IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
APPEALS OF DIRECTION OF PRODUCT BY THE BRITISH COLUMBIA CHICKEN MARKETING BOARD

BETWEEN:

LILYDALE CO-OPERATIVE LTD.
PENNINGTON HOLDINGS LTD.
NORM KNOTT
DON HOOGE
HOMELAND FARMS LTD.
LORNE JACK dba FIRBANK FARM
ALEC AND WILLIAM WESTERINGH
JOHN BARTEL dba CHERWOOD FARMS

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

HALLMARK POULTRY PROCESSORS LTD.
SUNRISE POULTRY PROCESSORS LTD.
BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION
BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

INTERVENORS

DECISION

APPEARANCES BY:

For the British Columbia Farm Industry Review Board	Richard Bullock, Chair Christine J. Elsaesser, Vice Chair Barbara Buchanan, Member

For the Appellants and the Intervenor British Columbia Chicken Growers' Association	Maria Morellato and Angela D'Elia, Counsel
For the Respondent	John J.L. Hunter, Q.C. and Julie L. Owen, Counsel
For the Intervenors Hallmark Poultry Processors Ltd. and Sunrise Poultry Processors Ltd.	Wendy A. Baker, Counsel
Location of Hearing	Abbotsford and Richmond, British Columbia
Dates of Hearing	September 8-10, 14, 2004

INTRODUCTION

1. On January 30, 2004, the British Columbia Chicken Marketing Board (the "Chicken Board") ordered that Claremont Poultry Ltd. ship 107,786 kgs live weight of its A-58 allotment to Sunrise Poultry Processors Ltd. ("Sunrise") despite the fact that Claremont had a signed BC101 contract to ship all its product to Lilydale Co-operative Ltd. ("Lilydale") in A-58.[1] The Chicken Board made a similar direction requiring Sweetbriar Poultry Farm Ltd. to ship 21,136 kgs live weight of its A-58 production to Sunrise despite the fact that it too had a signed BC101 contract to ship its product to Lilydale in A-58.

2. On March 4, 2004, Lilydale (Hatchery) appealed to the British Columbia Farm Industry Review Board (the "Provincial board") this decision to direct product away from Lilydale to a competitor processor. Subsequently, the avian influenza outbreak affected the production and marketing of chicken in BC for several months.

3. Prior to the original appeal being heard, the Chicken Board directed 661,669 kgs of product from the following growers away from Lilydale to Hallmark Poultry Processors Ltd. ("Hallmark") for period A-61:

   Pennington Holdings Ltd.
   Double Payne/Pain Farms
   Cherwood Farms (Bartel, John)
   Firbank Farms (Jack, Lorne)
   Westeringh, Alex and William
   Knott, Norm
   Homeland Farms Ltd.
   Hooge, Don.

4. On July 19, 2004, Lilydale filed an appeal of the A-61 direction. Also on July 19, 2004, the Provincial board received the collective appeal from the above growers, with the exception of Double Payne/Pain Farms. For ease of reference, these growers will be referred to as the "7 Growers".

5. The British Columbia Chicken Growers' Association (the Growers' Association") intervened in support of Lilydale and the 7 Growers while Hallmark and Sunrise intervened in support of the Chicken Board. For the purposes of this decision, Hallmark and Sunrise will be referred to collectively as the "Processors". The British Columbia Broiler Hatching Egg Commission also intervened in this appeal

[1] The BC101 contract (or Form BC101) is a standard form agreement created by the Chicken Board. It is an agreement between the grower, hatchery and processor for the production and marketing of chicken for a given quota period in accordance with the *Act*, the *Scheme* and the General Orders. The Chicken Board reserves the right to cancel a BC101 contract or declare it null and void pursuant to the provisions of the *Scheme*.

but its role was limited to that of an observer and being copied on all correspondence.

6. It should be noted that the Growers' Association filed a related appeal of Part 7 (assurance of supply to processors) and Part 8 (new entry program for processors) of the Chicken Board's new General Orders enacted on June 15, 2004. Rossdown Farms Ltd. also appealed an aspect of Part 8. Given that the policy of assurance of supply is the basis upon which the above directions of product were made, the Chicken Board and the Processors sought to have the Growers' Association appeal heard at the same time as the Lilydale and 7 Growers' appeals. The Appellants opposed this request. In a decision dated August 26, 2004, the Panel stated:

> As stated at the outset, counsel for the Appellants has chosen how she wishes to proceed with these appeals. That is counsel's right. The Panel is not going to interfere in that decision and order that the appeal with respect to Part 7 of the General Orders be heard during the September 8-10 hearing. But the Panel exercises this deference with the clear message that the Appellants cannot fetter the Chicken Board and the Processors response to their case. Similarly, the Provincial board will decide those issues which we feel must be decided in the context of those appeals.

7. The appeals proceeded to hearing on September 8-10 and September 14, 2004.

8. As Period A-61 commences on September 19, 2004, those growers whose product is directed to Hallmark in A-61 wish to have a final decision in advance of when they must ship their product. We note, however, that Lilydale maintains its appeal of the A-58 direction too, despite the fact that A-58 has expired (and indeed arose in the midst of the avian influenza crisis). While the Appellants wish to have a decision as soon as possible with respect to the direction of product in Period A-61, the fundamental concern is to have this matter settled for the long term.

9. The further appeals with respect to Parts 7 and 8 of the General Orders are scheduled to proceed in October and, if necessary, November 2004.

10. The present appeals raise issues as to the jurisdiction of the Chicken Board to direct product in the face of a signed BC101 contract, as well as a very significant marketing policy issue regarding whether production should be allocated to processors based on the policy of "assurance of supply". If the policy is valid, there are subsidiary issues of whether the appropriate process was followed in implementing the policy and whether the specific directions of product in A-58 and A-61 were appropriate in the circumstances.

11. The Panel wishes to state at the outset that having made every effort to convene and hear this complex matter in advance of the commencement of period A-61, and appreciating that the Appellants have appealed these orders to bring this issue to the fore, we are not prepared to allow this or any other 8 week period to force a rush to judgment regarding the desirability of assurance of supply as a matter of marketing

policy. It is apparent that this issue is far reaching for supply management in BC as a whole and not just the chicken industry.

12. Having heard these appeals, we have determined that these complex policy questions cannot be decided in isolation from the General Orders appeals scheduled for hearing in October and November. This is especially so since many of Ms. Morellato's arguments focused on the general policy quite apart from any special impact on the Lilydale growers. The Panel is not in a position to issue a decision on those policy questions based on the state of the record and arguments advanced before us in these appeals. Accordingly, a final decision on these appeals will be issued after the General Orders appeals.

13. What the Panel does intend to do in these reasons is to answer now those questions or issues which we are able to properly determine. This will narrow the remaining issues for the parties, thus expediting and focusing the General Orders appeal.

ISSUES ON APPEAL

14. The Appellants characterised their issue on appeal as to whether the Chicken Board acted properly and within its authority when it directed this production in Periods A-58 and A-61. This issue has three independent branches:

    a) the Chicken Board does not have the statutory authority to redirect product when that product is the subject of a pre-existing BC101 contract;
    b) redirecting product contrary to pre-existing BC101 contracts is not sound marketing policy; and
    c) the manner in which the Redirection Orders were implemented was arbitrary, uninformed and constituted a fettering of the Chicken Board's discretion.

15. The Appellants also allege that:

    a. the direction of product after contracts were signed
        - interferes with existing contractual arrangements
        - was unwarranted and unjustified in the circumstances
        - was contrary to the principles of orderly marketing
        - ignored service and quality considerations
        - was not in the best interests of the growers and Lilydale;

    b. the "huddle" process as it existed for Period A-58 was voluntary and should not have been allowed to interfere with existing contractual arrangements;

    c. the direction forces the growers, as Lilydale Co-op members (and directors in some cases), to do business with a competitor; and

d. the direction will result in thousands of dollars in lost profits to the 7 Growers.

BACKGROUND

16. In order to place these appeals into context, a brief historical overview is necessary. There are three major processors in BC: Hallmark, Sunrise and Lilydale. Under the national chicken supply agreement in place in the mid-1980s, BC was unable to increase its percentage of the national domestic allocation to support and develop further processing markets. The former "top-down" approach to allocation, where the national agency "assigned" production to BC without reference to actual market requirements, did not satisfy BC's market needs. As a result of incurring significant penalties for over-producing its allocation, BC withdrew from the national agreement in 1989. While outside the national agreement, Sunrise and Hallmark developed an export program for chicken, which essentially allowed them to increase their domestic production of white meat while exporting a corresponding volume of dark meat. Lilydale could have participated in this program but for its own business reasons chose not to.

17. The export program coupled with the domestic allocation gave processors a secure supply of chicken allowing them to develop a significant further processing industry and enter into long term national and regional contracts with food service and retail suppliers. BC processors became national "players" in a business formerly reserved for central Canadian processors. However, for all the economic advantages that the export program provided to the processors and to industry growth, it was the subject of ongoing grower criticism and concern. By 2000, there was a move by growers and the Chicken Board to re-enter the national agreement. In addition, some growers wanted to see revisions to the export program to make it more equitable. Given that the program was processor run and that Lilydale did not participate in the export program, Lilydale growers felt excluded from the financial benefits offered by "growing for export".

18. On January 18, 2000, the grower-elected Chicken Board was replaced with a fully appointed board (which membership is different from that of the current appointed Chicken Board). The appointed Chicken Board was given the mandate to resolve several issues dividing growers and processors which had not been resolved by the grower-elected Chicken Board. These included the need to develop, through consultation and negotiation, "an export program that is accountable and meets the requirements of the British Columbia chicken industry" and "changes required to improve the efficiency, accountability and effectiveness of the domestic allocation system".

19. The appointed Chicken Board enacted its August 15, 2000 policy rules addressing the larger systemic concerns by retaining the export program, but requiring that such production be planned (grown and exported within three production periods). Export production was also shared equitably with all growers who wanted to

participate without regard to whether "their" processor requested export production. Under this new system, processors lost a great deal of the flexibility enjoyed under the old export program. As a result, several appeals of the August 2000 policy rules were filed by growers and some processors and heard in whole or in part.

20. After much discussion, and representations by the Chicken Board that the new export program would provide the volumes of chicken required by the processors, Hallmark and Sunrise put their appeals into abeyance and agreed to give the new system a chance. For two years, processors made their requests for domestic and export production and these volumes were met.

21. In 2001, BC re-entered the Federal Provincial Agreement for Chicken (the "FPA"). In accordance with the "bottom up" approach under the new FPA, processors advise the Chicken Board of future consumer market requirements on a period-by-period basis. The ultimate consumer market as reflected by retailer requests drives chicken production in the province. The Chicken Board takes the processors requests forward to the national agency Chicken Farmers of Canada ("CFC"). Under the FPA, CFC uses the processors' market requirements to determine the national base allocation of chicken production for each province. The Chicken Board then takes BC's allocation and allots production to individual chicken growers based on their quota holdings and the processors' total requirements. Individual processors are then assigned that production through the huddle process.

22. The source of the current problem is that despite the processors' requests, since 2002 CFC has not allocated sufficient volume of chicken production to meet BC's market needs. Processors attend the huddle process facilitated by the Chicken Board where all the processors meet to work out among themselves how each processor's allocation would be met from available growers. Much has been said in this appeal about the voluntariness of processor participation in this process. However, the Panel accepts that all processors were aware that failing an agreement as to which growers' production would be moved, the Chicken Board would step in and make that decision if necessary.

23. For several years, this informal huddle process seems to have operated well. Processors were able to move growers between themselves to ensure that each received production in accordance with their requests from the reduced allocation, on a pro rata basis. In 2003, all of the processors lobbied to have the informal huddle process recognised in the General Orders so that the process would be transparent to all concerned. Ultimately, the huddle process became enshrined in Part 7 of the new General Orders enacted by the Chicken Board in June 2004. As mentioned earlier, Part 7 (as well as Part 8) is the subject of an appeal by the Growers' Association.

24. In A-58, after receiving its allocation numbers from the Chicken Board (and prior to the new General Orders) Lilydale signed BC101 contracts with growers in excess of the allocation. Lilydale then refused to participate in the huddle process

and refused to transfer the production from its signed growers in excess of its allocation to another processor. As a result of Lilydale's refusal, the Chicken Board stepped in and directed product from Lilydale to Sunrise to reflect the allocation numbers. Lilydale (Hatchery) appealed this direction of product.

25. In A-61, Lilydale again signed up growers in excess of its allocation numbers and again refused to voluntarily transfer product from its growers to a competitor processor. Again the Chicken Board stepped in and directed the product from eight growers to Hallmark. Lilydale's second appeal and the appeal by the 7 Growers ensued.

DECISION

26. The Appellants take issue with the Chicken Board's direction of product on many levels. They first question whether the Chicken Board has exceeded its jurisdiction by interfering with existing contracts.

Jurisdiction Issue

27. The Appellants argue that the Chicken Board derives its authority from the *Natural Products Marketing (BC) Act*, RSBC 1996 (the "*Act*") and the *British Columbia Chicken Marketing Scheme, 1961* (the "*Scheme*"). The powers of the Chicken Board can be found in s. 4.01 of the *Scheme*:

> s. 4.01 Subject to section 4.02(2), the board shall have the power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore or hereinafter enumerated, and without the generality thereof shall have the following powers:
>
> (a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be packed, stored or marketed; to determine the manner or distribution, the quantity and quality, grade or class of the regulated product that shall be produced, transported, packed, stored or marketed by any person at any time; to prohibit the production, transportation, packing, storage or marketing of any grade, quality or class of any regulated product; and to determine the charges that may be made for its services by any designated agency;
>
> …
>
> (l) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of the regulated product, and to amend or revoke the same;

28. The Appellants argue that while the above powers are broad, there is no express power to vary contracts or to direct product in a manner inconsistent with existing contracts. Further, the power to direct product or vary contracts does not arise by necessary implication, as powers that arise by necessary implication are not broad

and general but rather confer only those powers necessary to carry out the Chicken Board's express jurisdiction.

29. The issue of whether the Chicken Board has the power to direct product *in the face of existing contracts* was not dealt with by the Court of Appeal in its recent decision in *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd.*, 2003 BCCA 356. While that appeal related to a direction of product by the Chicken Board, the case was decided on the very narrow point of whether the Chicken Board had the authority to determine scheduling issues. It had nothing to do with the jurisdictional issue raised here and the case can be easily distinguished on the facts in that regard. Further at issue in the decision of Mr. Justice Tysoe appealed from was not whether product could be directed in the face of a BC101 contract. That issue was not before the court.

30. The Appellants also argue that if the Legislature intended the Chicken Board to have broad powers to vary contracts it would have provided so expressly in the *Scheme*. The Appellants point to the *Milk Industry Act*, which contains an express provision to vary contracts between its constituent groups without restriction. No similar provision is found within the *Scheme*.

31. The Appellants also argue that the Court of Appeal's decision in the *Money's Mushrooms* case [*Money's Mushrooms Ltd. v. British Columbia (Marketing Board)*, [2001] BCJ No. 1412 (CA)] does not assist the Chicken Board. While it is true that that decision dealt with the power of the Mushroom Board (now the "Mushroom Commission") to interfere with contracts, in that case the power had prospective application. The Mushroom Board in that case did not purport to interfere with existing contractual arrangements rather it refused to accept a contract in circumstances where that contract was inconsistent with the statutory scheme. In this case, neither the Chicken Board nor the Processors have identified any inconsistency between the BC101 contracts and the enabling legislation. As such, there is no attempt on the part of anyone to contract out of the regulatory scheme.

32. The Chicken Board maintains that it does have authority to direct product and that power stems from s. 4.01 of the *Scheme*. This section was considered by Mr. Justice Tysoe in *British Columbia Chicken Marketing Board v. Sunrise Poultry Processors Ltd*., Oct 11, 2002 (decision referred to above in paragraph 29) wherein he stated:

> The common law right to trade freely has been taken away by clear language in the *Scheme*, which was enacted pursuant to the *Act*. Section 4.01 of the *Scheme* gives the Chicken Board the power to promote, regulate and control in any and all respects the production and marketing of chickens. *This language is sufficiently broad to include the right to control the sale of chickens by specific growers to specific processors at specific times and in specific amounts.* [emphasis added]

33. The Chicken Board argues that the suggestion that this case is different simply because the directions of product occurred after contracts had been signed is clearly

not relevant. The authority to direct product is not and cannot be constrained by contracts made by the parties. One cannot contract out of regulatory jurisdiction. The Processors support the Chicken Board's argument on this issue. The courts and the Provincial board have confirmed that the Chicken Board has the authority pursuant to the *Scheme* to direct product even in the face of existing contracts. The common law right to trade freely has been taken away by the clear language of the *Scheme*.

34. The Panel agrees with the submissions of the Chicken Board and the Processors. Two recent judgments of the BC Court of Appeal have commented on the broad scope of powers conferred on marketing boards under provisions such as s. 4.01 of the *Scheme*: "The Legislature has conferred power of essentially unlimited scope on the Lieutenant Governor in Council which has in turn conferred those same powers, save the power to regulate production, on the Marketing Board. That the Lieutenant Governor in Council, in s. 4.01 of the *Scheme*, enumerated specific powers does not take away from the breadth of the opening words of that section": *Money's Mushrooms Ltd. v. British Columbia (Marketing Board)*, *supra*, at paras. 28, 29; *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd.*, 2003 BCCA 356 at para. 10.

35. The power in s. 4.01 expressly includes the power to prohibit, regulate, control and promote the marketing of the regulated product in any and all respects. "Marketing" is expressly defined in s. 1.02 as including "offering for sale" and "buying" and "selling". In the marketplace, buying and selling happen by contract. Thus, while the facts of *Money's* may have been limited to proposed contracts, the text of the legislation goes further, and this is what the Court was clearly referring to in the passage quoted above. To mean anything at all in the context of legislation whose very purpose is to replace the free market with a regulated market (see Tysoe J., *supra*), the express power to regulate, prohibit and control the buying and selling of chicken in any and all respects, further particularised as including the power to designate the time and place at which chicken shall be marketed, must at its core include the right to make directions to require two regulated persons (in this case, a licenced producer and a licenced processor) to act contrary to a "private" agreement they have entered into. As the Chicken Board says, one cannot contract out of a regulatory system.

36. The Appellants say the suggestion that there is anything inconsistent between the BC101 contracts and the governing legislation is "absolutely not true". However, what the Appellants fail to recognise is that the Chicken Board concluded that the contracts operated *contrary* to sound marketing policy. The very reason for a Chicken Board is to make policy judgments regarding sound marketing policy. It may develop marketing policy and may make orders both general and specific based on that policy. Whether its judgment was wise or unwise on the merits is the policy issue for us on these appeals. The Appellants' policy disagreement with the Chicken Board cannot determine the legal issue.

37. Whether the power to interfere with an existing contractual agreement *should* be exercised in any given context is a marketing policy question, and is a question we will decide in due course in relation to assurance of supply. But there is no question that commodity boards have the legal right to issue orders that interfere with marketing arrangements between two regulated actors. Allowing such parties to contract out of requirements that a commodity board has deemed to be contrary to sound marketing policy would undermine the very purpose of regulation.

38. We therefore disagree with the Appellants that there is no "express power" to "vary contracts" and that such power must be found by use of the "necessary implication" doctrine. The power *is* express. The Appellants' submission invites us to interpret this power extremely narrowly – to essentially read it down or even ignore it, contrary to both its express terms and the purposes of the statute. That approach runs directly contrary to *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2, where the Supreme Court of Canada stated that the courts should "whenever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved."

39. As Mr. Justice Tysoe concluded in the quotation above, s 4.01 of the *Scheme* gives the Chicken Board broad powers to regulate the industry. These powers include the right to control the sale of chickens by specific growers to specific processors at specific times and in specific amounts. The Chicken Board's ability to regulate its industry in accordance with its best judgment regarding orderly marketing principles cannot be dependent on or restricted by the simple act of entering into a contract.

40. We should add that even if the question was, as the Appellants say, whether the power to redirect product was "necessary", it is clear that the Chicken Board here did consider it necessary, or it would not have taken that step. Whether we think it was "necessary" is the policy question on this appeal. That is not an objective "legal" question. The Appellants' attempt to fold the "necessity" argument into the jurisdictional equation is creative, but incorrect in law.

41. This leaves the Appellants' argument based on former s. 39 of the *Milk Industry Act*. That section, referred to in the case of *Anderlini v. Fraser Valley Milk Cooperative Association* (1989), 63 DLR (4^{th}) 404 (BCSC), was applicable only to the Milk Board. It was not drafted on the same principles as the regulatory schemes under the *Act*, and in particular it did not confer the express power to prohibit, control, regulate and promote marketing in any and all respects. The fact that the drafters of that statute opted for an express enumeration of powers does not mean that this is the only way to confer such powers on marketing boards. If this were so, the result would be to exclude each power enumerated in the old *Milk Industry Act* not expressly included in the existing schemes. One need only to look at the powers listed in former s. 39 to see the absurdity of this position. As noted by the Court of Appeal in the *Money's* case: "That the Lieutenant Governor in

Council, in s. 4.01 of the *Scheme*, enumerated specific powers does not take away from the breadth of the opening words of that section."

42. Accordingly, this branch of the appeal is dismissed.

Policy Argument

43. Despite the fact that these appeals arose from the specific directions of product in A-58 and A-61, much of the hearing focussed on whether the decision to direct product was based on sound policy and in accordance with the principles of orderly marketing. This issue is very complex and requires a consideration of the history of supply management within BC as well as the national context.

44. While the Panel has deliberated on this issue at considerable length in the time available to us, we have in the end concluded that we are not now prepared to rule on the policy underpinnings of the decision to direct product and the related policy of assurance of supply. What we can say at this point is that we have many more questions than answers. We are not satisfied that the parties before us (and those that are not before us) have adequately addressed all the policy implications of a decision of this sort.

45. We note that dates for the hearing of the Growers' Association appeal relating to Parts 7 and 8 of the General Orders is scheduled to be heard in October and November. These policy issues will be front and centre in this appeal.

Manner of Implementation

46. The Appellants argue that the manner in which the orders directing product were implemented was arbitrary, uninformed and constituted a fettering of the Chicken Board's discretion.

47. The Appellants take issue with the methodology employed by the Chicken Board in selecting the growers to be directed once the decision to direct had been made. A July 9, 2004 internal memorandum of the Chicken Board confirms that Carol Blatz, a staff member, selected which growers would be directed based on criteria of her choosing (and set out in the memorandum). Having made her decision as to which growers would be moved, the Chicken Board simply accepted her recommendation, abdicating responsibility for the selection process and thereby fettering its discretion.

48. The Appellants argue that the Chicken Board on its own admission wanted nothing to do with the direction criteria or their development. In addition, industry was not consulted. As a result, long time, loyal Lilydale growers were targeted. These growers are all shareholders in a co-operative and as such have invested in its long-term growth. As a result of having product directed, they stand to lose thousands of dollars in dividends based on production not shipped to Lilydale. By way of

example, Don Hooge testified he would lose $9,422.49 in dividends and John Pennington would lose $2,960.30.

49. The Panel raised questions as to whether lost dividends on the part of Lilydale growers were relevant to the issue of directing product. The Appellants maintain that these losses should inform the Provincial board's analysis on whether it was necessary for the Chicken Board to direct product in circumstances where Lilydale growers are forced to provide product to their competitor.

50. In response, the Chicken Board disagrees with the Appellants' characterisation of the role of Ms. Blatz, and that somehow by relying on Ms. Blatz to choose the growers to be directed the Chicken Board fettered its discretion. The Chicken Board developed its policy of direction of product to create assurance of supply for processors and in A-58 and A-61, and the Chicken Board determined that it was necessary to direct product away from Lilydale to other processors in order to preserve historic market share. Having made that decision, the Chicken Board turned over an administrative task to a staff member. Ms. Blatz was given the administrative task to determine which growers would be directed and told to record her selection criteria. The Chicken Board is aware that there was no consultation on the criteria but this is not a procedural flaw. The time frame between when Lilydale announced its intention not to agree to direction of product and when chick placements had to occur did not allow for industry consultation. The Chicken Board argues that it was the actions of Lilydale in signing up growers in excess of its market share in a deliberate and provocative manner that created this problem.

51. The Panel finds that the Appellants have failed to make out this branch of their appeal. We reject the argument that the Chicken Board acted in an arbitrary, uninformed manner or that it fettered its discretion. Whatever can be said about the impugned policy (a point we will decide in due course) it is clear that the Chicken Board spent a great deal of time trying to develop what it regarded as a sound policy in accord with both the historical and national context. We specifically reject the notion that the Chicken Board fettered its discretion by requesting a staff member to identify the growers to be directed. The Chicken Board developed what it thought was an appropriate policy with respect to direction of product to support assurance of supply. The Chicken Board determined that in A-58 and A-61 it was necessary to direct product to support assurance of supply and it determined the volumes that should be directed. Having made the policy decisions, it was appropriate for the Chicken Board to delegate the administrative task of selecting growers to a staff member. This delegation was prudent in that it removed the possibility that grower selections could be impugned on the basis that Chicken Board members targeted certain growers. Given that Bill Vanderspek, a board member and acting General Manager, was a long time employee of Lilydale, care to avoid any perception of conflict of interest was the prudent approach.

52. The Panel also wishes to comment on the Appellants' argument regarding the special status of Lilydale growers given their position as equity shareholders in a co-operative. The Chicken Board has the authority to regulate the production of chicken within the province. In carrying out this role, we conclude that it would have been both a legal and policy error for the Chicken Board to take into account considerations relating to Lilydale growers in their capacity as shareholders. The fact that certain growers have chosen to be shareholders in a processor cannot give them special rights over and above other growers.

53. The situation here is analogous to an issue which arose in an earlier appeal before the Provincial board in *Rossdown Farms Ltd. v. British Columbia Chicken Marketing Board*, September 12, 2002. In that case, the Provincial board held that when dealing with a chicken grower with an interest in a hatchery, the Chicken Board's responsibility was to regulate the grower independent of his hatchery interests:

> 29. Does the situation change any then when one considers that the Appellant is a major chicken producer as well as a hatchery? The Panel does not think so. The Chicken Board is responsible for regulating the chicken industry. *The Chicken Board has the authority to control the amount of chicken grown in British Columbia and the price paid for that chicken. Chicken growers hold quota, which gives them the privilege of producing the allocated volume of chicken at a price set by the Chicken Board. The processors, in turn, obtain that volume of chicken when during the production cycle they require it, at the price fixed by the Chicken Board. The supply-managed system ensures that growers are paid for the product they produce and processors receive the product when they require it to meet their market demands.* The Chicken Board's task is to balance the needs of the producers with those of the processors in order to ensure stability in the marketplace. [emphasis added]

54. The Panel finds that similar reasoning applies in this case. Lilydale growers do not gain special status by virtue of their interest in the co-operative. The Lilydale growers who were directed to another processor received payment (or will receive payment) for their product from the new processor as required by the supply management system. Accounting for any losses incurred by these same growers as Lilydale shareholders is not a proper consideration.

55. Accordingly, should the Chicken Board orders directing product ultimately be quashed and given that the product will have been shipped and paid for, the Panel confirms that any remedy will not include a consideration of dividend losses to Lilydale shareholders.

REMEDY

56. The Panel recognises that we find ourselves in the somewhat unique position of having dispensed with certain grounds of appeal but not others. As noted above, this stems from the fact that these appeals arise in the context of orders issued for specific, time-limited marketing periods. As also noted above, we are not prepared to let the "tail wag the dog", and to have these relatively brief marketing periods dictate the course of our deliberations on so important a policy question. The Panel has felt very comfortable determining the issues addressed in this decision, but it is

not prepared to allow the time pressures surrounding the need for a decision in advance of shipments for A-61 to dictate a hasty decision on what is a very significant issue for all supply managed boards.

57. Branches one and three of the Appellants' appeal are therefore dismissed. Branch two relating to whether direction of product in support of assurance of supply is sound marketing policy, remains unresolved and outstanding.

58. It should be noted that despite being aware of these the time constraints the Appellants did not seek a stay of the Chicken Board's decisions. Had they sought such an order, given the circumstances as we now know them, the Panel is doubtful that a stay would have been issued.

59. Given the foregoing, the Panel has decided that as it cannot render a decision on the relative merits of the assurance of supply policy, the outstanding issues on this appeal will be adjourned. In the interim, the Chicken Board's assurance of supply policy remains in effect as do the directions of product made in support of that policy.

60. Upon the conclusion of the appeals relating to Part 7 and 8, the Panel will provide its decision with respect to the policy issue on these appeals. At that point in time, the parties can make submissions as to any appropriate remedy arising from a subsequent decision in favour of the Appellants on these appeals.

Dated at Victoria, British Columbia, this 17th day of September 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Richard Bullock, Chair
Christine J. Elsaesser, Vice Chair
Barbara Buchanan, Member