008-2010 to be fully utilised;
- the beneficiaries of Order #320 were the existing growers;
- new growers entering the industry since 1997 cannot share in growth until all transitional quota is fully utilised and converted;
- faint hope quota holders (quota holders who had sold quota prior to 1997) were only entitled to an allocation of 5000 birds upon conversion.

41. The Chicken Board argues that the purpose behind Order #320 has changed. Originally, a stated objective (confirmed by Mr. Mykle) was to increase minimum farm size. This requirement was removed in 2000. The other key element, the non-transferability of transitional quota has been circumvented and transitional quota has become very transferable. In the final analysis, the Chicken Board determined that Order #320 was simply "too much, for too long". Given that Order #320 locked up growth for the benefit of some growers to the exclusion of others for over eight years and may in fact be closer to 11-13 years due to slowed industry growth, the Chicken Board decided to allow equitable participation in the industry now.

[4] BCCGA submission dated January 20, 2006

42. The Chicken Board is well aware that there will be winners and losers as a result of the July 8 Order. However, since 1992, growers have been granted 11,400,000 kgs of new quota (39.3% of the British Columbia allocation in Period A-68). This quota was allocated to existing growers as secondary and transitional quota. It was not bought or paid for. Since Order #320 was passed, not all growers have had the opportunity to share equitably in the growth of the industry; many have experienced no growth whatsoever. The Chicken Board believes that the July 8 Order allows all quota holders to share equitably and fairly in the future growth of the industry from Period A-69 onward.

43. Finally, the Chicken Board takes issue with the BCCGA's proposal that transitional quota be issued to faint hope and primary only growers as per the July 8 Order but with the rescinding of the conversion of transitional to primary. Transitional quota would be converted only when fully utilised at some point in the future. The Chicken Board argues that the BCCGA's proposal does not address the concerns of equitable access to growth as it further extends the time frame before new growers (i.e. those new since 1997) can participate in industry growth.

44. As for the recent submissions of the BCCGA introducing new evidence, the Chicken Board submits that the Panel has the authority to consider the new information regarding CFC's recent allocations but the authority is discretionary. In this case, it argues that the evidence is of little importance and adds nothing to the issue of principle raised by this appeal and addressed by the Chicken Board already. The Chicken Board further noted that this information was not subject to cross-examination. The Chicken Board argues that CFC allocations are not a reliable indication of annual production. Further, the parties at the hearing all agreed that 2% growth was a reasonable assumption. But in any event, 2% growth is not integral to the Chicken Board's decision. If 2% is optimistic, the real effect would be to extend the time over which Order #320 would have operated and further reinforces the Chicken Board's argument that it is "too much, for too long". [5]

45. The Panel is well aware of the significance of the decision that this appeal requires us to make. This dispute involves a challenge to a new set of rules which change the status quo as it has existed since 1997. In determining whether the Chicken Board erred in enacting the July 8 Order, we must weigh different policy alternatives, reflecting the legitimate concerns of growers with differing interests. In the final analysis we must select the approach that we conclude would, on balance, best achieve the objectives of regulated marketing given the realities of the chicken industry.

46. At this point in time we offer a few comments about the further submissions of the BCCGA on the impact of recent CFC allocations. We have considered these submissions in their entirety. We accept that we have the authority to receive such submissions as part of our deliberations. We also accept that the submissions are to some extent relevant. However, in the end we find that these submissions have had

[5] Chicken Board submission dated January 23, 2006.

no material effect upon our deliberations and ultimately our decision. As such, there is no adverse effect upon the procedural rights of the Chicken Board given that these submissions have been received without the benefit of cross examination.

47. During the two days of appeal, the Panel heard from growers representing the different groups identified under the July 8 Order (faint hope, primary only and regular growers). We heard from large, long time growers, many of whom could be considered industry leaders. These growers maintained that they had bought and paid for their primary quota and by virtue of the July 8 Order, a significant number of growers would not be growing 100% of their primary quota for an unknown period of time. This loss would be permanent and not recoverable.

48. As justification for implementation of the July 8 Order, the Chicken Board pointed to the unprecedented growth seen by the chicken industry since 1992 and to the fact that 39% of the current allocation of quota in British Columbia was given out as either secondary or transitional quota (i.e. not bought or paid for). However, the BCCGA does not concede that its members have received a significant benefit since 1992. Instead, it argues that growers' investment in quota and barns entitles them to the growth received.

49. It is clear that there is little middle ground here. The Chicken Board started from the position that Order #320 was flawed in that it allocated twice as much growth to existing growers. By so doing, Order #320 effectively tied the bulk of 10 to15 years of growth to existing growers. The BCCGA does not accept that Order #320 is fundamentally flawed and suggests that if its proposal is accepted, faint hope and primary only growers would receive an allocation now and Order #320 could run its course.

50. The Panel agrees with the Chicken Board that Order #320 was flawed. It locks up industry growth into the hands of those growers who were in business prior to 1997 and who had never transferred any quota. The inequities of Order #320 may not have been as significant had it run its course over the five to seven year period originally contemplated. But unfortunately industry growth has slowed and if Order #320 is left intact, conversion is not likely for another five to seven years. The Panel finds that it is not in the best interests of the industry to allow all industry growth to be held by a segment of the industry for in excess of a decade to the exclusion of other growers.

51. Further, the Panel finds that to keep Order #320 intact would be inconsistent with good governance. While we recognise that the July 8 Order is a significant policy shift from Order #320, this must be viewed in light of the government's decision (reflected in recent regulatory amendments) to move away from a Chicken Board structure with representation only from existing growers. Looking at Order #320 in today's light it can be seen as a decision made at the time in the interests of certain segments of the industry represented at the board level, at the expense of newcomers and other identified but unrepresented groups.

52. The Panel rejects the proposal of the BCCGA to accommodate faint hope and primary only holders by giving them additional transitional quota to produce but delaying the conversion of transitional quota. We find that this is not a viable solution as it again creates a new block of growers to share in market growth, but still denies growth to anyone entering the industry from this point forward.

53. All sides agree that the pro rata approach to allocating production growth is desirable. The real difference between the position of the parties is the speed with which pro rata is achieved. The Chicken Board has chosen, in its decision, to act now and immediately convert all transitional to primary quota and move forward with only one class of quota, to the benefit of all growers, present and future. The BCCGA argues that immediate conversion of transitional takes actual production away from some growers and is unfair and inequitable. Given the recent decrease in allocation by CFC, the inequity of the July 8 Order is magnified as those growers who are in a losing position will be in that position for a longer period of time.

54. The Panel acknowledges that there are growers who are producing less chicken as a result of the July 8 Order. To some extent, these losses are offset by gains those same growers received in the past (in terms of both quota and income). These losses are in the order of one lost cycle over a five-year period. If national allocations continue in a dip for a period of time, the impact will be increased somewhat. If growth occurs as projected by the Chicken Board, the losses will be attenuated.

55. The Panel supports the concept of only one type of quota (primary quota) and we accept that the July 8 Order will result in better administration of quota regulations and less abuse of the quota system. At the same time, the July 8 Order reduces the inequities of the past and facilitates a transparent process for growth across all types of growers. The July 8 Order is a well thought out effort to correct the disparities of the past. It represents sound marketing policy enacted in the best interests of the chicken industry as a whole. By addressing Order #320, the Chicken Board undertook to solve what it perceived as long-standing inequities in quota allocation, a problem not of its own making. The Chicken Board has exercised leadership in tackling this very difficult and divisive issue.

56. The Panel finds that to adopt the proposal of the BCCGA would be to perpetuate an inequitable system benefiting only some of its grower membership. The proposal is not forward looking and does not accommodate a fully open and transparent process for the benefit of all growers, present and future. The focus on protecting the status quo and allowing the inequities of the past to continue would not be consistent with sound marketing policy.

ORDER

57. The appeal is dismissed and the Chicken Board's July 8, 2005 order is affirmed.

58. There will be no order as to costs.

Dated at Victoria, this 6th day of February, 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Wayne E.A. Wickens, Member