IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
APPEALS OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD
REGULATIONS DATED AUGUST 15, 2000

BETWEEN:

HALLMARK POULTRY PROCESSORS LTD.,
J. D. SWEID LTD. and SUNWEST FOOD PROCESSORS LTD.,
ASHTON ENTERPRISES LTD., WAYSIDE FARMS INC.,

SUNRISE POULTRY PROCESSORS LTD., DOGWOOD POULTRY LTD.,
HIGH PLAINS POULTRY FARMS LTD. and
OUTLANDER POULTRY FARMS LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

INTERVENOR

DECISION

APPEARANCES BY:

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Ms. Satwinder Bains, Member Mr. Richard Bullock, Member

For the Appellants, Hallmark Group	Mr. Christopher Harvey, Q.C., Counsel
For the Appellants, Sunrise Group	Ms. Wendy A. Baker, Counsel
For the Respondent	Mr. John J.L. Hunter, Q.C., Counsel Ms. Sarah P. Pike, Counsel
For the Intervenor	Ms. Maria Morellato, Counsel Ms. Lisa Hynes, Counsel
Place of Hearing	Richmond and Surrey, British Columbia
Dates of Hearing	October 10-12, 31, November 1, 6, December 13, 2000, February 26, 2001 and October 11, 15-17, 2002

INTRODUCTION

1. On August 15, 2000, the British Columbia Chicken Marketing Board (the "Chicken Board") issued a set of industry-reforming "regulations" that repealed and replaced the Chicken Board's General Orders (1987) as amended, and all previous Chicken Board policies and guidelines. To avoid confusion, these "regulations" will be referred to as "policy rules" in these reasons. This is more descriptive of the nature of these rules, and is in line with the language of the enabling *Natural Products Marketing (BC) Act*, RSBC 1996, c. 330, ss. 11(1)(q) (the "*Act*").[1]

2. The Chicken Board's primary purpose in issuing the August 15, 2000 policy rules was to achieve a greater measure of control, consistency and discipline in the regulation of chicken production. Major changes included period-by-period quota compliance, requirements for growers to have sufficient barn space to grow their assigned quota, limitations on leasing quota and a requirement for all specialty growers to obtain permits. Given their scope and significance, it should not be surprising that the Chicken Board's new policy rules, and their application in individual circumstances, resulted in appeals to the BCMB[2], and triggered other litigation.[3]

3. The present appeals raise two challenges that have not previously been the subject of an appeal. The first is an objection, on the merits, to certain policy decisions of the Chicken Board in its reform of the former "BC Export Program" (see Part 25 and Schedules 9-11 of the policy rules). The other takes issue with the Chicken Board's lack of action following its stated intention, in the policy rules, to formulate production standards for chicken in the event that the Joint Committee failed to do so: Part 26, s. 142.

4. The details of the Appellants' arguments on these policy questions will be addressed below. Before doing so, it is important to understand how these arguments evolved, as these appeals have a somewhat convoluted history.

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[1] In *British Columbia (Chicken Marketing Board) v. Brad Reid*, [2002] BCJ No. 2403 (SC), Mr. Harvey argued on behalf of Mr. Reid that the use of the label "regulations" rendered the policy rules invalid because the Chicken Board's authority to pass "regulations" was removed some years ago; however, the Court did not, in the end, find it necessary to address this argument. We note that Mr. Harvey advanced this same position before us on this appeal when it was originally filed, but did not pursue it when the appeals were re-filed.

[2] The appeals included *89 Chicken Ranch Ltd. et al v. British Columbia Chicken Marketing Board* (August 3, 2001, BCMB), *Jim Hong v. British Columbia Chicken Marketing Board* (October 2, 2001, BCMB) and *Ponich Poultry Farm Ltd. v. British Columbia Chicken Marketing Board* (December 17, 2001, BCMB). The BCMB decision in each of these cases was considered and upheld by the courts: *British Columbia (Chicken Marketing Board) v. British Columbia Marketing Board* (2002), 44 Admin. LR (3d) 262 (BCCA); *Ponich Poultry Farm Ltd. v. British Columbia Marketing Board*, [2002] BCJ No. 2194 (SC).

[3] See *British Columbia (Chicken Marketing Board) v. Brad Reid*, [2002] BCJ No. 2403 (SC), in which Justice C.L. Smith granted the Chicken Board's application for a statutory injunction requiring the grower to cease production until he has received a Grower's Licence and permit under the new policy rules.

HISTORY OF THESE APPEALS

5. The original appeal was filed, by way of a letter dated August 25, 2000, by the Appellants Hallmark Poultry Processors Ltd., J. D. Sweid Ltd., Ashton Enterprises Ltd., Wayside Farms Inc., and Sunwest Food Processors Ltd. (collectively known as the "Hallmark Group") and by the Appellants Sunrise Poultry Processors Ltd., Dogwood Poultry Ltd., High Plains Poultry Farms Ltd. and Outlander Poultry Farms Ltd. (collectively known as the "Sunrise Group").[4]

6. When the first appeal was filed, the Appellants challenged the policy rules in their entirety, and applied to the BCMB to have them stayed pending appeal. The stay application was argued on September 25, 2000. On October 2, 2000, the BCMB dismissed the application for a stay.[5]

7. Following the stay decision, the appeal hearing commenced on October 10, 2000. The October 10, 2000 hearing date addressed a series of preliminary issues, including the issue of document disclosure, which was ultimately addressed in BCMB *Reasons for Decision: Production of Documents*, October 23, 2000.

8. The evidentiary stage of the appeals commenced on October 11, 2000. In his opening, counsel for the Hallmark Group emphasised that his clients' primary interest was in having the export program restored to its former state, but also made clear that they took issue with the other major changes brought about by the August 15, 2000 policy rules. The hearing resumed on October 12, and continued on October 31, 2000, November 1 and 6, 2000, and December 13, 2000 after which the appeal was adjourned. The parties engaged in further discussion and negotiation during this adjournment.

9. The appeal was scheduled to reconvene on February 26, 2001. On February 1, 2001, the BCMB received a request for an adjournment by the

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[4] When the hearing originally commenced, the Appellants in these proceedings included specialty processor K&R Poultry Ltd., other growers and the British Columbia Egg Hatchery Association. Those Appellants later withdrew their appeals. The grounds of challenge were also much broader when the first appeal originally commenced. Grounds were advanced that many of the provisions of the new policy rules were *ultra vires* the Chicken Board, and that some contravened the *Canadian Charter of Human Rights and Freedoms* and were not World Trade Organization (WTO) compliant. The Appellants did not pursue these arguments when the appeal was "re-filed" in late 2001; their closing submissions made clear that the new appeals are policy appeals on the merits.

[5] In the stay decision, the Panel applied the three part test set out in *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 SCR 110, and found that while the appeal did raise a serious issue, there was insufficient evidence of irreparable harm to the Appellants and the balance of convenience favoured the Chicken Board. As in these appeals, the Appellants raised the issue of the failure of the Respondents to comply with previous BCMB orders. The Panel found that any previous directions made by the BCMB with respect to the BC Export Program were made within the context of the National Allocation Agreement. As the processors successfully challenged the validity of BC's participation in the NAA in the Supreme Court of British Columbia in April 2000, the BC chicken industry was operating outside the national system at the time the new policy rules were enacted. The directions requiring mutual consent or binding arbitration by the BCMB were tied to BC's participation in the NAA and as such were no longer applicable.

Appellants. The Chicken Board and the Intervenor British Columbia Chicken Growers' Association (the "Growers Association") opposed the adjournment application. On February 19, 2001, the Panel held a hearing by teleconference. In written reasons dated February 21, 2001, the Panel refused to adjourn the hearing, finding that it was in the best interests of the BC chicken industry to have a timely decision on this broad challenge to the Chicken Board's new policy rules.

10. On February 26, 2001, the Panel was notified of Chicken Board amendments to the policy rules, made in late January and early February 2001. The parties agreed that the existing appeal should be taken as an appeal of the Chicken Board's policy rules, as amended.[6]

11. Following the noon break on February 26, 2001, counsel returned to advise the Panel that the Appellants were withdrawing their appeal on terms that made it apparent that they wished to continue to negotiate and to work their way through the new policy rules:

> The terms are that at any time during this year, 2001, the appellants may bring a new appeal. That appeal may include any or all of the issues in the present appeal and the evidence taken so far in this appeal can be used in the new appeal with both the appellants and the Board will make a joint application … that the (BCMB) exercise its discretion under the provision which allows the Board to extend the 30 day appeal period. So that by extending the 30 day appeal period that would enable the new appeal in law to include all the issues in the present appeal, if that's what is determined should be done.

12. Notwithstanding the efforts made by the parties, the Hallmark Group and Sunrise Group Appellants re-commenced two new appeals with the BCMB in November 2001. The appeals were ultimately set down for hearing on October 10, 2002. The Growers Association continued to have Intervenor status. The new grounds for appeal were much more limited than the original appeal, and were restricted to the policy rules relative to the export program and to the production standards issue, described in more detail below.

13. At the outset of the October 10, 2002 hearing, counsel for the Hallmark Group requested a one-day adjournment, advising that he was not prepared to proceed as a result of having to prepare and attend in the Supreme Court of British Columbia with the Chicken Board on an unrelated matter earlier that week. The Chicken Board and the Intervenor were ready to proceed.

14. The Panel adjourned the appeal to October 11, 2002, reserving the right to hear from the Respondent and Intervenor with respect to the issue of costs thrown away. At the conclusion of the hearing on October 17, the Intervenor requested payment from the Appellant Hallmark Group for its costs thrown away for attending on October 10, 2002. In a letter dated October 18, 2002, counsel for the Chicken

[6] While the existing parties agreed to proceed with the appeals based on the policy rules, as amended, we note that no individual grower, apart from the existing Appellants, exercised his right to appeal the amended policy rules either generally or in their individual application to that grower.

Board made a similar request. Counsel for the Hallmark Group**,** by letter dated October 21, 2002, opposed this request. This issue will be dealt with at the conclusion of these reasons.

15. The hearing continued on October 11, 15 and 16, 2002 and concluded with final submissions on October 17, 2002. In total, the Panel received 38 exhibits, and heard from 21 witnesses (some on more than one occasion). The proceedings resulted in approximately 1000 pages of transcript. In arriving at the present decision, the Panel has carefully considered all the material before us in light of the ongoing grounds of appeal.

ISSUES ON APPEAL

16. The Appellants' closing submissions make clear that these are policy appeals; their objections to the Chicken Board's policy rules are narrower and more specific than was the case when the first appeal was originally filed and proceeded with in 2000.

17. The first objection is to the new Export Program, as amended. With regard to this objection, the Appellants no longer object to the Program at large. They accept that the new Export Program has been able to meet the Appellant processors' export production requirements within the new, more disciplined planning arrangements under the Federal Provincial Agreement for Chicken. Their remaining objection is more specific – they object to the transitional and operational policy judgments made by the Chicken Board to redistribute export production between growers in transition between the former and present systems. The Appellants' second objection, relating to the Chicken Board's failure to address production standards, is discussed more fully below.

18. In his October 17, 2002 closing submission, counsel for the Hallmark Group summarised his clients' remaining objections to the Chicken Board's policy rules:

> [T]he issues in this appeal have been reduced to the export program. There are three aspects to that: challenging the lack of 100 percent and permanent grandfathering of barn space, the further loss of grandfathering when quota is purchased, and the removal of the grower's option of grow-out. And then also the absence of quality standards.

19. Counsel for the Sunrise Group's opening submission was to the same effect. Her closing submission locates these objections in the following provisions of the Chicken Board's policy rules:

- section 120 and schedule 9 (barn space transitional rules for export production)
- schedule 9(4) (reduction of export barn space following growth or quota purchase), and
- section 142 (establishment of production standards).

20. By way of remedy, the Appellants seek orders (i) "grandfathering", in perpetuity, the amounts being produced by individual growers for export as of August 15, 2000, which amounts should not be subject to reduction if the grower acquires quota via purchase or overall industry growth; (ii) deleting Schedule 9,

paragraphs (4) and (5); and (iii) requiring the Joint Committee to establish production standards, failing which the Chicken Board shall formulate such standards by a date certain.

THE FORMER EXPORT PROGRAM

21. The former Export Program, which is something of a misnomer for those not familiar with its complex workings and history, has been subject to extensive discussion and review in previous BCMB appellate and supervisory decisions, with which the Panel is very familiar. Rather than repeat that history at length, we note in summary that 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, now Chicken Farmers of Canada (CFC), "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.[7]

22. Once out of the agreement, and even during the currency of the ensuing "National Allocation Agreement" (the "NAA")[8], the Chicken Board supported the market needs of further processors with a permit and credit program, which ultimately became known as the "BC Export Program", the global operation of which was described as follows in the BCMB's March 17, 2000 Supervisory Decision (p. 5):

> As the passage of time has confirmed, the BC Export Program is not really about regulating exportation at all. It is about managing production domestically….
>
> A single chicken is comprised of both white and dark meat, but the Canadian domestic market is primarily a white meat market and processors pay growers for the whole chicken on a per kilogram basis. Rather than have the dark meat go to waste or depress the domestic market, with a resulting negative impact on both processors and growers, the BC Export Program encourages processors to find foreign markets for dark meat. As their reward for doing so, they are given re-grow credits to grow back into the domestic market the amount of chicken they have exported. This production in theory could have been sold into the Canadian market on the basis of domestic allocations.

23. Thus, in return for processors finding markets and exporting dark meat (back-on-legs and thighs) to Asia, Cuba and Russia on an *ad hoc* or unplanned basis, the two participating processors (Hallmark and Sunrise) received a "re-grow credit", based on a co-efficient formula approved by the Chicken Board, for the exported weight to be "re-grown" as domestic production. This gave processors access to additional white meat to allow them to compete more effectively on the "white meat" side of

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[7] For the years 1986-1988, penalties against BC under the federal provincial agreement exceeded $2,000,000.00 payable to the Canadian Chicken Marketing Agency (predecessor to the CFC).

[8] The NAA and correspondent Liquidated Damages Agreement were the subject of numerous BCMB decisions, and a decision of the Supreme Court in *Hallmark Poultry Processors Association et al v. British Columbia (Marketing Board) et al*, [2000] BCJ No. 694 (SC).

the domestic market. As a result of the Export Program, the processors experienced substantial growth; J.D. Sweid Ltd. is now the second largest further processor in Western Canada. This growth is due to the processors' ability to access white meat over and above domestic quota production even without access to Tariff Restricted Quota ("TRQ").[9]

24. We therefore find that Rick Theissen, President of the Growers Association, was correct when he testified that, properly understood, the Export Program is more than just a dark meat disposal program. As he stated succinctly, and accurately, "(t)he main reason for dark meat disposal is to enhance white meat supply domestically".

25. For all the economic advantages that the former Export Program provided to the processors and to the industry's growth, it was the subject of ongoing grower criticism and concern. One criticism lay in the concern that, if allowed to grow without any controls, non-quota domestic production over and above quota production was contrary to and would undermine the supply management system.[10] After a great deal of conflict, discussion and negotiation, this concern was addressed in the new policy rules and the new Federal Provincial Agreement, whereby the Export Program is capped at 14% of the domestic allocation, a cap which has satisfied growers and has met the needs of processors.

26. For other growers, a more serious objection to the former Export Program was that, despite the Chicken Board's recognition of the program in the "B.C. Chicken Export Permit Guidelines for the Regulated Product" (1994-96), in practice the Appellant processors, and not the Chicken Board, determined when, how much and by whom credit production would be grown. The seriousness of this concern can be understood by recognising that "export production" was production without quota. While one had to be a registered grower (and therefore hold quota) to grow export production, we heard evidence from at least one grower, Theo Peters, who produced export production many orders of magnitude above his quota allocation. He acknowledged that he knew that the program might change, but that he took the opportunity while it was available. In this context, it is not at all difficult to understand the concern, from other growers, that there should be fairness and equity and that there should not be preferential treatment in the distribution of this type of "free" production.

27. The concern about inequitable access to export production went back at least to 1996, and was recognised at p. 16 of the BCMB's October 1999 supervisory report *Management of the Export Production Program in the British Columbia Chicken*

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[9] TRQ allows processors to import white meat from the United States. TRQ is more beneficial to Ontario and Quebec as the US chicken production areas, located primarily in the southeastern United States, are more accessible to processors in those provinces.

[10] See for example, BCMB Supervisory Report, *Management of the Export Production Program in the British Columbia Chicken Industry* (October 1999), p. 1.

Industry, in a summary that mirrors the positions that have been argued before us on these appeals:

> The Chicken Board (p. 25) listed as one of the concerns with the export program "Grower inequity of program access". The Chicken Growers are concerned (p. 38) that not all producers have been given access to produce the export product. The Processors state (p. 47) that they have never refused any grower who wishes to place export production.

28. In October 1999, the supervisory panel stated that "all growers must have access to the program but with some conditions…. Access must be provided in a manner that takes into consideration normal business practices". The BCMB's reference to "normal business practices" reflected its view at the time that, rather than retaining the pooling system in the existing guidelines, growers who wished to produce "re-grow" could simply schedule that production with a hatchery, as they do with domestic production (pp. 22-24).

29. As will be noted below, the appointed Chicken Board ultimately concluded that a form of pooling was, following its consultation process and in the context of their overall industry re-structuring, the appropriate policy solution to the problem of access to export production. While we will discuss the details of this policy solution below, it will suffice to observe at this stage that the BCMB's October 1999 supervisory report accepted that there was a lack of equity in the accessibility of export production, and we make that finding expressly here based on the evidence before us. We recognise that there were some growers who, on principle, refused to grow export chicken because they felt that it undermined the supply management system. We also appreciate the processors' evidence that they never refused growers who wished to place export production. However, the fact is that, in practice, some growers were approached and encouraged to place export production while others were not given the same opportunity.

30. The complaints about lack of access were not unfounded. Growers for the other major provincial processor, Lilydale – who made up 20-24% of the industry – had no access unless they undertook the difficult and cumbersome process of changing processors. Some growers had significantly greater access to information, and opportunities, than others. Furthermore, the processors wished to encourage export production via "grow-out", growing on a contract basis whereby the processor, rather than the grower, provides the feed and other inputs. This having been the processors' preference, some growers did not have the practical option of placing export production unless they could provide an entire floor or an entire barn with a separate feed bin in order for the processor to use the grow-out system. While some growers were able to split barns and split floors, this was the exception. In his evidence, Mr. Janzen agreed that, due to the processors' grow-out preference, his processor would not allow him to grow chicken for export in a barn that also had "domestic" chicken.

31. On the totality of the evidence, we find that it was neither in the mind, nor in the role, of the processors to be concerned with an equitable and accessible system for

growing export production. Access was not universally available. Compared with a maximum of 50 growers (more commonly in the 20s) who used to participate regularly in export production, there are now as many as 178 growers (over half the industry) who do so under the new Export Program.

32. The fact that the former Export Program was operating in a "fast and loose" manner is apparent on the evidence. The processors, who were controlling production to maximise their business opportunities, did not make equitable access to all growers a high priority. The Chicken Board admitted that, having issued the 1996 Guidelines, it did not actively monitor or enforce them in the years that followed. On this issue, we note that over the course of the two-year period that these appeals were heard, not a single grower who testified showed us a copy of a "Chicken Export Permit" referenced in the Guidelines (ss. 2 and 3). When Greg Peter was asked in October 2000 whether we he had ever applied for an export permit, he stated that he could not recall.

33. As Counsel for the Hallmark Group candidly pointed out in his submission, the former Export Program was operating alongside the supply management system as if it were not part of that system. As such, it was operating without reference to policy considerations such as equitable access to production, which are central to fair and effective domestic supply management. These policy factors are central to the reforms made by the Chicken Board in August 2000, and were articulated succinctly by Mr. Theissen in his evidence:

> It's a white meat supply program, and that white meat is being supplied domestically. So these two things go hand-in-hand, and if we're going to share the, the ups and downs of the domestic program throughout the industry with all the growers, why wouldn't you do the same with the export because they're, they're working together.

THE NEW EXPORT PROGRAM

34. On January 18, 2000, three months after the BCMB's October 1999 report, the Lieutenant Governor in Council amended the *British Columbia Chicken Marketing Scheme, 1961* (the "*Scheme*") and replaced the grower-elected Chicken Board with a fully appointed Board.[11] The appointed Chicken Board was given the mandate to resolve a series of on-going, critical issues bitterly dividing growers and processors within the chicken industry, which issues the grower-elected Chicken Board had been unable to resolve with the processors. 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".

35. The inability of the former NAA to accommodate BC's compelling need for a flexible Export Program was a key reason why, on March 17, 2000, the BCMB

[11] BC Reg. 8/2000.

ordered the Chicken Board to terminate the NAA as a matter of policy.[12] This is consistent with the BCMB's repeated statements in support of the need for an effective Export Program that realistically addresses the processors' market needs.

36. However, the BCMB's March 17, 2000 supervisory decision also emphasised the need to reform the Export Program (pp. 10-11):

> *The BCMB agrees that the export program must be more accountable*. The BCMB agrees that re-grow cannot be allowed to undermine domestic quota and cannot exceed certain annual limits. The BCMB agrees that re-grow must be planned. *The BCMB agrees that all growers should have the ability to participate in re-grow production.* The BCMB agrees that a cap on re-grow credits, and an adjustment of the "bank" of such credits that has been created over time, may have to be considered. All these steps, properly administered, audited and enforced, will ensure that a proper balance exists between "domestic" and "re-grow" production on an annual basis. [emphasis added]

37. The Chicken Board's August 15, 2000 policy rules addressed these larger systemic concerns by retaining the export production program, but requiring that such production take place on a planned basis, with exported production being grown and exported within 3 (8-week) production periods. These larger systemic changes to the policy rules, which the Appellants originally challenged but which are no longer in issue on these appeals, were a significant improvement over the operation of the rules for export production under the former NAA, and have been accommodated within the new Federal Provincial Agreement. As the evidence made clear, these changes have not left the processors short of product, but have added discipline to the supply management system.

38. Along with these larger systemic changes to the Export Program, the Chicken Board also made operational and transitional changes to the Export Program – affecting the individual growers participating in "re-grow". On this issue, the policy question for the Chicken Board, and the key issue on this aspect of these appeals, was how, if at all, to remedy the earlier lack of universal access to valuable permit production. The Chicken Board's solution was as follows:

- Partially grandfather the production of those growers who constructed barns before July 1, 2000 with space expressly for export production. The grandfathering is limited in duration (until January 2005) and amount (50% of their previous production).
- Place all other production in a pool, to be distributed to all growers who have available space and apply, including grandfathered growers.
- Prohibit the practice of "grow out" (contract growing) for all this production.

[12] As the BCMB stated in October 1999, "The BCMB has not changed its opinion that the interests of all members of the chicken industry and the greater public interest are best served by being part of a national system. However, a national system which does not have the flexibility to meet provincial requirements to develop new markets does not serve the best interests of British Columbia."

39. A more detailed summary of the relevant August 15, 2000 policy rules (as amended) is as follows:

Part 25 Export Quota

- To receive export production a grower must apply to the Board, must specify the quota production period, and must own at least 20,000 quota units (ss. 110, 111).

- A grower's share of export cannot exceed 100% of a grower's primary and secondary quota (s. 112).

- A grower shall pay the processor a fee per 1.929 kg live weight of production (s. 108) (first set at 30 cents has since ranged up to 40 cents plus per 1.929 kg live weight).

- Subject to the grandfathered amounts (see below), export quota will distributed pro-rata among the growers requesting a share (s. 117).

40. The grandfathering provisions – referred to in the policy rules as "fixed allotments" – apply to growers who constructed barn space expressly for export production, "[i]n partial recognition" of their investments. The rules are as follows:

- Subject to the rule that a grower's share of export quota cannot exceed 100% of the grower's primary or secondary quota (s. 112), growers who constructed barns before July 1, 2000 with space expressly for export production are to meet with Chicken Board staff to determine their fixed allotment of export quota, based on 50% of the barn space built expressly for export production: Schedule 9, ss. (1)-(3), as amended.

- The above calculation of barn space will not increase if a grower later adds new barn space. Further, it will be reduced as a grower acquires increased industry production as arises from industry growth or purchase of quota: Schedule 9, s. (4).

- Grandfathered growers are also eligible for additional export quota from the pool, but this again is subject to the requirement that their total export production cannot exceed 100% of their primary and secondary quota: s. 113.

- The grandfathering provisions (i.e., fixed allotments) expire January 1, 2005: Schedule 9, s. 5. After this time, all export quota will be distributed through the pool.

THE CLAIM FOR 100% GRANDFATHERING

41. The Appellants oppose the limits on both the amount and duration of grandfathering for growers who built or acquired barn space under the former Export Program. They argue that they should be grandfathered for 100% of their production, either indefinitely or for at least 20 years, in order to recoup their barn investments. They further argue that the grandfathered barn space calculation should not be subject to reduction if a grower later purchases quota.

42. The Appellants submit that certain growers invested in barns and equipment for export production on the basis of assurances from government, the BCMB and the Chicken Board that the Export Program would continue. They argue that the Chicken Board's decision should be set aside because it made these changes without any detailed economic analysis of the impacts on those individual growers.

43. The Appellants argue that it is not fair to take 50% of the export production and use it to fill empty barn space from the "domestic" program, which empty space results from the Chicken Board's new rules prohibiting leasing. They argue that the Chicken Board should have treated export production in the same way as specialty production, i.e. full grandfathering. Sunrise argues that there was no reason not to protect the 23 of 300 growers who made substantial investments on the strength of the export program continuing. The Chicken Board's new policy rules still recognise export production, and as such, the growers who took the initial risk had a legitimate expectation that they would be able to continue to maximise use of their barn space.

44. The Appellants argue that the new rules penalise young people who used the Export Program to grow in the industry without acquiring quota. It also penalises those who assumed the risk and built the "export" production side of the industry. They argue that even under a fully grandfathered regime, there would still be a pool, albeit smaller but which would hopefully grow over time, of export production to be shared among all growers. Counsel for Sunrise argues that the desire to spread participation around to all growers cannot, in fairness, be at the expense of those who invested in the program initially. She notes that the former Export Program was not a renegade program; it was endorsed by Ministers of Agriculture, the BCMB and the Chicken Board.

45. We have carefully and thoroughly considered the Appellants' arguments in the context of the purposes of regulated marketing and the circumstances of the chicken industry. In this light, we do not agree with their positions that the Chicken Board should have grandfathered 100% of the production produced by those that built or acquired barn space for export production. We do not agree with the view that the viability of land and barn investments overrides all other policy considerations nor do we agree that simply because they grew the production before, that it is "unfair" for them not to be fully grandfathered into the future. A number of factors inform our conclusion.

46. First, "export" production is, properly understood, part of the domestic supply management system. There is, in our view, an extremely compelling regulatory value in that system for all growers to have equitable access to all domestic production – particularly where such production represents a large percentage of the total, and is "free" (i.e., over and above quota).

47. Second, the manner in which export production had been allocated prior to the August 15, 2000 policy rules was clearly inequitable. In our view, this inequity called for and justified an effective regulatory remedy. It would have been quite wrong for the Chicken Board to make insuring the business risk taken by the growers who benefited from the inequitable distribution of export quota its primary policy concern.

48. Third, there is no question that the affected growers did in fact take a calculated risk when they made investments to grow this production. While many (but not all) invested in barns, they had no ongoing right to grow chicken in those barns, let alone to keep their barns full. The chicken was being grown under a licence to produce. Neither licences nor quota constitute property that fetter a regulator in making decisions in the best interests of the industry: *Sanders v. Milk Board* (1991), 77 DLR. (4th) 603 (BCCA), *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd. et al*, [1993] BCJ No. 1748 (SC).

49. Fourth, while neither quota nor permits are property, permits are, within the regulated marketing system's policy structure, generally regarded as providing a less secure form of production.[13] Quota is the key underpinning of supply management regulation. The nature and finite supply of quota has meant that it has become expensive to acquire in the marketplace despite the legislative prohibition on a commodity board assigning value to it. The regulated system makes all key regulatory decisions in relation to quota, and makes all reasonable efforts to ensure chicken that a grower produces under quota is purchased in a given period, according to CFC's allocation to the province. In turn, the grower is subject to potential penalties for over and under production of his quota.

50. Permits, by contrast, are a regulatory device commonly used by commodity boards to achieve specific policy objectives, such as fostering production in specialised or niche products, fostering new industry entrants or meeting other emerging production needs. Permit production tends to cost less than quota production. The consequences of over or under production can be less severe for permit as opposed to quota production.

51. The *quid pro quo* of permit production is, of course, that it is more transient than quota production. The nature of the licence to produce conferred is far less secure. Permit production cannot generally be sold, and according to the evidence of

[13] On the evidence, it appears that permits were mostly notional. Growers of export production did not receive a permit *per se*. However, the BC101 contract signed between a grower and processor identified production that was grown under export permit.

Mr. Peter, bankers do not assign any equity value to it. The realities of permit production make it attractive to many growers who cannot afford quota. At the same time, however, those growers know, or should know, they assume a risk whenever they make investments to grow permit birds.

52. In our view, the interests of equity are not in these circumstances overridden by a grower claiming a desire to continue to grow "free" permit production because he has built a barn to house it. In our view, this allows the grower to use a barn investment as an indirect way of seeking to acquire free quota.[14]

53. Fifth, any grower who invested in barns to grow export production knew or ought to have been aware that such production is, from a market perspective, less secure than primary and secondary quota production. Export production to be grown in a given period – even under the new rules – depends entirely on the processors' success in finding international markets for dark meat. If (as the evidence suggested), the export market begins to sour, the amount of available export production diminishes accordingly.[15] Any person who built or financed an export barn would reasonably be aware of this reality, and of the fact that there could *never* be any guarantee that the export program would keep his barns full. We note that even before the August 15, 2000 amendments, there was nothing preventing the processors, who at that time controlled this production, from deciding to decrease or redistribute export production in their own interests and in response to changes in the domestic allocation and export markets.

54. Sixth, export growers knew or ought to have been aware of the regulatory reality that in the supply management system, the policy rules governing production may change at any time, particularly in an area in which there is significant controversy and calls for reform. While some witnesses testified that they did not expect these rules to change, and may have hoped they would not change, it would be unrealistic and unreasonable for them to believe that they would never change, particularly in light of the ongoing controversy surrounding the Export Program. The following exchange between counsel for the Chicken Board and Mr. Peters, from October 11, 2002, sets out the matter accurately:

> Q… they didn't say you couldn't do it?
> A. No.
> Q. But they also told you that the program might change?
> A. It might change, but they said, but will always be an Export Program.
> Q. Yes.
> A. But they never said to me, you would have empty barns.
> Q. Yes, but they never said to you, you will have full barns either, did they?
> A. No.

55. The Chicken Board has the role, and the responsibility, to regulate the industry. The severe processor-grower conflict in the industry in the 1990s resulted in the

[14] Albeit not of the same order as primary and secondary quota.
[15] A fact expressly recognised in s. 115 of the Chicken Board's policy rules.

appointment of a new Chicken Board in 2000, with an important mandate. These policy rules enacted after industry consultation, created both economic benefits and economic burdens throughout the industry. One example is the new policy rules regarding leasing. As a result of the August 15, 2000 policy rules (ss. 194-196) chicken growers must, except in very limited circumstances, actually grow their chicken in their own facilities rather than lease the quota to other registered growers. This rule, which ensures that growers do not treat quota as a mere commodity instead of farming it, has already been considered and endorsed by the BCMB as being "appropriate in the context of a supply-managed commodity".[16] However, as a result of the new leasing rules, some growers, on pain of losing their quota, were required to incur the considerable expense of building barns or adding barn space to accommodate their previously leased quota. Others lost revenue because they had empty barn space as a result of not being able to lease production from other growers. These economic consequences are in the nature of supply management regulation. A commodity board striving to restore order, coherency and fairness to a system and achieve a balance between supply and price, cannot be all things to all people.

56. "Fairness" in this context cannot be viewed merely from the perspective of persons who incurred costs to build barns in order to house permit production. In our view, the position that they should be fully grandfathered does not accord with the compelling interest of ensuring that all production should be available on an equitable basis, especially in an industry subject to dramatic rule changes and subject to the ebb and flow of domestic quota allocation. As the evidence before us made clear, there is a surplus of barn space throughout the industry, reinforcing the need, both from the perspective of equity and efficiency, to make this significant pool of export quota available throughout the industry. We do not accept counsel for the Hallmark Group's characterisation that excess barn space was the fault of the Chicken Board's for changing the leasing rules. The leasing rules – which the Appellants chose not to challenge in the end – were made for valid reasons, and are only one reason for the excess of barn space.

57. In August 2000, the Chicken Board decided to take control of the export production system, and in doing so to assign export production greater prominence in the supply management system than was previously the case. This is reflected in its decision to refer to this production (while not of the same order as primary or secondary quota) as "export *quota*". The Chicken Board was alive to the obvious inequity, within supply management, of having one group of growers being allowed to acquire and retain what is effectively entrenched "free production" when others did not have equal access to that production. Those growers incurred the significant expense of purchasing quota, and are also experiencing difficulties with barn space in consequence of the new policy rules as well as national changes in the domestic allocation.

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[16] See *89 Chicken Ranch et al v. British Columbia Chicken Marketing Board* (August 3, 2001, BCMB) at paras. 33-34.

58. There were approximately 25 growers who, as of August 15, 2000, invested in production facilities (i.e., barns and sometimes land) to house "re-grow" (export) production. This production amounted to between 3.5 and 4 million kilograms of chicken per period, which represents approximately 15% of the total domestic allocation. In all the circumstances, we conclude that it would not have been unfair or inappropriate for the Chicken Board to have decided to pool and distribute all of this production on a pro rata basis to all growers in order to remedy the previous unfairness and in the overall context of the regulatory changes and industry circumstances.

59. This being said, the Chicken Board chose not to do this. Instead, it initially decided to grandfather growers on a 15% basis, before engaging in the pooled distribution. By January 2001, and after various discussions with and representations by various growers, the Chicken Board raised the fixed amount to 50% of available barn space, to end in 2005.[17]

60. The Appellants sharply criticise the Chicken Board for having failed to arrive at its grandfathering numbers based on a specific and individualised economic analysis of the impact of the changes on their barn and land investments.

61. In our view, this criticism misunderstands what the Chicken Board was attempting to achieve. At no time did the Chicken Board represent that it was seeking to protect or insure the Appellants' business ventures. The grandfathering provisions merely state that "[*i*]*n partial recognition of investments* made by some growers", the grandfathering provisions will apply: s. 120. As we stated above, the Chicken Board's policy rules would not in our view have been unfair in the circumstances here even if they had they refused to give any recognition to those investments. While we do not criticise the Chicken Board for having given these investments partial recognition, it would in our view be unreasonable, and a recipe for regulatory inertia, to have required them to finely calibrate the grandfathering to have exactly the same proportionate impact on each grower based on that grower's individual business circumstances. We consider it even less appropriate to criticise the Chicken Board for not having totally grandfathered all export production since this would, in our view, have failed to adequately address the compelling marketing policy interest of ensuring equity of access.

62. We arrive at this conclusion taking full account of the evidence we heard regarding the effect of the new policy rules. With regard to that evidence, we should say firstly that we found it somewhat curious that in all the evidence tendered by the Appellants and these other growers over two years, we were not given a single copy of a business plan provided to a bank or financier that was predicated upon "full barns". This was somewhat surprising given the Appellants' theory of the case, their criticisms of the Chicken Board and the broad appellate role of the

[17] According to Mr. Beattie's evidence, the new grandfathering rules means that 30% of the total export pool will be grandfathered to these growers until January 1, 2005 rather than being made available to the entire industry.

BCMB on appeal. Our second observation regarding this evidence is that we found it unusual despite the many dramatic statements made by counsel regarding the effect of the changes, only the corporate Appellants appealed as persons "aggrieved or dissatisfied by" the original or amended policy rules. None of their grower witnesses appealed the original or amended rules, nor did any of the remaining grandfathered (and mostly unnamed) growers we heard about.

63. This latter point is significant because, in October 2000, many of the growers who testified before us as witnesses stated that they were unsure about the impact of the new amendments and that they were still in the process of speaking to the Chicken Board. Derek Janzen testified expressly that he knew he could appeal if the final resolution was unsatisfactory. Despite Mr. Janzen appearing before the BCMB twice as a witness and giving evidence about unique representations that he said were made to him, he did not exercise his right of appeal either in August 2000 or in January 2001.

64. This said, we take the obvious point that barns that are less full generate less revenue than those that are full. However, we also point out that this is a concern that applies to all chicken growers, who are in large numbers facing empty barn space due to factors that include the decline in the export markets after a period of rapid growth and lower domestic production allocated by CFC under the Federal Provincial Agreement. If the domestic and export numbers were to increase, this would obviously mitigate the barn space issue for the entire industry. Ron Pollon of the Hallmark Group testified that he expected the export market to pick up again in the next year or two. If that happens, there will of course be more export quota for everyone, something that will be enhanced if CFC increases BC's domestic allocation.

65. The evidence from Peter Shoore of the Sunrise Group in October 2002 was that the provisions operate to keep his barns 75% full with a combination of grandfathered and pooled production. Mr. Pollon testified that his barns were only completely full in one cycle during the summer; otherwise he has experienced some empty barn space.[18] Mr. Pollon also gave the following evidence on cross-examination:

> Q And I take it sir, that it's still a profitable enough venture for you that you are still asking for export production each period?
>
> A. That's correct. It's either that or my barn is empty. I don't really have a choice when I am not getting what I am asking for.

66. Five individual growers who testified in October 2000 (Mr. Peter, Mr. Peters, Elmer Cyrankiewicz, Denton Friesen and Mr. Janzen) were largely unclear about

[18] Mr. Pollon's evidence as of October 15, 2002 was that, following the new policy rules, his processing operations have received all the production they required, but that his Ashton Farms Ltd.'s barns have been full only in one period in the summer. The excess barn space has meant $60,000 - $90,000 per year less revenue than he would receive with 100% grandfathering. He expects that cost to increase when the grandfathering ends in January 2005.

the overall impact of the changes on the viability of their operations. When proceedings resumed in October 2002, the only growers who returned were Mr. Peters, Mr. Friesen and Mr. Janzen. Mr. Friesen testified that he sold his farm in October 2001, stating that following the changes, he was only able to keep his barns 2/3 full. However, Mr. Friesen stated that there were factors in addition to the policy rules that caused him to sell the farm. Furthermore, he did not invest for the purpose of the Export Program; he simply used export production to fill barn space that he had previously paid for and was not utilising. Mr. Peters, who grew export (and lease) production many orders of magnitude above his quota, also appeared in October 2002 with his wife. He advised that he had sold his chicken farms, and his quota, and was now engaged in other farming. Mr. Peters noted that, in the periods leading up the August 2000 policy rules, he was largely growing lease production rather than export production. Mr. Peters agreed that when he undertook the export venture, he assessed the risk and was given no guarantees. He felt that there was no indication that there would be any changes. When Mr. Janzen appeared in October 2002, he advised that his family was able to purchase additional quota, the timing of which did not adversely affect his grandfathering, and as a result is still in the business. However, he stated that if his quota purchase had been timed differently, it would have reduced his grandfathered amount.

67. In considering all the evidence before us regarding impacts, we find that the grandfathering provisions do exactly what they set out to do – give partial (yet still significant) recognition to those investments. However, quite properly, the recognition is only meant to be partial. In the end, it will be for each individual or corporate grower who made an investment decision to govern himself according to the 50% barn space calculation and the grandfathering sunset date of January 1, 2005. Having undertaken a calculated risk, it was and is for each grower to determine how to proceed. No regulator could responsibly give any grower a guarantee that there would no regulatory changes, let alone that the grower's barns would always be full. No grower was given any representation that the Chicken Board was insuring its investments, and as we have concluded above, it would not have been appropriate for the Chicken Board to do so in these circumstances.

ALLEGED ASSURANCES

68. On the latter issue, the Appellants advanced submissions that both formal and informal "assurances" were given to the industry by the BCMB and the Chicken Board that led them to believe that their investments would be safe. Through the evidence of Hakon Komm, Chief Financial Officer for Hallmark, counsel for the Hallmark Group referenced a BCMB supervisory decision, made in February 1998, directing that the former Export Program remain intact for the duration of the NAA. What Mr. Komm's evidence conspicuously overlooked was that on March 17, 2000 the BCMB directed the Chicken Board to exit the NAA effective December 31, 2000, and that the NAA was declared void by Justice Lowry effective April 4, 2000. On April 7, 2000, the BCMB specifically confirmed that

Justice P.D. Lowry's judgment was in effect pending any appeals, and stated as follows:

> The Court's decision also overtakes other orders we have made based on BC remaining in the NAA until December 31, 2000. This includes our February 19, 1998 supervisory decision, establishing the conditions for BC's entry into the NAA, which stated that changes to the export program required the prior approval of the British Columbia Marketing Board ("BCMB"). From that decision came our March 17, 2000 direction, no longer required, that the Chicken Board recommend a new export program to the BCMB by June 30, 2000….
>
> As we have said previously, it is for the Chicken Board to decide, after necessary consultations with affected parties, if and how re-grow credits will be recognized, issued and administered in the future. The question is how the Chicken Board will set, allocate, audit and enforce overall production limits and deal with dark meat disposal. The Chicken Board must consider all its options in making these economic and regulatory decisions.
>
> As we stated in our March 17 decision … the Chicken Board is the assigned decision-maker. No one in the regulated marketing system, no matter how economically powerful, should be allowed to impose their will or undermine decisions made in good faith and in the public interest. The Court's judgement (sic) makes resolution of many questions urgent. Stakeholders who choose not to accept the opportunity to engage in meaningful consultation cannot later be heard to complain about the process.
>
> [emphasis added]

69. The Panel heard some evidence and much in argument about other "assurances" received by growers that their barns would be kept full. In most instances, these assurances to growers came from processors. One example is Mr. Peter. His processor told him that if he built barns for export, they would be kept full. Mr. Peter was aware that the Chicken Board of the day was not in favour of the Export Program and it did not encourage him to get into export production. He was also aware that approximately three-quarters of the Growers Association did not agree with the Export Program and there was a significant issue as to equitable participation in the Program.

70. The Panel also heard from Mr. Peters, who was advised by then Chicken Board General Manager Art Stafford that although the Export Program might change, it would always be available. In the case of Mr. Janzen, he spoke to Ross Husdon, Chair of the BCMB, to get some kind of indication of whether investing in the Export Program was a good idea or whether it was being frowned upon. Mr. Janzen stated that the end result was that "they were encouraging the export program and there was nobody saying that what I was doing wasn't a good idea".

71. As noted above, the Panel heard from Hakon Komm, of the Hallmark Group. Mr. Komm's evidence was that since 1993, processors had received support for the continuation of the Export Program from numerous Ministers of Agriculture, Deputy Ministers and other senior Ministry staff as well as the from the BCMB. After making various hearsay statements about representations made to various growers by the BCMB Chair, Mr. Komm admitted that he had never spoken to Mr. Husdon about this point.

72. Given the evidence before this Panel, it appears that there were two kinds of assurances alleged – assurances allegedly given to the Appellants from government or regulatory bodies and assurances allegedly given to the grower witnesses.

73. Mr. Pollon testified that he made his investment in 1997 after speaking with Mr. Husdon and Mr. Stafford (then Chicken Board General Manager).[19] He advised them of his plans and asked whether major changes were planned for the Export Program. After being advised in the negative, he made his investment, based on the belief that he could keep his barns full. As he stated, "[a]t that time the processors had control over where the birds were being grown for the export program so I had no concerns about keeping the barn full".

74. We accept that the new policy rules result in lower revenue than Mr. Pollon would have wished, based on full barns. We also accept that Mr. Pollon made what inquiries he could at the time he made the decision to invest. This said, Mr. Pollon is an industry leader, and a very experienced industry stakeholder. He knew full well that the market and regulatory environments are subject to change. While Mr. Husdon and Mr. Stafford would clearly have given him the best information they could, they could not – nor did Mr. Pollon testify that they did – provide him with guarantees that the Export Program would never change, let alone that his barns would always be full of non-quota production. That no guarantees were made, and that Mr. Pollon was taking a calculated risk as an experienced businessman, is evident in his testimony that "… at that time the government was promoting export, which *I felt*, you know, if the government was promoting export, that the *chances are pretty good* there wouldn't be changes…. *I never expected to see the changes that came*". "[*I*]*t sounded at the time that the Board wanted to promote export so I thought it was something that was just going to keep growing.*" [emphasis added] While it is easy to say today "I would not have built (the barn)" had the future been known, no one makes investment decisions with that kind of foreknowledge.

75. Peter Shoore, on behalf of the Sunrise Group, testified that "[e]very person we talked to in government was always very positive on the export program", but did not suggest that his grower corporations undertook their investments based on any assurances from regulators. He stated that he made the decision to build the barns partly due to the large quantity of lease production available after the Mundhenk farm went out of production[20], and to address "the bank of export production I was starting to build". Mr. Shoore explained that he switched the production in those barns from export to lease production after grower complaints, but that his primary

[19] Ashton Enterprises Ltd. is a grower corporation that Mr. Pollon described as "mine" and which is part of the network of vertically integrated chicken hatchery, grower and processor operations that make up the Hallmark Group. Mr. Pollon's evidence was that in 1997, he decided to build a large, double-decker barn in order to address the shortage of barn space for raising export birds. The barn, in which he placed 120,000 birds per period, cost $1.2 million. This is in addition to four other barns on the same farm, with capacity for 210,000 birds, of which 93,000 are quota birds.

[20] For the relevant background, see the separate BCMB decisions in *89 Chicken Ranch Ltd. et al v. British Columbia Chicken Marketing Board*, October 6, 1999 and August 3, 2001.

motivation for building was the export program, which "*I felt…would be reasonably successful for the foreseeable future*".

76. With respect to the evidence of the growers, the Panel heard much about the assurances given to them by processors, anxious to see an increase in their supply of white meat. In two other instances, the Panel heard of the "assurances" from Mr. Stafford, then Chicken Board General Manager, to Mr. Peter. Mr. Stafford's statements to the effect that the Export Program, while it might change, would always be available do not, on their own, constitute a guarantee in support of a new business venture. As to Mr. Janzen's conversation with Mr. Husdon, Mr. Janzen reported it as follows:

> I was basically, I was getting ready to make a decision on whether or not we were going to lay out in excess of a million dollars, and wanted, I don't know if confirmation, but some kind of indication from Mr. Husdon, of was this a good idea or was this being frowned upon? And the end result was that they were encouraging the export program and there was nobody saying that what I was doing wasn't a good idea. There was no opposition.

77. As the quotation above discloses, Mr. Janzen's evidence on this point did not attribute any specific statements to Mr. Husdon. While Mr. Husdon indicated, according to this evidence, that the Export Program was being encouraged and that there was "no opposition" to his plan, Mr. Janzen was careful not to assert that Mr. Husdon provided him with an assurance that his barns would always be full of export chicken and that he would be immune from changes to the Export Program. In our view, this report of a conversation between the BCMB Chair and a grower, which conversation the grower himself did not find a sufficient basis to launch his own appeal either in August 2000 or January 2001[21], is far from being a sound basis on which to accept that there was an assurance of full barns for Mr. Janzen. Even less is it a basis for a broadside attack on the policy rules governing the entire industry on this point, particularly when one takes account of the evidence referred to above from Mr. Pollon and Mr. Shoore.

78. With respect to the "assurances" given to the Appellants by government, the BCMB or the Chicken Board, most of these can be characterised as broad statements of support and recognition of the importance of the Export Program to BC. However, on the evidence, nothing in the assurances from government or regulatory bodies indicated that the Export Program was carved in stone, and this was particularly so given the BCMB's March 2000 and April 2000 statements emphasising the need for its reform. The responsibility of regulation and the law against fettering discretion means that very little in a regulatory system can be

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[21] On October 31, 2000, the following exchange took place between counsel for the Intervenor and Mr. Janzen: "Q. My understanding from your evidence, as well, is that both the amount of grandfathering per grower, as well as the length of time and the period in which the grandfathering would be applicable is also an issue that's open for discussion? A. I hope so. Q. Your experience is that it has been and it is? A. Yes. Q. I also understand that, following this discussion, that if it's not a situation that you agree with, you understand that there's recourse at that juncture in time as well, through an appeal, if it's necessary, is that fair? A. Yes."

considered carved in stone; circumstances and priorities evolve over time and regulators must respond. In this context, persons wishing to take benefits, especially from a permit program, know or should know that they are taking calculated risks.

79. Although the Export Program has changed, its essential core has been retained; the processors continue to get additional lower cost white meat from the Export Program. However, in tandem with the program reforms, the Chicken Board properly decided that there would be a phased in but eventually full redistribution of the export quota among all growers. No party or witness to this appeal received an assurance that this would never happen or that their barns would always be full.

SPECIALTY PRODUCTION

80. The Appellants argue that there is no reason in principle for treating export permit production, which was not fully grandfathered, differently from specialty chicken production, which was fully grandfathered.

81. The short answer to this argument is that specialty chicken, while properly regulated under the *Scheme*, constitutes a distinct sector of the chicken industry subject to distinct policy considerations. As a result of the quantity, origin, evolution and production methods involved in specialty production, including the Chicken Board's desire, and ability to encourage growers outside the law to come into compliance without disrupting the larger price and production system, full grandfathering was possible and appropriate.[22] Export growers, by contrast, have always been primary quota holders. Their export production is, properly understood, indistinguishable from domestic production and is produced in such quantities that it should, for all the reasons discussed above, be made available to all quota holders.

LEASE VS. GROW-OUT

82. The Hallmark Group also opposes the removal of options in the method of growing export production. Under the former Export Program, chicken was produced on a processor's "re-grow credit". As mentioned earlier, in return for processors finding markets and exporting dark meat, the Chicken Board issued "re-grow credits" to participating processors to be "re-grown" as domestic production. This domestic production was "re-grown" on either a grow-out or a lease option. With the grow-out system, growers were paid a flat rate of $0.08/lb. by participating processors. The processor supplied feed and chicks, while the grower supplied the barn space. The grow-out system gave growers a predictable income for budgeting purposes. Under the lease program, growers pay the processor a lease fee set by the processor (in the range of $0.30 – 0.41/bird) to access the re-grow credit. The grower

[22] By contrast in the egg industry, the British Columbia Egg Marketing Board determined that it was not possible to grandfather specialty production: see *Olera Farms Ltd v. British Columbia Egg Marketing Board*, February 25, 2003, BCMB.

supplies the feed, chicks and barn space. The Hallmark Group argues that there is no logical or reasonable basis to remove the grow-out option from the growers; it argues that the grow-out option offers choice to growers, and advantages to processors who, by controlling inputs, can control scheduling. Hallmark also objected to the alphabetical allocation of leases, which effectively prevented the Hallmark Group from continuing its grow-out arrangements with its own closely held (corporate) farms.

83. The Chicken Board maintains, and we agree, that while "choice" sounds good, it does not withstand policy scrutiny. Under contract growing, growers effectively become tenants of the processors, a situation not far removed from the contract growing found in some parts of the United States. As a matter of sound marketing policy in BC, registered growers should have incentives to run their own businesses. While grow-out transfers economies of scale relating to chick price and feed to the processor, the lease option transfers those economies of scale to the grower, allowing them to realise better prices for feed and chicks and to fully utilise barn space. We agree with the Chicken Board's policy judgment that rather than the processor benefiting from economies of scale relating to production efficiencies, the person actually growing the chicken should receive these benefits. While the Appellants seek to criticise this as decision-making based on "philosophy", any approach here, including one which vests control in the processors, would also be based on philosophy. Policy judgments have to be made, and in our view, the one made here was sound.

84. We note that while there was evidence that growers used contract growing in the past, growers did not come before this Panel stating their preference for grow-out or objecting to lease only growing. Beyond making assertions, the processors did not provide financial information demonstrating any significant financial hardship. As Mr. Hunter pointed out, it is important to recognise that processors are, under the lease system, *paid* by growers to receive export production[23]:

> You may wonder, as I did when I became more conversant with this, why is the processor getting this lease payment anyway? After all, he's buying chicken, he's paying the Board price, he is going to sell it again hopefully at a profit, how come the supplier is paying him for the privilege of selling him chicken? Well, presumably there are reasons for that. From the grower's point of view, it's extra production. The price which is set, the domestic price, is intended to compensate him for a lot of fixed costs which he has anyway and the export is extra production so that the marginal cost of that is relatively low so the grower doesn't seem to mind doing this. From the processor's point of view it's cream. It's not that he is – not just that he is getting the product to sell on the export market, but he is being paid by the supplier to take that product and he is being paid a fixed sum which he sets and which he gets even if the producer underproduces. So in the example that Mr. Beattie gave, if the processor says he needs 1 million kilograms for a period, he gets $370,000 and he gets the birds. And he pays for them at Board price and then sells them on his fabled free market. It's not a bad deal for the processors.

85. We note that the Intervenor Growers Association strongly supports the Chicken Board, and argues that the leasing requirement in the new policy rules is

[23] See August 15, 2000 policy rules, ss. 118, 119.

appropriate. The majority of growers in BC do not want to see a return to grow-out or the producing of chicken on contract where the grower receives a set price for the birds and the processor provides all the inputs, a system under which the processor essentially owns the birds. Although under the former Export Program there was a choice between grow-out and lease, on the evidence there was usually no choice in practice. A grower wishing to produce birds for export did so on a grow-out.

86. Under the new Export Program, a grower leases export production. He owns the birds just as he owns domestic production. The grower controls the costs and is able to gain the benefit of any efficiencies. The grower pays a set amount to the processor for the privilege of growing export birds. He is not limited to having an empty floor or barn as there is no distinction in chick or feed between domestic and export birds. The option between lease and grow-out is that it creates a separate but unequal system between corporate and independent farms. Fairness, equity and transparency dictate the growers' preference for the lease option over grow-out. The evidence of growers preferring grow-out to lease can be more properly characterised as evidence of growers making more money with the grow-out system. However, it cannot be overlooked that *processors* set the lease price; it is within *their* power to allow growers to make the same or similar returns under the lease program. Thus, the Intervenor argues that as long as the lease price remains in the control of the processors, they can ensure that grow-out is the preferred (most profitable) option for growers.

87. The Appellants also took issue with the alphabetical system of allocating lease production which denies them the ability to use grow-out on farms under their control. The short answer is that an alphabetical method is transparent and prevents favouritism. To do otherwise perpetuates, as pointed out by the Growers Association, a separate but unequal system between corporate and independent farms. Fairness, equity and transparency dictate the same system for all growers. This in our view is sound marketing policy. The Appellants have given us no compelling rationale to justify the Chicken Board administering two separate schemes, or continuing to delegate this issue to the processors.

88. For the reasons we have given, the Panel is satisfied that the Chicken Board's decision not to maintain the grow-out option in its new policy rules was a sound marketing policy decision. We appreciate that, in the past, the processors controlled this aspect of the Export Program. It is not surprising that they take issue with the Chicken Board's regulations in areas not previously regulated. However, it is the Chicken Board that has the statutory mandate to regulate the marketing of chicken within BC. Not finding any error and having weighed the public policy implications, the Panel is not prepared to interfere with the Chicken Board's new policy rules.

PRODUCTION STANDARDS

89. The Appellants also take issue with the failure on the part of the Chicken Board to establish production standards in its new policy rules. Section 142 of the new policy rules reads:

> Production standards will be developed by the Joint Committee, referred to in Schedule 4, failing which the Board will formulate standards.

90. The Joint Committee (comprised of three growers plus one alternate and three processors plus one alternate) has never been able to agree on standards. The Chicken Board has not formulated any standards of its own.

91. The Appellants argue that production standards in three dominant areas (weight compliance, condemned and contaminated birds) are essential for the industry. Currently in BC, there is a posted minimum price set for a specific weight range. There are differing set prices for various weight ranges; however, as there is no reduced price for undesirable weight birds, there is no mechanism to enforce discipline on growers to produce birds in the weight ranges needed by processors.

92. When the Chicken Board was appointed in January 2000, the Deputy Minister of Agriculture identified a number of critical, ongoing and unresolved issues requiring the Chicken Board's attention in its first 90 days, one of which was:

> Develop, through consultation and negotiation, a process to establish production standards that *increase the competitiveness* of the British Columbia chicken industry *by providing live chicken of the size and quality required by the processing sector.*
>
> [emphasis added]

93. The Appellants argue that in light of the foregoing direction, there is no excuse for the Chicken Board failing to develop production standards. Instead, by insisting that the processors and growers agree, it has effectively given the Growers Association a veto over any proposed production standards. The Appellants argue that while it is not surprising that the Growers Association resists a more disciplined approach to production, such an approach is necessary in order that the processor receives live chicken of the "size and quality" it requires for its customers.

94. The Chicken Board agrees with the Appellants that production standards are necessary, but believes that the primary stakeholders should agree on workable standards. While the Chicken Board could "micro-manage" and impose these standards, its preference is not to do so. The Growers Association has put forward a draft set of standards; the processors have not. The Chicken Board suggests that the appropriate course is for the Growers Association to review its standards with the processors and attempt to reach a compromise. In addition, the Chicken Board

argues that the issue of production standards is ideally suited to the ongoing of review of regulations and the BCMB should direct the Chicken Board to deal with this issue in that context.

95. The Intervenor argues that the issue of production standards is not as simple as quality and size standards with penalties or disincentives payable by growers not meeting those standards to processors. A complete set of standards, taking into account the inputs such as feed quality, chick quality, vaccinations and slaughter scheduling that affect bird size and quality, is necessary. Given that some of these inputs (chick quality and slaughter scheduling) are processor controlled, any production standard must be fulsome and complete, recognising *all* issues important to quality control.

96. The Intervenor has prepared draft production standards and in September 2001, the Chicken Board struck a sub-committee to consider this issue. The Intervenor recommends that the issue of production standards either be returned to that sub-committee or alternatively, be returned to the Chicken Board for consideration as part of its regulatory review.

97. The lack of production standards has been an issue in the chicken industry for some time. As mentioned above, when the elected Chicken Board was replaced by an appointed Board one of the first issues identified for its attention was "production standards that increase the competitiveness of the British Columbia chicken industry by providing live chicken of the size and quality required by the processing sector". The processors operate fully automated plants geared to slaughter chicken of a particular size range. Underweight birds fall out of the shackles; overweight birds require equipment adjustments before they can be slaughtered. Both create inefficiencies which impact processors' bottom line.

98. This issue was also raised in a recent decision of the BCMB, *Primary Poultry Processors Association et al v. British Columbia Chicken Marketing Board*, December 13, 2002 (*Rossdown #2*). In that decision, the processors appealed a decision of the Chicken Board directing product from a grower over multiple home weeks. The processors took issue with the lack of production standards and the requirement that they take a grower's chicken even in circumstances where the product did not meet the contract specifications. In that decision, the BCMB recognised the need to provide optimal product to the market place:

> Further, the BCMB recognises that in order for the chicken industry in the province to be competitive and viable, there must be co-operation among the Chicken Board, producers, suppliers of inputs and processors. The goal is to achieve efficiencies within the entire system in order to supply optimal product to the marketplace. Ultimately however, it is the processor who knows the market and knows how to meet market needs.

99. The Panel identified the issues surrounding the lack of production standards as follows:

> The second issue is the lack of quality standards. The Panel heard considerable evidence on the tight product tolerances that processors are given by their customers. An extensive amount of time and money go into establishing breeds and strains with better yields of desirable products. Producers who ship under weight, over weight or otherwise sub-standard birds cost their processors money and negatively impact the market. The Processors stated that they have little interest in penalties. What they want is product they can use at the time and place when they need it. It is the Chicken Board's responsibility to put in place appropriate production standards that serve to balance the needs of the industry. Even if appropriate standards cannot be agreed on by industry, the Chicken Board, perhaps in consultation with the (British Columbia Broiler Hatching Egg) Commission, may still need to act to ensure consistency within the industry.

100. Between the release of the *Rossdown #2* decision and the hearing of this appeal, there has been no consensus in the chicken industry regarding production standards. While the Chicken Board and the Intervenor believe that more discussion is necessary and recommend the regulatory review process, at some point this issue must be resolved. It has been three years since the Chicken Board was directed to put production standards in place. It hoped that a negotiated solution was possible, however that does not appear to be the case.

101. Given that the Chicken Board has the regulatory authority under s. 4.01 of the *Scheme* to promote, regulate and control in all and any respects the production and marketing of chickens, it has the authority to impose production standards on the chicken industry. If parties refuse to participate in a negotiation process to establish these standards, it sits ill in their mouth to later complain or accuse the Chicken Board of "micro managing".

102. It should be noted that in the time since this appeal was heard the Chicken Board has circulated draft orders for review by the industry. It may be that industry consensus will result in appropriate production standards. If, however, the review does not result in industry consensus, the Panel directs the Chicken Board to implement production standards by December 31, 2003. As mentioned in the *Rossdown #2* decision and given the integrated nature of the chicken industry, the Chicken Board is to discuss production quality issues with the British Columbia Broiler Hatching Egg Commission.

COSTS THROWN AWAY

103. As indicated earlier, this appeal did not commence on October 10, 2002 as scheduled, as the Hallmark Group was not ready to proceed. Earlier in the week, the Hallmark Group was in the Supreme Court dealing with a Chicken Board injunction application in an unrelated matter. As a result of late service of documents by the Chicken Board, time that was to be spent preparing for this appeal, was instead spent responding to the injunction application. To allow

counsel for the Hallmark Group time to prepare, the Panel adjourned the appeal to October 11, 2002.

104. The Chicken Board and the Intervenor seek their costs thrown away in attending the hearing on October 10, 2002. The Hallmark Group opposes this application blaming the late delivery of documents by the Chicken Board in the Supreme Court injunction application for the delay.

105. The hearing of these appeals originally commenced in October 2000; the dates for continuation were set many months in advance. The Hallmark Group did not offer any compelling reason why they could not have prepared their case well in advance of October 10, 2002. As a result of the Appellant Hallmark Group not being prepared, the BCMB, the Chicken Board and the Intervenor (and it should be noted the other Appellant) were all incurred unnecessary costs. This must be discouraged and in this case, the Panel feels the circumstances justify an award of costs to the Chicken Board and the Intervenor.

ORDER

106. Subject to the direction that the Chicken Board implement production standards by December 31, 2003, the appeals are dismissed.

107. The Intervenor and the Chicken Board are each entitled to $500 from the Hallmark Group on account of their costs thrown away in attending the hearing on October 10, 2002. These costs are payable immediately.

108. Apart from costs thrown away referred to in paragraph 107, there will be no further order as to costs.

Dated at Victoria, British Columbia, this 27th day of June 2003.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Satwinder Bains, Member
Richard Bullock, Member