IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT AND IN THE MATTER OF AN APPEAL CONCERNING A DECISION TO ENTER INTO A NATIONAL ALLOCATION AGREEMENT AND/OR A WESTERN PROVINCES MEMORANDUM OF AGREEMENT

BETWEEN:

HALLMARK POULTRY PROCESSORS LTD.
SUNRISE POULTRY PROCESSORS LTD.
J.D. SWEID LTD., and
SUNWEST FOOD PROCESSORS LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

REASONS FOR DECISION

APPEARANCES:
For the British Columbia Marketing Board

Mr. Ross Husdon, Chair
Ms. Christine Elsaesser, Vice Chair
Ms. Karen Webster, Member
Mr. Dedar Sihota, Member
Mr. Hamish Bruce, Member

For the Appellants

Mr. Christopher Harvey, Q.C., Counsel

For the Respondent

Mr. John Hunter, Q.C., Counsel
Mr. Doug Scullion, Counsel

Date and Place of Hearing

January 6 and 7, 1998
Richmond, British Columbia

INTRODUCTION

1. In December of 1978, the Canadian Chicken Marketing Agency (CCMA) was established by a federal-provincial agreement signed by the federal Minister of Agriculture, his provincial counterparts, the Chair of each province's chicken board as well as the Chair of each province's supervisory board. The goal of the CCMA was to maintain a healthy and viable chicken industry in Canada by creating a national quota allocation system among its province members.

2. In 1989, in response to "unfair national constraints on BC growth", the British Columbia Chicken Marketing Board (the "Chicken Board") with the support of the BC government withdrew from the national federal-provincial agreement. Years of rapid growth and increased profits for the BC chicken industry flowed from this decision. Due to its withdrawal, the Chicken Board became a non-voting member of the CCMA, now the Chicken Farmers of Canada (CFC).

3. Up until May of 1994, the CCMA set production levels in a "top-down" arrangement (i.e. processors were told what they could produce). In May of 1994, the CCMA replaced that approach with a "bottom-up" arrangement whereby processors determined in advance their market requirements.

4. Effective December 24, 1995, the Chicken Board signed on to the National Allocation and Pricing Agreement (NAPA). From the outset, this agreement was unworkable.

5. In March of 1997 a new National Allocation Agreement (NAA) was proposed. Subsequently, the CFC hired Intersol Consultants to develop a nation wide consensus. By October 1997, the four western provinces determined that a Memorandum of Agreement (MOA) was necessary to allocate production between them prior to entering the NAA.

6. On November 6, 1997, the Chicken Board decided to enter into the MOA and NAA. The Chicken Board signed the MOA in the version that existed on that date. It was its intention to enter into the NAA on November 13 or 14, 1997. On November 10, 1997 the Appellants filed their appeal of the Chicken Board's decision to enter into both agreements and sought a direction staying the implementation of these agreements pending appeal.

7. On November 12, 1997, in the exercise of its supervisory authority under the *Natural Products Marketing (BC) Act* (the "Act") and taking into consideration the issue of consultation, the British Columbia Marketing Board (BCMB) directed the Chicken Board not to sign the MOA pending further review by the BCMB. At that time the Chicken Board was not prevented from signing the NAA. Not all of the remaining western provinces signed on to the November 6, 1997 draft of the MOA following this decision. The MOA has been redrafted but at the time of the hearing of this appeal, the Chicken Board had not entered into either the MOA or NAA.

8. On January 22, 1998, the BCMB released the decision on this appeal with written reasons to follow. These are the written reasons.

PRELIMINARY ISSUE

9. At the commencement of the hearing, the Panel considered whether or not a written submission from Mr. John Schildroth of the Trade Competition Branch (TCB) of the Ministry of Agriculture, Fisheries and Food (MAFF) could be entered as part of these proceedings.

10. The Appellants did not oppose the document being an exhibit in these proceedings.

11. The Respondent strenuously opposed the admission of the document. It purported to be a statement of government policy on the issues on appeal. However, the author of the document was not available to give evidence. The Respondent argued that it would be prejudiced if this evidence was admitted without the opportunity to cross-examine the author of the document.

12. The Panel ruled that the letter would be admitted, given that we may receive evidence that might not otherwise be admissible in court, and it would be accorded appropriate weight. However, the parties were advised that this appeal would ultimately be decided on the evidence presented by each of them.

13. In coming to our decision, the Panel gave minimal weight to the TCB document insofar as it purported to represent government policy. Had representatives of the TCB appeared at this hearing and been subject to cross- examination, our view may well have been different.

ISSUES ON APPEAL

14. Did the consultation process followed by the Chicken Board satisfy the requirements of procedural fairness as well as those imposed by the Chicken Scheme? (the "Process Issue")

15. Are the proposed agreements destructive and detrimental to the chicken industry in British Columbia? (the "Merits Issue")

16. Does the Chicken Board have the authority to enter into national agreements to regulate production of chicken within British Columbia? ("Jurisdiction")

FACTS

BACKGROUND

17. By virtue of an amendment to the British Columbia Chicken Marketing Scheme, 1961 (the "Scheme") on December 7, 1995, the Chicken Board was required to establish a Pricing and Production Advisory Committee (PPAC). This committee was composed of 3 grower and 3 processor representatives, an independent chair and further persons appointed by the Chicken Board. The Chicken Board is required to consult the PPAC and consider its advice before making any decisions with respect to pricing and production.

18. On April 16, 1997, following an appeal by the Primary Poultry Processors Association of BC (PPPA), the BCMB undertook a complete review of the PPAC process. The review was conducted under the BCMB's supervisory jurisdiction and involved lengthy consultation between both the processors and the Chicken Board. This review resulted in the BCMB issuing, on November 17, 1997, an order restructuring the PPAC and establishing a new process for the determination of price and production for a specific broiler quota period.

19. During this period, the chicken industry in BC was volatile. However, in an attempt to bring stability, the processors and the Chicken Board agreed to a nation-wide cap on production of 3% for cycles A14-A17 (July 6, 1997 to February 14, 1998). With this cap in place, the CFC continued the national consultative process to determine whether a new national agreement could be reached with all provincial boards.

CONSULTATION PROCESS

20. In February 1997, the Chicken Board met with the Minister to seek his support for a new federal-provincial agreement and advise him of the possibility of a new NAA in the interim. The proposed NAA would be an agreement between the 10 provincial boards to allocate national chicken production. The NAA would not include either the federal or provincial governments as signatories.

21. In the May 15, 1997 minutes of the Chicken Board, the plan for consultation was discussed. The Chicken Board planned to include BC stakeholders including the processors, the BCMB, and the TCB.

22. The Chicken Board met with the BCMB and the TCB on June 3, 1997 to update them on the new NAA and to invite their participation in the June 20, 1997 consultation.

23. The June 20, 1997 meeting took place. Producers, processors, further processors and representatives from the CFC, the TCB and the BCMB attended the meeting led by Intersol Consultants.

24. As part of the nation-wide consultation process, the processors met with their national counterparts in Winnipeg, Halifax, St John's, Toronto and Edmonton through the summer and fall. At the Winnipeg meeting, the BC processors initially voted against a national cap. This motion did not pass and they eventually supported an 8% national cap on production.

25. On September 4, 1997, the Chicken Board met with Mr. John Schildroth and Dr. Linda Chase Wilde of TCB. The Chicken Board minutes of this meeting confirm that the NAA was discussed and record "the BC government's position is that there are concerns of domination from the central market-place".

26. On September 25, 1997, the Chicken Board met and passed a motion to give a mandate to the BC CFC directors to approve the September 22, 1997 draft of the NAA in principle. They also reviewed a draft of the MOA and decided to await further comments by the other western provinces.

27. The October 15, 1997 minutes indicate that the Chicken Board reviewed the final draft of the NAA and mandated the BC CFC directors to ratify the document. The MOA was also reviewed and the Chicken Board decided to discuss it further with the other provinces and a fourth draft would then be circulated.

28. The October 23, 1997 minutes confirm that a CFC conference call resulted in an endorsement of the NAA in principle with the processors abstaining from the vote pending a meeting with the Canadian Poultry and Egg Processors Council (CPEPC) later in the week. A further conference call was scheduled for November 7, 1997. The final wording of the MOA was to be discussed by the western provinces on October 27, 1997.

29. On November 4, 1997, the CPEPC met in Edmonton and passed a motion requiring regional conflict resolution agreements satisfactory to the processors to be in place prior to the implementation of the proposed NAA. The CFC at its meeting of November 13 & 14, 1997 modified the recommendation to include consultation with the processors but the requirement of processor satisfaction was dropped.

30. Mr. Colin Pritchard, Secretary-Manager of the PPPA stated that a Manitoba processor gave him a copy of the draft MOA at the Edmonton CPEPC meeting. This was the first time the document was seen by any of the Appellants.

31. On November 6, 1997, the Chicken Board met with BC chicken industry stakeholders, including the processors. The BCMB and the TCB were also in attendance at the meeting. The Chicken Board gave a presentation explaining the financial implications of the NAA and MOA. There is some dispute between Mr. Pritchard and Mr. Stafford, General Manager of the Chicken Board, as to whether the MOA was mentioned by name although its basic principles were discussed. This was the first time the Chicken Board discussed the MOA with the processors. However, the actual document was not before the group until distributed by Mr. Pritchard. Following the meeting, the Chicken Board met and having decided that the earlier meeting with stakeholders was 'positive consultation", it signed the MOA and passed a motion to ratify the NAA.

32. On November 12, 1997, the BCMB ordered the Chicken Board not to sign the MOA pending an appeal. The Chicken Board was not prevented from signing the NAA.

33. On December 16, 1997 the newly restructured PPAC met at the request of the Chicken Board. The NAA and MOA were both discussed. Given that there was a split vote on the MOA and the consensus was that more review of the NAA was required, the decision was made to revisit the agreements at the January 15, 1998 PPAC meeting.

TERMS OF THE MOA AND NAA

34. The MOA was further revised on December 29, 1997. Hence, the draft of the MOA that initiated this appeal is not the draft that was actually before us in the hearing.

35. The MOA proposes that BC forego its share (50%) of the 1.5% market responsive pool available to the Western Region when the national cap is 5% or less. The Chicken Board agrees to use "best efforts" to establish a live price of chicken in excess of both the Ontario and Alberta price.

36. The NAA places a 5% cap on nation-wide production. It also creates the market responsive pool of 1.5% mentioned above. The market responsive pool is only available to one region, of which there are three, at any given time.

37. An automatic review of the national cap is triggered by the following events: i. total storage stocks drop 2 million kg. below the 5 yr. moving average for two consecutive months or increase above 20 million kg, ii. in any one quarter, issued import permits under tariff rate quota (TRQ) are greater than 30% or less than 20% of annual TRQ, iii. supplementary import permits are issued for market shortages for 2 consecutive periods, or iv. unacceptable producer prices.

38. There is no sunset clause in the NAA, nor are there any withdrawal provisions. The NAA requires the Chicken Board to consult with BC processors and establish a method to resolve any conflicts between processor market requirements and provincial and national caps. This had not been done at the time of the hearing.

39. It was apparent at the hearing that the terms of both the MOA and NAA were not fixed. Both parties appeared to be actively negotiating terms during the course of this hearing. In addition, the PPAC meeting to discuss the MOA and NAA was scheduled for January 15, 1998. The Chicken Board agreed that further revisions were possible. In addition, national consultation is ongoing and further changes are still contemplated. Thus, the MOA and NAA, which are the subject of this appeal, are not necessarily the final agreements which may eventually be put forward for approval.

40. The Chicken Board was scheduled to sign the MOA on January 15, 1998 and the NAA on January 29, 1998. The Chicken Board has agreed not to enter into any agreement until this decision is released.

ARGUMENT OF APPELLANTS

PROCESS ISSUE

41. The Appellants argue that the Chicken Board breached the rules of procedural fairness by failing to adequately consult with processors.

42. In addition, the Appellants argue that as the MOA and NAA deal with pricing and production, the Chicken Board must comply with s. 3.20(3) of the PPAC regulation and "consult with the committee and consider the committee's advice before the board makes any decision relating to pricing or production".

43. The consultation leading up to the decision to enter the NAA and MOA has been inadequate. Despite Chicken Board representations to the contrary, the Appellants are concerned that the Chicken Board has ignored the processors' request that regional conflict resolution agreements, satisfactory to the processors, be in place prior to the implementation of the proposed NAA.

MERITS ISSUE

44. The Appellants argue that the NAA and MOA are inconsistent with the statutory powers governing the Chicken Board and therefore, must be rejected. This argument goes to the heart of the Chicken Board's jurisdiction to enter into these agreements and it will be dealt with under that heading.

45. The Appellants argue that the effect of the MOA will be to forego production in BC. This loss has been calculated at 235,000 kgs every 8-week period. On the Appellants' analysis, this results in a potential loss to BC producers of $4,242,655 in the first year and in excess of $61,000,000 over 10 years.

46. The Appellants argue that the Chicken Board has not conducted its own economic analysis of the impact of the MOA on processors. Since volume is critical to the BC processors' competitive advantage, the Appellants assume they will suffer a material loss.

47. When taken in combination with the NAA, the effect of the MOA on BC is to reduce the annual production increase from the 8% available to the prairie provinces, to 5%. This decrease does not take into account the 2% sleeve available to BC under the Liquidated Damages Agreement (LDA). The Appellants are not reassured by the Chicken Board's evidence that the historical method of calculating production levels guarantees an additional 6.5% growth to BC. Such "guarantees" do not give the Appellants any comfort in the face of the wording in the agreements.

48. The Appellants also take issue with the absence of a "sunset" or "exit" clause. It is unclear if these words are being used inter-changeably. Usually a sunset clause is the date when an agreement ends while an exit clause is method by which a signatory can withdraw from the agreement itself. The NAA and MOA have neither. The Appellant argues that the failure to include such provisions is contrary to BC government policy.

49. Finally, the Appellants argue that the effect of the NAA is to transfer the power to set BC price and production levels to central Canada. The agreed 5% cap can be downwardly adjusted based on a triple majority formula with 'triggers' largely controlled by Quebec and Ontario. In addition, the 'triggers' that force an automatic review are defined such that a review is certain within the first year of the NAA

50. The Appellants' final argument is that despite the Chicken Board's representations to the contrary, these new agreements are a return to the old 'top-down' approach which was in place for years and ultimately proved unworkable.

JURISDICTION

51. The Appellants argue that the Chicken Board has no statutory authority to enter into the NAA because such action constitutes inter-provincial regulation of trade, a matter of exclusive federal jurisdiction pursuant to s. 91 of the Constitution Act, 1867. In support of this proposition, the Appellants cite BCMMB v. Bari Cheese (1996), 26 BCLR 279 at p. 295 (Bari II).

> While production is prima facie a matter within provincial legislative competence, this undoubted provincial power cannot be used for the purpose of supporting an extra- provincial marketing scheme. If this were possible there would be no room for federal power.

52. The Appellants argue that the provincial government of BC made a decision to opt out of the federal-provincial agreement in 1989. Thus, from a constitutional perspective the Chicken Board should not be allowed to do indirectly what it is clear the provincial government does not want it to do directly.

53. The Appellants raise a second jurisdictional argument based on s. 6 of the Act. It provides that with the approval of the Lieutenant Governor in Council, a provincial board may grant authority to a federal board to perform any power or function relating to trade in BC that the provincial board itself may perform.

54. The Appellants argue that the effect of the NAA is to grant a federal board (the CFC) the power to make binding decisions on the Chicken Board with respect to production levels. Such a delegation of power can only be effected with government approval in the form of an Order-in-Council. No such Order-in-Council has been issued.

55. Finally, the Appellants argue that it does not matter whether the Chicken Board's actions constitute an unauthorised sub-delegation or an unlawful fettering of discretion. The result is the same. A statutory board such as the Chicken Board vested with discretion is compelled to exercise it. It cannot fetter its discretion or sub-delegate it to the CFC. With the NAA, the Appellants argue the Chicken Board is doing both

ARGUMENT OF RESPONDENT

PROCESS ISSUE

56. The Respondent's position is that this appeal is largely premature. There is no order or regulation for this Board to review nor is one necessary. The Chicken Board has been involved in a 'dynamic process' that is not yet finalised. The Chicken Board has decided in principle to enter into the NAA and MOA but the precise wording of the agreements is not settled as evidenced by the settlement discussions that continued during the hearing.

57. The Respondent argues that on the whole, the consultation process has been adequate. The two impugned agreements are the result of a national consultation process that began in March of 1997. The processing sector was fully involved through the CPEPC. The Appellants have been given the opportunity to participate as fully, if not more fully, than if restricted to the PPAC process.

58. Further, the Respondent argues that the PPAC process was itself under review during the development of the agreements. Accordingly, during the review an ad hoc consultation process was used that functioned reasonably well. Once the BCMB issued the revised PPAC order, the Chicken Board moved quickly to convene a meeting to discuss the agreements. The PPAC process was not concluded at the time of the hearing and a further meeting to discuss the NAA and MOA was scheduled for January 15, 1998.

59. The Respondent argues that by bringing their appeal before the agreements are signed, the Appellants have pre-empted the consultation process.

MERITS ISSUE

60. The Respondent argues that the purpose of the NAA is to provide industry stability and protection against the historical problem of overproduction. The purpose of the MOA is to encourage the western provinces to sign onto the NAA to the ultimate benefit of the entire BC chicken industry.

61. The Respondent argues that the two agreements meet these two objectives without sacrificing the ability to increase production to meet legitimate demands. BC's competitive advantage will permit annual growth as high as 13.5% or perhaps 16.5% if the national cap is raised as discussed. In their evidence, the Appellants agreed that a 10% annual increase in domestic production would be sufficient for their growth needs.

62. The Respondent submits that there is no basis for the criticism that caps will be lowered. The triggers criticised by the Appellants are equally likely to raise as lower the cap.

63. The Respondent further argues that the proposition that the MOA will require BC to forego production is "entirely superficial". The MOA provides a degree of comfort for the other western provinces to grow by 8% if their markets allow. In reality, BC's historical position provides a built in buffer and allows that level of growth and more. Without the MOA, the western provinces will not enter into the NAA and without the western provinces, there will be no national plan.

64. The Respondent argues that the impact analysis prepared by the Appellant is superficial in the extreme and not worthy of the slightest weight. The Respondent argues it is significant that the analysis shows no impact at all on the processors.

65. Finally, the Respondent argues that the absence of a termination clause is an insufficient reason not to sign the NAA. This is a bridging agreement. The practical reality is that the agreement will be replaced in few years when the province enters into a new federal-provincial agreement. Alternatively, the agreement will collapse from a lack of commitment by the various provincial boards and commissions.

JURISDICTION

66. The Respondent argues that the BCMB cannot consider constitutional questions, as the Act does not grant that authority. Apart from the express language of the statute, the Respondent also relies on Cooper v. Canada (Human Rights Commission), [1996] 3 SCR 854. The Supreme Court of Canada points to factors such as the area of expertise of a board and the nature of its hearings as determinative of the authority to make constitutional determinations.

67. Apart from the BCMB's ability to decide constitutional questions, the Respondent argues that as a matter of fact, this appeal is premature. There is no law being challenged but rather a mere agreement and mere agreements cannot breach s. 91 of the Constitution Act, 1867. The case law relied on by the Appellants can be distinguished on this basis. The issue in Bari II was the constitutionality of regulations and orders enacted in support of entering into a national agreement not the constitutionality of the agreement itself.

68. The Respondent takes the position that no order is necessary to enter into the NAA and thus, the constitutional argument is premature.

69. The second constitutional argument deals with s. 6 of the Act and the improper delegation or fettering of Chicken Board authority. The Respondent argues that the Appellants have misstated the effect of the national plan. Section 6 only applies if the Chicken Board grants one of its responsibilities to a federal board.

70. That is not the case with the NAA. The Chicken Board will continue to set production for BC, not the CFC. The Respondent argues that:

> the only circumstance in which the National plan would even be relevant to the production decision would be in the extremely unlikely scenario that BC production requirements increased by more than 13.5% in one year, and there was no increase in the cap at all (assuming the cap is set at 5%, which is currently under review).

71. The Respondent is of the view that this argument too, is premature. The agreement is largely irrelevant to production limits. The Respondent argues that this transaction is essentially a paper one, particularly for BC where it is extremely unlikely that these agreements will have any effect on production decisions.

ARGUMENT OF APPELLANTS IN REPLY

72. The Appellants take issue with the characterisation of this appeal as premature. They argue that there is a very real issue as to whether the Respondent has the authority to regulate according to these types of agreements. The consultation process to date, the merits of the agreements and the lack of jurisdiction make this a timely issue.

73. The Appellants also take issue with the Respondent's submission that nothing will change if these agreements are entered into. The Appellants find this naive and unconvincing. The Appellants argue that the Respondent fails to deal with the obvious intent of the agreements, to give away 1.5% production. The effect of this will be to restrain BC production.

74. With respect to consultation, the Appellants argue that consultation after the fact is totally unsatisfactory and amounts to nothing more than window- dressing.

75. With respect to the merits, the Appellants take issue with the Respondent's characterisation of the triggering mechanisms as equally likely to increase as decrease the cap. This ignores the genesis and rationale of the NAA that came into being because of Quebec's concerns about overproduction.

76. With respect to jurisdiction, the Appellants argue that constitutional considerations affect the administration of the law as well as the law itself and cite Ref: re Agricultural Products Marketing Act (1978), 84 D.L.R. (3d) 257 in support of what is, according to the Appellants, 'trite' law.

77. The Appellants argue that just as a provincial law can be struck down for overreaching into federal jurisdiction, so too can administrative actions, such as a provincial board regulating marketing based on agreements with other provinces.

78. The Appellants also distinguish the Supreme Court of Canada's reasons in the Cooper decision. That case does not stand for the proposition, as stated by the Respondent, that an administrative tribunal should not undertake a constitutional analysis of relevant legislation unless it has been expressly given that power in its empowering legislation. Rather, the Appellants argue that Cooper turns on the fact that the commission in question was a mere screening body and had no adjudicative powers. In fact, the Court in that case stated at p 888:

> There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature.

79. The effect of the Respondent's submission as a whole would mean that the BCMB does not have the power to interfere with the Chicken Board's actions even if its actions have not kept with the mandated process, are not beneficial to BC and are not within its constitutional authority.

DECISION

PROCESS ISSUE

80. The BCMB finds that the consultation prior to the November 6, 1997 meeting did not follow the PPAC process. Even though the structure of the PPAC was under review by the BCMB, the provisions of the Scheme were in effect and the obligation on the Chicken Board to comply with them remained.

81. The atmosphere between the processors and the Chicken Board was acrimonious during this period. While it appears that the Chicken Board did not take full advantage of the PPAC process, the processors also chose not to request a further meeting although it was within their power to do so. Thus, they too must be somewhat at fault for the lack of what Mr. Peter Shoore of Sunrise Poultry called 'meaningful consultation'. Mr. Arne Mykle, Chair of the Chicken Board, gave evidence that following the September PPAC meeting, the processors refused to schedule any further meetings. Mr. Shoore in his testimony sought to clarify that what he meant was that he would not personally take part in future meetings. Whatever Mr. Shoore intended, it appears that there was a breakdown in the PPAC process.

82. While not made clear in the evidence, it appears that the Chicken Board allowed the national consultation to eclipse the PPAC process. The CFC created a national forum for discussion and both the Chicken Board and the processors participated.

83. There were two industry stakeholder meetings held by the Chicken Board in conjunction with the CFC. In addition, processors were participating in the national process through their own organisation. BC processors met with the CPEPC on several occasions and the CPEPC then took the recommendations and motions forward to the CFC for consideration.

84. By November 6, 1997, when the Chicken Board made the decision to enter the two agreements, the BCMB finds that adequate consultation had not taken place. It is troubling that the Chicken Board chose not to circulate the draft of the MOA but chose to talk in generalities. Given that the Appellants had to find out the details of the proposed MOA from their Manitoba counterparts, their suspicions about the entire process were only natural.

85. Since this Appeal was commenced, there have been ongoing discussions between the Respondent and Appellants to try and reach agreement on the terms of the MOA and NAA. Both parties appeared to be negotiating terms during the course of their evidence. It is apparent that this is, as the Respondent submits, 'a fluid process'.

86. In addition, the restructured PPAC has met twice since the filing of the appeal to consider the MOA and NAA.

87. This Panel finds that although the consultation process was initially flawed at the time the Appeal was filed, it has been remedied by the ongoing consultation both prior to and during the hearing. In addition, the agreements have continued to evolve and there have been opportunities for consultation since the conclusion of the hearing. Thus, even if there has been a breach of the Scheme, in these unique circumstances it is not so prejudicial as to warrant our allowing the appeal on this ground.

MERITS ISSUE

88. It was apparent at the hearing that the content of both the MOA and NAA were not yet fixed. As set out earlier, both parties appeared to be actively negotiating terms during the hearing. As well, the draft of the MOA in place at the time the appeal was commenced

was not the draft before us at the hearing. The Chicken Board agreed that further revisions were possible as a result of the hearing process and the ongoing national consultation. It is evident that the MOA and NAA, which are the subject of this appeal, are not the agreements that may eventually be signed.

89. Regardless, the BCMB finds merit in having a national agreement to provide stability to chicken production in BC and Canada. Without such an agreement there is a serious risk of widespread overproduction and lower industry returns. Mr. Pritchard confirmed this risk when in his evidence he stated that his Quebec counterpart, Mr. Claude Gauthier, did not share the view that in the absence of an agreement, processors would or should exercise self-restraint in production. That said, the BCMB has serious concerns about the two agreements before us on appeal.

90. The Appellants took issue with the fundamental principle behind the MOA, foregoing production in BC with the potential loss of millions of dollars in revenue. The Appellants also point to the fact that the Respondent has performed no economic analysis. The Respondent argues that the method of calculating BC's base allows sufficient growth to meet processors requirements. The MOA is merely window dressing with no adverse impact on BC production and as such no impact analysis is necessary.

91. The BCMB accepts that there is an element of informed risk inherent in entering arrangements such as the NAA and MOA. Formal impact analyses have their own uncertainties and limitations, and thus are not determinative of the policy decision to enter arrangements of this sort.

92. The difficulty we face here however, is that the Chicken Board has not performed any formal "economic impact analysis" as it is confident in its own assessment that there will be no substantial constraint on required production. It gave extensive evidence on its method of calculating the provincial base and the interaction between the NAA and the LDA. The Chicken Board's confidence in its assessment is based on this evidence.

93. If the Chicken Board's confidence turns out to be misplaced, the proposed agreements could turn out to have a serious limiting impact on provincial production. As the Appellants note, the CFC Board of Directors can agree through triple majority to change the national cap. The Chicken Board is bound by its honour to follow the NAA and to make its "best efforts" to follow the MOA. The Chicken Board would have no recourse but to lower the cap, regardless of BC requirements, should other provinces decide to alter it.

94. The Chicken Board argues that if matters go awry, it could exit from the LDA at the first opportunity. Signatories to the NAA must also be signatories to the LDA. The LDA has an exit clause and thus, by implication, the Chicken Board argues that this is a method by which it could exit the NAA. However, the BCMB has no assurance that such a withdrawal would relieve the Chicken Board of possible common law remedies such as damages or injunctive relief resulting from an alleged ongoing breach of the NAA. Nor do we have any assurance about whether and to what extent the CFC could in future alter BC's method of calculating the base.

95. The absence of an exit clause takes on great significance in view of the above. While Mr. Stafford argues that the proposed agreements are only bridging agreements pending a new federal-provincial agreement, one must recognise based on the unpredictability of federal provincial negotiation that this may be a very long bridge. The current version of the NAA could bind the Chicken Board for a very long period of time. Given the unknown risks of exiting the NAA, in the absence of a specific provision, the BCMB finds difficulty in assuming that no consequences will flow from such a decision.

96. These difficulties would be reduced substantially if the Chicken Board could exit the NAA on reasonable notice. This would allow the Chicken Board to enter the agreement while at the same time allowing it to exit in the event that its original expectations were not being met or that its discretion to make decisions in the interests of BC risked being significantly fettered by the CFC.

97. The Appellants also take issue with the fact that there has been no attempt by the Chicken Board to establish a method of resolving conflicts between processor market requirements and provincial and national caps as required by s.6 (a) and (b) of the NAA. Given recent history, the processors are not prepared to enter the NAA without resolving this issue in advance.

98. The BCMB finds the Appellants' arguments compelling and directs that as a minimum the NAA must have an exit clause allowing BC to unilaterally withdraw from the agreement on reasonable notice. What is appropriate notice is a difficult question, which we leave to the parties to discuss. However, the two period notice requirement found in the LDA would appear to provide an adequate level of protection to BC.

99. The BCMB further directs that prior to entering into any NAA, the Chicken Board must consult with the BC processors and "establish a method to resolve any conflicts between processor market requirements and provincial and national caps". The BCMB must be kept apprised of these consultations.

JURISDICTION

100. The Appellants argue that the Chicken Board lacks the authority to enter into the NAA because such action constitutes a regulation of inter-provincial trade, a matter of exclusive federal jurisdiction, and either an improper delegation or fettering of discretion. The Respondent argues that the BCMB does not have the power to consider constitutional questions. In the alternative, if the BCMB can consider such questions, the Respondent argues that the division of powers argument applies to regulations or orders and not agreements.

101. The BCMB agrees with the Respondent that the power to determine constitutional questions must be found in a tribunal's enabling legislation. However, a review of the Act supports the conclusion that the BCMB can consider this constitutional question.

102. The Act gives the BCMB the mandate of hearing appeals from any marketing board. These appeals can themselves be appealable to the Supreme Court of BC on a "question of law" (s. 9(1)). The Supreme Court's right to hear appeals on questions of law would make little sense if the BCMB did not itself have the ability to determine questions of law.

103. Even if the BCMB were limited to determining questions of law arising within the Act, s. 21(1) specifically addresses the question of constitutionality where it states: the purpose and intent of the Legislature is to confine the provisions of this Act within the competence of the Legislature, and all its provisions are to be construed so as to give effect to this purpose and intent.

104. Not only must the BCMB respect s. 21 when interpreting the Act; it must also be authorised to consider whether a subordinate board has acted within the constitutional limits of the Act. To suggest that the BCMB does not have the power to stop a board from overstepping provincial legislative authority is inconsistent with the supervisory and appellate functions of this Board. The BCMB finds it has the authority to consider the constitutional argument raised by the Appellants.

105. The next issue to be considered is whether the NAA and MOA are invalid as they deal with inter-provincial trade, an exclusive federal jurisdiction under s. 91 of the Constitution Act, 1867.

106. The Respondent argues that a mere agreement cannot breach s. 91; only laws can. This is a compelling argument.

107. The NAA and MOA are not laws or compulsory legislation. This fact alone distinguishes this appeal from Bari II. In that case, an underlying law limiting production or marketing was at issue. Where such a law exists, the inquiry into its pith and substance would necessarily involve the actual application of the law and by necessity any national agreement entered into. The Appellants have not cited any authority for the proposition that the mere decision to enter into an agreement is subject to the same constitutional review as a legislative enactment. Accordingly, the BCMB agrees with the Chicken Board and finds that the constitutional challenge based on the division of powers argument is premature. The Appellants' constitutional objection would properly arise if and when the Chicken Board passed a production order that could be shown to be constrained by these agreements

108. The Appellants' second jurisdictional argument is based on s. 6 of the Act, which requires an Order-in-Council before a provincial board can delegate a power to a federal board. No Order-in-Council has been granted and therefore, the NAA which gives the CFC the power to make binding production decisions on BC amounts to either an improper delegation of power or a fettering of discretion.

109. The Respondent's argument is that these agreements which are largely 'on paper' are unlikely to have any effect on production and therefore, there is no improper delegation. There is sufficient room, given the method of calculating the provincial base, to prevent the agreed upon domestic production limits from in reality fettering the Chicken Board's production decisions.

110. The Respondent also argues that any limits on domestic production levels imposed by the NAA could be remedied by re-directing some production to the export market on an 'ad hoc' basis, which is allowable under the LDA.

111. The Respondent's argument appears to be that the wording of the MOA and NAA are not significant. As long as BC maintains its historical advantage, there will be no effect on BC production.

112. The BCMB does not accept this argument. The proposed NAA sets voluntary limits on domestic production. However, these can be changed by a triple majority of the CFC Board of Directors. There is no sunset or exit clause in the NAA. If the caps change and the Chicken Board' s confidence about the calculation of the provincial base proves incorrect, it will be bound into agreements with no specific termination and no method of exiting. In view of these concerns, the BCMB finds the potential for fettering of discretion and effectively delegating decision-making to the CFC is so real and substantial that we would not authorise the agreements in their current form.

113. These potential risks of fettering and improper delegation become much more remote if the NAA contains an exit clause with a reasonable notice provision, thus preserving the independent discretion of the Chicken Board. Then if its original expectations were not being met or if the CFC made decisions or took actions likely to impair the Chicken Board's ability to make decisions in the public interest of BC, its legal independence would still be preserved. Any allegation that it did not properly exercise its independence would turn on the particular circumstances and would be appealable to the BCMB.

DIRECTIONS

114. The BCMB directs that the Chicken Board cannot enter into any NAA until such time as the agreement at a minimum contains an exit clause. While we wish to leave some flexibility, the two period notice requirement found in the LDA minimises our concerns about fettering.

115. The BCMB directs that the Chicken Board meet the requirements of s. 6 of the draft NAA prior to signing any agreement. Regarding s. 6 (b) in particular, the Chicken Board must, prior to entering any agreement:

i. establish a method to resolve conflicts between processor market requirements and provincial and national caps, and
ii. demonstrate genuine attempts at consultation, including efforts to reach consensus with processors concerning the establishment of that method.

116. The BCMB directs that the Chicken Board utilise the PPAC process as part of this consultation.

117. The BCMB directs that the Chicken Board keep the BCMB apprised of this consultation and seek our approval prior to entering into any NAA or MOA.

Dated at Victoria, British Columbia, this l6th day of February, 1998.

BRITISH COLUMBIA MARKETING BOARD
Per:

(Original signed by):

Ms. Christine Elsaesser, Vice-Chair
Ms. Karen Webster, Member
Mr. Dedar Sihota, Member
Mr. Hamish Bruce, Member