

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL BY LILYDALE CO-OPERATIVE LTD. FROM JANUARY 30, 2004  
DECISIONS OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD (#04-04)  
AND  
AN APPEAL BY LILYDALE CO-OPERATIVE LTD. FROM JULY 12, 2004 DECISIONS  
OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD (#04-10)  
AND  
AN APPEAL BY PENNINGTON HOLDINGS LTD., NORM KNOTT,  
DON HOOGE, HOMELAND FARMS LTD., LORNE JACK (dba  
FIRBANK FARM), ALEC AND WILLIAM WESTERINGH, AND  
JOHN BARTEL (dba CHERWOOD FARMS) FROM JULY 12, 2004  
DECISIONS OF THE BRITISH COLUMBIA CHICKEN MARKETING  
BOARD (#04-11)  
AND  
AN APPEAL BY THE BRITISH COLUMBIA CHICKEN GROWERS'  
ASSOCIATION OF PARTS 7 (ASSURANCE OF SUPPLY) AND PART  
8 (NEW ENTRANT PROGRAM FOR PROCESSORS) OF THE  
JUNE 15, 2004 GENERAL ORDERS OF THE BC CHICKEN  
MARKETING BOARD (#04-07)

**BETWEEN:**

LILYDALE CO-OPERATIVE LTD.  
PENNINGTON HOLDINGS LTD., NORM KNOTT, DON HOOGE,  
HOMELAND FARMS LTD., LORNE JACK (dba FIRBANK FARM),  
ALEX AND WILLIAM WESTERINGH, AND  
JOHN BARTEL (dba CHERWOOD FARMS) (the "7 Growers")  
BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION  
**APPELLANTS**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD  
**RESPONDENT**

**AND:**

BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION  
HALLMARK POULTRY PROCESSORS LTD.  
SUNRISE POULTRY PROCESSORS LTD.  
LILYDALE CO-OPERATIVE LTD. (in Appeals #04-07 and #04-11)  
BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION (in Appeals #04-04,  
#04-10 and #04-11)  
7 GROWERS (in Appeals #04-04 and #04-10)  
**INTERVENORS**

**DECISION**

**APPEARANCES BY:**

For the British Columbia  
Farm Industry Review Board

Richard Bullock, Chair  
Christine J. Elsaesser, Vice Chair  
Garth Green, Member

For the Appellants and Intervenors  
7 Growers and British Columbia  
Chicken Growers' Association

Maria Morellato and  
Angela D'Elia, Counsel

For the Appellant and Intervenor  
Lilydale Co-operative Ltd.

Kim Wakefield, Q.C., Counsel

For the Respondent

John J.L. Hunter, Q.C. and  
Julie L. Owen, Counsel

For the Intervenors Hallmark Poultry  
Processors Ltd. and Sunrise Poultry  
Processors Ltd.

Wendy A. Baker, Counsel

Location of Hearing

Abbotsford and Richmond, BC

Dates of Hearing

September 8, 9, 10 and 14, 2004;  
November 8, 9, and 27, 2004

## INTRODUCTION

1. These appeals require the British Columbia Farm Industry Review Board (the “Provincial board”) to address marketing policy questions arising from decisions and orders of the British Columbia Chicken Marketing Board (the “Chicken Board”) to assign to BC’s chicken processors shares of the limited supply of chicken allocated to BC under the Federal Provincial Agreement (the “FPA”) for chicken.
2. The Chicken Board decisions and orders describe this marketing policy as assurance of supply. Since June 15, 2004, that policy has been codified in Parts 7 and 8 of the Chicken Board’s General Orders as follows:

### **Part 7 Assurance of Supply**

- 7.1 A processor shall receive a share of provincial supply of chicken in a specific period in proportion to its share of provincial allocation in three equivalent periods in the prior year.
- 7.2 All contracted chicken must be slaughtered in the processor’s own facility.
- 7.3 In order to qualify for 100% of its allocation, a processor must have produced between 97.5% and 102.5% of its allotment in the three periods of the prior year.
- 7.4 If, in any of the three periods used to calculate the base the processor slaughters over 102.5% or under 97.5%, then the allocation for that period in calculating the base shall be adjusted downward by the percentage the processor either failed to produce at least 97.5% or exceeded 102.5%.
- 7.5 Section 7.3 and 7.4 of this order will be effective in period A-62. The first time that processor bases may be adjusted under this policy will be in period A-69.

### **Part 8 New Entrant Program for Processors**

- 8.1 At the end of every third year, if in the preceding three years there has been an average of at least 1.0% growth per year in total BC production, the Board will consider applications for the entrance of a new processor or an increase in allocation of an existing smaller processor. The application period will be between January 1 and April 30 of the year following the end of the third year of the period used to calculate provincial growth.
- 8.2 The Board will allocate up to 2.5% of the average live weight of total BC production of the last six (6) cycles of the three-year period. The total available to New Entrants and Deemed New Entrants will be available for distribution over the ensuing three (3) years.
- 8.3 There will two types of applicants for the growth:
  - a. a “deemed new entrant” is an existing processor who can demonstrate a need for additional production. To qualify as a deemed new entrant an existing processor must be processing less than 1.5% of the production of the last six (6) cycles of the three-year period used to calculate provincial growth;
  - b. a “new entrant” may apply for production up to a maximum of 1.5% of the production of the last six (6) cycles of the three-year period used to calculate

provincial growth. A new entrant may not be an existing processor or related, either directly or indirectly, to an existing processor...<sup>1</sup>

3. To place Parts 7 and 8 in context, the easiest place to begin is by describing the system they reject, open contracting between processors and growers. Under an open contracting model in chicken's national supply management system, processors would be required to interact directly and exclusively with growers and compete for the limited supply of chicken grown in BC. Additional processors may enter the processing industry at any time and compete for that same production. The open contracting model provides no regulatory assurance that any particular processor will have any particular supply of chicken (or any chicken at all) during any particular production period. Whatever assurances processors can obtain under the open contracting model are those assurances successfully negotiated privately with chicken growers. Because no regulatory assurance of supply is provided in open contracting, it has been said that this is a model at which regulation "ends at the farm gate".
4. Parts 7 and 8 reject the open contracting model as being contrary to sound marketing policy for BC's chicken industry. Their premise is that if the goals of orderly and stable chicken marketing are to continue as they have over the past decade, a regulatory structure is needed to formalise distribution of the limited provincial chicken supply between the system's key regulated actors (growers and processors). The Chicken Board's regulatory solution, was to provide that:
  - the share of the provincial allocation for which any individual processor may contract with growers in a given period is determined according to a formula that heavily weights the share that processor received during equivalent periods in the previous year (Part 7). The corollary is that if any individual processor purports to sign up production exceeding their share, the Chicken Board will intervene to direct that production to other processors in accordance with the policy; and
  - potential new processors may enter the industry, but in a controlled fashion and only where there is overall industry growth (Part 8).
5. The Appellants, the British Columbia Chicken Growers' Association (the Growers' Association"), Lilydale Co-operative Ltd. ("Lilydale") and the 7 Growers strongly oppose the marketing policies set out in Parts 7 and 8. The Respondent, Chicken Board and the Intervenors, Sunrise Poultry Processors Ltd. ("Sunrise") and Hallmark Poultry Processors Ltd. ("Hallmark") referred to collectively in these reasons as the "Processors" were equally strong in their support. Near the conclusion of the Growers' Association appeal, the Panel heard the related appeal of Rosstown Farms Ltd. ("Rosstown") regarding the specific application of Part 8 to its circumstances. The evidence in the 7 Growers,

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<sup>1</sup> For purposes of this summary, the remaining provisions of Part 8 have been omitted.

Lilydale and Growers' Association appeals formed part of the evidence in the Rosstown appeal. The reasons for decision in the Rosstown appeal are dealt with separately as companion reasons to this decision.

6. The policy issues on the Growers' Association appeal generated considerable passion on the part of all parties. This passion was due partly to the considerable competing financial self-interests at play and partly to the parties' competing philosophies. While we have considered all of the evidence and arguments in detail, one can obtain a flavour of the positions and interests impressed upon the Panel in the testimony of Mike Heppell, President and CEO of Lilydale and the testimony of Bruce Arabsky on behalf of Hallmark:

*Mike Heppell:*

I think ... in the long run redirection is going to work against processors, because the moment we're talking about redirection we're talking about locked-in market shares, and what that ... immediately does is it removes one of the key pieces of competitive pressure and it also reduces the incentive of addressing for the marketplace opportunities that continue to present themselves as our industry and our economy continue to evolve....

Clearly Lilydale has struggled with a policy as to how the market share under this system would be derived at, and we are not satisfied with that component. There are other people who have said wait a sec, I want to get into the business. You can't just lock people out of the business and say that you know these three or four processors are going to be the processors for – until such time as they choose to sell their operations, and so now we even have to come up with a new entrants policy and that creates all sorts of issues. In an effort on the Board's part to ... follow what they believe is ... is best for the industry.... So there's all sorts of instability that ends up getting created because fundamentally ... with good intention we went down a road that was not right.

[T]he clear view of Lilydale is that [the Ontario and Quebec] system does not in the long run provide a stable, competitive, sustainable industry and it does not achieve the maximization of growth potentials that exist.

I believe that when you start with a wrong foundational premise, no matter how many Band-aids you put on it you'll never make it right, and fixed market share is a wrong foundational premise and we need to – we need to get away from it.<sup>2</sup>

*Bruce Arabsky:*

[Our] position on that ... is that if you're fighting over the pie, you know, it's really just predatory on somebody else's business. It doesn't bring value to the equation, to growers in B.C. nor to our industry as a whole. Technically the way, you know, a Mike Heppell version of the world could have a number of growers in B.C. decide to stop shipping to us and ship to Lilydale, and they could technically put us out of business....

[Probably] the greatest testament to the system that's been in place, you know, for the minimum four years, but maybe up to nine years, is that we've seen this stability in return(s) come back to the producers and we as processors support that.... [It] seems to have been either forgotten or totally overlooked ... that we have a very healthy industry,

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<sup>2</sup> Sept 9, 2004, Transcript pages 19-20; 38; 59; November 8, 2004, Transcript page 133.

incredibly healthy. I don't even know what the hell we're doing here. Like, we should be dancing in the streets.

[Without assurance of supply] we will all focus on securing and ensuring that we get supply for survival. But if we're focused on that we will definitely lose our focus on marketing and moving B.C. forward.... It is orderly where we are, but we are limited in our, you know, insatiable appetite for growth, but that's one of the prices you pay to be in orderly marketing. And we're – we've bought into that. But, you know, it's just getting a different picture from what we were all assured we'd got into.

To say we're not, you know, not innovators or that we're, you know, just kind of second run, somebody's either smoking something or not really paying attention to what's going on in the industry.<sup>3</sup>

7. To these views one must also enter into the mix the perspective of Rick Thiessen, President of the Growers' Association that, as a result of Parts 7 and 8 of the Orders:

[Processors] don't have to do anything to foster any type of good relations with producers because they know if they have dissatisfied producers that want to leave, they can leave, but they'll either have those producers directed back to them ... or they'll have other producers directed to them.... [And] they don't have to do anything in their marketing strategies, so to speak, to help make producers more profitable, whether that's through offering a specific genetic of bird or a specific shipping age that – that may be more profitable, those types of things.<sup>4</sup>

8. Mr. Thiessen stated that to avoid becoming tenants on their own land, growers should be able to contract with the processors and hatcheries of their choice. As to the concern that open contracting would trigger a bidding war for chicken, Mr. Thiessen stated:

We don't want to have premiums. Who's in control of paying the premiums? The processors are. If they don't offer them, they won't have to pay them. The only incentive a producer needs to either stay with a processor or move to another one is for that processor to, a) show them respect, b) show them that they can be more profitable through genetics, shipping ages, etc. by staying with them. It has nothing to do in my mind with wanting premiums, and the processors are the ones that are fully in control of either offering them or not. Of course, if somebody's offering a premium it's pretty hard to say no, if they're not offered it, it won't exist.<sup>5</sup>

9. We are well aware of the significance of the decision these appeals call upon us to make. This is not a dispute between two individuals in the context of a set of defined rules. The fundamental challenge here is to the rules themselves. These appeals involve legislative policy and affect multiple interests. They require us to do more than make findings about past facts and events. We are required to weigh different policy alternatives, each of which reflects legitimate concerns and potential advantages and disadvantages, and to select the policy approach or

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<sup>3</sup> November 9, 2004, Transcript pages 140, 152, 153, 157.

<sup>4</sup> September 9, 2004 Transcript, page 138.

<sup>5</sup> September 9, 2004 Transcript, page 154.

framework that we conclude would, on balance, best achieve the objectives of regulated marketing given the realities of the chicken industry.<sup>6</sup>

## ISSUE

10. Did the Chicken Board err in issuing Part 7 and Part 8 of its June 15, 2004 General Orders?

## BACKGROUND

11. Our conclusions on these appeals cannot be explained without understanding their procedural and factual background. It is to these areas that we now turn. On September 17, 2004, a Panel of the Provincial board released its decision in appeals relating to direction of product orders made by the Chicken Board with respect to the production from a number of farms, including those of the 7 Growers.<sup>7</sup>
12. The Panel dealt in the September 17, 2004 decision with two out of the three issues raised by the 7 Growers and their processor, Lilydale holding that the Chicken Board did not exceed its legal powers by interfering with existing contracts between growers and their processors nor did it act in an arbitrary, uninformed manner or fetter its discretion in implementing the direction of product orders.
13. However, with respect to the underlying policy issue relating to the “wisdom” of issuing the direction of product orders, the Panel held as follows:
  43. Despite the fact that these appeals arose from the specific directions of product in A-58 and A-61, much of the hearing focussed on whether the decision to direct product was based on sound policy and in accordance with the principles of orderly marketing. This issue is very complex and requires a consideration of the history of supply management within BC as well as the national context.
  44. While the Panel has deliberated on this issue at considerable length in the time available to us, we have in the end concluded that we are not now prepared to rule on the policy underpinnings of the decision to direct product and the related policy of assurance of supply. What we can say at this point is that we have many more questions than answers. We are not satisfied that the parties before us (and those that are not before us) have adequately addressed all the policy implications of a decision of this sort.

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<sup>6</sup> It is a further reflection of the complexity of the issues that while the Growers’ Association appeared and spoke ostensibly on behalf of all chicken growers, in fact at the hearing of this appeal growers did appear on behalf of the Chicken Board. It should be further noted that the Growers’ Association advised that it did not have the opportunity to consult with its membership on the “Six Cycle Proposal”.

<sup>7</sup> The 7 Growers who filed an appeal of the direction of product orders were Pennington Holdings Ltd., Cherwood Farms (John Bartel), Firbank Farms (Lorne Jack), Alex and William Westeringh, Norm Knott, Homeland Farms Ltd. and Don Hooge. The procedural history of those appeals is set out at paragraphs 1-7 of the September 17, 2004 decision and will not be repeated here.

45. We note that dates for the hearing of the Growers' Association appeal relating to Parts 7 and 8 of the General Orders is scheduled to be heard in October and November. These policy issues will be front and centre in this appeal.
14. The Provincial board determined that a final decision on the Lilydale and 7 Growers appeals would have to await the outcome of the Growers' Association appeal with respect to Parts 7 and 8. This appeal was heard on November 8-10 and 27, 2004. By agreement of the parties, all the evidence adduced in the September and November hearing dates was considered in arriving at this decision.
15. The overview set out in the Provincial board's September 17, 2004 decision in the Lilydale and 7 Growers appeals provides a useful backdrop for explaining the context and operation of the chicken industry:
  16. In order to place these appeals into context, a brief historical overview is necessary. There are three major processors in BC: Hallmark, Sunrise and Lilydale. Under the national chicken supply agreement in place in the mid-1980s, BC was unable to increase its percentage of the national domestic allocation to support and develop further processing markets. The former "top-down" approach to allocation, where the national agency "assigned" production to BC without reference to actual market requirements, did not satisfy BC's market needs. As a result of incurring significant penalties for over-producing its allocation, BC withdrew from the national agreement in 1989. While outside the national agreement, Sunrise and Hallmark developed an export program for chicken, which essentially allowed them to increase their domestic production of white meat while exporting a corresponding volume of dark meat. Lilydale could have participated in this program but for its own business reasons chose not to.
  17. The export program coupled with the domestic allocation gave processors a secure supply of chicken allowing them to develop a significant further processing industry and enter into long term national and regional contracts with food service and retail suppliers. BC processors became national "players" in a business formerly reserved for central Canadian processors. However, for all the economic advantages that the export program provided to the processors and to industry growth, it was the subject of ongoing grower criticism and concern. By 2000, there was a move by growers and the Chicken Board to re-enter the national agreement. In addition, some growers wanted to see revisions to the export program to make it more equitable. Given that the program was processor run and that Lilydale did not participate in the export program, Lilydale growers felt excluded from the financial benefits offered by "growing for export".
  18. On January 18, 2000, the grower-elected Chicken Board was replaced with a fully appointed board (which membership is different from that of the current appointed Chicken Board). The appointed Chicken Board was given the mandate to resolve several issues dividing growers and processors which had not been resolved by the grower-elected Chicken Board. These included the need to develop, through consultation and negotiation, "an export program that is accountable and meets the requirements of the British Columbia chicken industry" and "changes required to improve the efficiency, accountability and effectiveness of the domestic allocation system".
  19. The appointed Chicken Board enacted its August 15, 2000 policy rules addressing the larger systemic concerns by retaining the export program, but requiring that such production be planned (grown and exported within three production periods). Export production was also shared equitably with all growers who wanted to participate without

regard to whether “their” processor requested export production. Under this new system, processors lost a great deal of the flexibility enjoyed under the old export program. As a result, several appeals of the August 2000 policy rules were filed by growers and some processors and heard in whole or in part.

20. After much discussion, and representations by the Chicken Board that the new export program would provide the volumes of chicken required by the processors, Hallmark and Sunrise put their appeals into abeyance and agreed to give the new system a chance. For two years, processors made their requests for domestic and export production and these volumes were met.
  21. In 2001, BC re-entered the Federal Provincial Agreement for Chicken (the “FPA”). In accordance with the “bottom up” approach under the new FPA, processors advise the Chicken Board of future consumer market requirements on a period-by-period basis. The ultimate consumer market as reflected by retailer requests drives chicken production in the province. The Chicken Board takes the processors requests forward to the national agency Chicken Farmers of Canada (“CFC”). Under the FPA, CFC uses the processors’ market requirements to determine the national base allocation of chicken production for each province. The Chicken Board then takes BC’s allocation and allots production to individual chicken growers based on their quota holdings and the processors’ total requirements. Individual processors are then assigned that production through the huddle process.
  22. The source of the current problem is that despite the processors’ requests, since 2002 CFC has not allocated sufficient volume of chicken production to meet BC’s market needs. Processors attend the huddle process facilitated by the Chicken Board where all the processors meet to work out among themselves how each processor’s allocation would be met from available growers. Much has been said in this appeal about the voluntariness of processor participation in this process. However, the Panel accepts that all processors were aware that failing an agreement as to which growers’ production would be moved, the Chicken Board would step in and make that decision if necessary.
  23. For several years, this informal huddle process seems to have operated well. Processors were able to move growers between themselves to ensure that each received production in accordance with their requests from the reduced allocation, on a pro rata basis. In 2003, all of the processors lobbied to have the informal huddle process recognised in the General Orders so that the process would be transparent to all concerned. Ultimately, the huddle process became enshrined in Part 7 of the new General Orders enacted by the Chicken Board in June 2004. As mentioned earlier, Part 7 (as well as Part 8) is the subject of an appeal by the Growers’ Association.
  24. In A-58, after receiving its allocation numbers from the Chicken Board (and prior to the new General Orders) Lilydale signed BC101 contracts with growers in excess of the allocation. Lilydale then refused to participate in the huddle process and refused to transfer the production from its signed growers in excess of its allocation to another processor. As a result of Lilydale’s refusal, the Chicken Board stepped in and directed product from Lilydale to Sunrise to reflect the allocation numbers. Lilydale (Hatchery) appealed this direction of product.
  25. In A-61, Lilydale again signed up growers in excess of its allocation numbers and again refused to voluntarily transfer product from its growers to a competitor processor. Again the Chicken Board stepped in and directed the product from eight growers to Hallmark. Lilydale’s second appeal and the appeal by the 7 Growers ensued.
16. Canada’s chicken industry is supply managed on a national scale. By virtue of the FPA entered into by the provinces and the federal Government in 2001, BC

can no longer unilaterally determine the amount of chicken that may be produced in the province. Those judgments are now made by the federal statutory agency, the Chicken Farmers of Canada (the “CFC”). Where BC’s total production allocation received from CFC satisfies the market requirements requested or proposed by individual processors in a province (as was the case for the first several production periods under the present FPA), complaints about market share relative to other processors tend to be greatly diminished, as processors are meeting their markets.

17. The problem arises where supply is short, as has become the case since 2002. The causes of short supply in a national system that is structured to be market responsive are complex, and are matters BC is seeking to address at the national level. For the purposes of this decision, it is not necessary to delve into those difficulties in great detail. Suffice it to say that while FPA allocations are more market responsive than they were under the former FPA, allocations are not exclusively market driven; a province’s historical base is part of the allocation formula. CFC’s composition and voting structure have also presented challenges to allocating additional growth to a province according to its quota utilisation and performance. A third factor arises from the fact that while all processors tend to complain about insufficient supply at the provincial level, their national organisation, the Canadian Poultry and Egg Processors Council (the “CPEPC”) often advocates that CFC *restrict* growth nationally to support higher wholesale prices.<sup>8</sup> This point was fairly and candidly made at the September 10, 2004 hearing by the Chicken Board’s former Chair, Michel Maurer:

...I really appreciate a lot of what Lilydale has said here in terms of growing markets, in terms of development, in terms of innovation. The truth is, in my time, in 18 months there is not one processor in Canada that I have talked to that hasn’t said exactly the same thing, I really see market opportunity and I want more production to go after it. But if you follow the logic, if the strategy is to keep the market tight so wholesale prices are up, the dynamic is always going to be that processors can say hey, look at all those opportunities out there, because the market, by definition, is tight. So the view is keep the market tight nationally, but give me more. Because I want the wholesale prices up, but I want product to go after a new market.  
[emphasis added]

18. It is in this industry context that the policy question we must deal with on this appeal arises. As a matter of sound marketing policy, should the Chicken Board leave the BC processors to their own devices to compete with each other over the limited production pie allocated to BC or is there proper and legitimate reason for

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<sup>8</sup> Lilydale, whose operations span several provinces and is one of Canada’s two largest processors, has supported the national organization’s position to restrict supply in order to bolster prices. This said, Mr. Heppell testified that Lilydale has in the past advocated for higher production numbers than were ultimately advanced by CPEPC. It should be noted Hallmark and Sunrise quit CPEPC for some time over its position on the question of growth, but have since rejoined, and have more recently supported its position as a result of what they agree is a softening of wholesale prices.

the Chicken Board to provide regulatory rules which effectively provide that, in a short supply environment, cutbacks are to be applied pro-rata among processors according to that processor's historical market base?

## **SUBMISSIONS OF THE PARTIES**

19. Having briefly described the parties' positions through the excerpts from testimony of Messrs. Heppell, Arabsky and Thiessen quoted earlier, we now outline the parties' positions and arguments in greater detail.<sup>9</sup>

### **Growers' Association**

20. The Growers' Association argues that Part 7 of the General Orders creates a fixed market share policy that restricts healthy competition and innovation, curtails the ability of processors to grow by increasing market share and capturing regional and national markets, and even potentially raises health and safety concerns. Part 7 adversely affects the freedom of all players (growers, retailers and food service companies) in the industry to determine with whom they will do business. The Growers' Association argues that supply management should stop at the farm gate, and the Chicken Board has no place intervening in the relationship between growers and processors except to ensure that all of a grower's quota production for a period "finds a home". It points to Hallmark's recent switch from the Hubbard bird strain as evidence of the increased empowerment of growers when processors are faced with the threat of growers who are free to change processors.
21. The Growers' Association submits that a policy of fixed market share for processors is inconsistent with the recently articulated *Regulated Marketing Economic Policy* of the Minister of Agriculture, Fisheries and Food (the "Minister") which encourages responsiveness to the needs of the industry, accommodations to processors who pursue innovative market opportunities and attempts to capture regional and national markets. This policy neither endorses nor requires fixed market share or any form of "processor quota". Large processors support for such a policy is due to the obvious value that protected market share attaches to their businesses. Further, this policy undermines the incentive to compete since, regardless of any individual processor's efforts in BC, that processor can only benefit through proportionate growth.
22. The Growers' Association points out that historically, the way the BC market evolved from the frozen fryer to fresh market was through innovative processors garnering supply to service new markets. Had there been a fixed market share system then, the chicken industry would not have evolved in the dramatic fashion it has.

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<sup>9</sup> It would be too cumbersome to outline the parties' written and oral submissions in the order that they arose for both set hearings. This Part will therefore summarise key arguments advanced in the written and oral submissions made by the parties both in chief and in reply at both sets of hearings, recognising that we have read and carefully considered them all.

23. The Growers' Association notes that the spectre of premiums and bidding wars for growers is used as a justification for a fixed market share policy. It argues that there is no evidence that there have ever been problems in BC with any premiums, let alone exorbitant ones. Further, it points to the Competition Bureau's opinion that premiums should not be thought of as an evil. They give growers, rather than processors, the benefit of the true value of the product they are growing and in short supply. The Growers' Association also notes that if premiums are truly an evil, then the Provincial board should recognise that under the Chicken Board's orders processors will pay each other premiums to access chicken in short supply situations.
24. The Growers' Association also argues that there is a significant difference between the consensus through which processors themselves decided to divide production over the past several years, and an enforced allocation by the Chicken Board. The Growers' Association rejects the argument by the Processors that a fixed market share was assured in exchange for the processors' agreement to the new export program. The Growers' Association argues that such an assurance cannot be the basis of sound marketing policy. Further, the Growers' Association maintains that its position has no negative repercussions for the export program.
25. The Growers' Association also takes issue with the consultation process used by the Chicken Board in coming to their fixed market share policy. The Chicken Board failed to consult with the Growers' Association when the informal huddle process came into being, and disregarded its concerns when seeking to formalise this process. In addition, the Chicken Board failed to engage in any prior consultation with downstream stakeholders such as the retail, restaurant and food services sector.
26. The Growers' Association argues that the Provincial board must consider the anti-competitive implications of Parts 7 and 8 as they pertain to the *Competition Act*. The "regulated conduct defence" under the *Competition Act* applies where the entity invoking the defence can demonstrate that the required activities are required or authorised by the governing provincial statute. The Growers' Association maintains that the Chicken Board has failed to demonstrate that it has acted within its legislative authority in enacting Part 7 and in its final reply argues that there is no power in the *British Columbia Chicken Marketing Scheme, 1961* (the "*Scheme*") to enact economic policy that results in fixing market shares of processors in BC. Supply management was never intended to extend beyond the farm gate. Part 7 promotes differential growth only through acquisition and will only result in more predatory processor behaviour.
27. The Growers' Association submits that even if the Chicken Board has acted within its legislative authority, the evidence of Ontario grower Gabe Kocsis and the submissions of the Competition Bureau relating to the Ontario program in 1991 offer important insights into the fundamental problems associated with a

- fixed market share policy including restrictions on business relationships, competition and industry growth.
28. The Growers' Association points out that the position of the Processors is difficult to reconcile with their current actions seeking to break into the markets of Alberta and Saskatchewan where, unlike Ontario and Quebec, there is no policy of assured supply.
  29. The Growers' Association says there is simply no evidence to challenge its position that Parts 7 and 8 are contrary to the best interests of the BC chicken industry which has operated without such a policy for many years and thrived. Our chicken industry is unique and the Chicken Board should avoid basing BC policy on a faulty Ontario system.
  30. The Growers' Association proposed what it called a middle ground solution to the assurance of supply issue, a six-cycle notice requirement for growers wishing to change processors. Such a notice period (approximately one year) provides processors with ample time to react and source product from another grower to meet contractual obligations without fixing market shares while still giving growers a choice as to who they do business with. The Growers' Association describes this proposal as providing assurance of supply without locked-in market shares; it allows processors to plan and supply their markets without interfering with the development of new markets.
  31. The Growers' Association also opposes Part 8 of the General Orders arguing that there should be no restriction on new entrants into the industry. Restricting competition and growers' choice is not sound policy. Limiting new entrants to 2.5% of BC's total production over a three-year period makes it unlikely that anyone would be willing to make the investment necessary to compete with the major BC processors. This policy is not viable beyond small niche or specialty markets and when taken in conjunction with Part 7, serves only to stifle the chicken industry in BC.

### **Lilydale**

32. Lilydale (represented by the Growers' Association counsel in the September hearings and then by separate counsel in November) agrees with the submissions of the Growers' Association, subject to the caveat in Lilydale's November 2004 submission that it does not raise an issue of jurisdiction to make the policies. Lilydale argues that the Panel must determine whether Parts 7 and 8 are good policy. In making this determination, the Panel must, in the context of what will likely be future shrinking production allocations, consider what evil the orders are attempting to address and whether supply management *should* extend beyond the farm gate into the market place.

33. Lilydale argues that supply management is a paradigm whereby the supply of regulated product is limited so that growers receive cost of production plus a reasonable return and the consumer receives a stable supply at a reasonable price. Nothing in this rationale requires the regulation of processors; in fact, a competitive processing sector is essential to support the system. By extending supply management to processors through fixed market share, the Chicken Board has created a major shift in policy without proper consultation and without any recognition of a particular evil sought to be corrected. Extending supply management to processors does not add to the supply available to retailers and consumers. Rather it appears that the Chicken Board is acting like a “jurisdictional vacuum cleaner” choosing to regulate processors simply because they are there.
34. Lilydale argues that if there is an evil here, that evil is fixed market share. The evidence demonstrates that policies of fixed market share result in irrational decisions by processors to hang onto production, not cutting back in response to surpluses as to do so would result in lost market share under the allocation rules. This type of policy promotes oversupply. The only lesson to be learned from the Ontario system is that regulation cannot accommodate the differential growth between processors essential for competition and growth. Lilydale argues that the Provincial board should give very little weight to the evidence of Tony Tavares from Maple Lodge Farms Ltd., who Lilydale describes as a “true believer and evangelist for supply management”. If this was such a great idea, “this paradise would be applied to all sectors of the economy.”
35. Lilydale argues that Part 8 is a sham and is for appearances only; it does not reflect a new entrant program as there is no real prospect for entry. There will be no new entrants under this policy except for small niche processors. The real new entrant program is the Island Pride Poultry Processors Ltd. (“Island Pride”) proposal to build a plant on Vancouver Island to gain access to the 11% of BC’s annual production either currently on Vancouver Island or which was transferred off Vancouver Island but subject to “repatriation” under the terms of an Order in Council. This queue jumping by Island Pride will result in massive disruption to the BC processing industry. Given that Mr. Arabsky, who testified on behalf of Hallmark, is a director of Island Pride, this is nothing more than an attempt by Hallmark to access more production.
36. The real question is whether the Chicken Board should enact policies extending the existing regulatory framework beyond its express legislative authority, without undertaking a full inquiry beyond just processors and growers to include downstream users such as the retail, restaurant and food services sector, the Competition Bureau, the general public and provinces other than Ontario, such as Alberta and Saskatchewan. Lilydale suggests that the Panel’s answer to this question should be “no”, especially as no evil has been identified and no justification offered for moving the bar to where supply management starts and

ends. The Provincial board should resist the urge to allow the Chicken Board to be a “jurisdictional vacuum cleaner”.

### **Chicken Board**

37. The Chicken Board points out that Parts 7 and 8 are not a move “from some past of free competition into some tightly constrained straightjacket that (it) has arbitrarily decided to impose”. Rather, the Chicken Board has codified an industry reality that provided an orderly and stable market for a decade. This reality was only disrupted when Lilydale decided to sign up additional growers.
38. The Chicken Board argues that its policy is sensible, that supply management is rightly concerned with balancing the interests of growers and processors and that the Chicken Board is properly concerned with the supply of chicken once off the farm.
39. With respect to Lilydale’s concern about increasing market share, the Chicken Board argues that there is nothing special about Lilydale in this respect. The Chicken Board says the real focus should be on increasing the pie for everyone. While this has been a focus for Hallmark and Sunrise, Lilydale has not done so, as reflected in Lilydale’s positions regarding the national allocation, and its decisions to request zero export (market development quota).
40. The Chicken Board also notes that the nature of this appeal has evolved. Initially, Lilydale and the Growers’ Association were opposed to assurance of supply; more recently, they seek to distinguish between assurance of supply (which they accept) and fixed market share (which they do not accept). Given that the Growers’ Association has suggested that processors should not have their markets guaranteed indefinitely and instead propose a six-cycle notice, the Chicken Board maintains that question is no longer whether there should be assurance of supply. The only question is for how long?
41. The Chicken Board argues that assurance of supply is necessary in a managed supply market to ensure orderly marketing. It does not accept the characterisation of Part 7 as a policy of fixed market share where market shares are guaranteed indefinitely. However, the restriction of supply inherent in a producer quota system requires some degree of protection for processors who, in the interests of a stable and effective marketplace, must be able to rely on their supply of chicken, to the extent possible under BC’s allocation from CFC.
42. The Chicken Board argues that contrary to the views of the Growers’ Association and Lilydale, it does have legislative sanction for these orders. The Provincial board accepted this view in its decision in the 7 Growers and Lilydale appeals (at paragraph 35):

The power in s. 4.01 expressly includes the power to prohibit, regulate, control and promote the marketing of the regulated product in any and all respects. “Marketing” is expressly

defined in s. 1.02 as including “offering for sale” and “buying” and “selling”. In the marketplace, buying and selling happen by contract. Thus, while the facts of *Money’s* may have been limited to proposed contracts, the text of the legislation goes further, and this is what the Court was clearly referring to in the passage quoted above. To mean anything at all in the context of legislation whose very purpose is to replace the free market with a regulated market (see Tysoe J., *supra*), the express power to regulate, prohibit and control the buying and selling of chicken in any and all respects, further particularised as including the power to designate the time and place at which chicken shall be marketed, must at its core include the right to make directions to require two regulated persons (in this case, a licenced producer and a licenced processor) to act contrary to a “private” agreement they have entered into.

43. The Chicken Board says that the only remaining question is whether the underlying policy of assurance of supply represents sound marketing policy? To this, it answers “yes”. The huddle and ensuing policy of assurance of supply are the logical extension of the bottom up approach adopted in BC as part of its re-entry into the FPA on chicken. In the late 80’s and early 90’s, the supply of chicken to processors was largely uncontrolled and the result was processors bidding for product to meet markets. Eventually, in the mid-90’s, processors entered into an informal agreement not to “poach” each other’s growers. The “huddle” process followed whereby processors under supervision by the Chicken Board re-allocated product to maintain traditional market shares. This system worked well as long as BC was successful in obtaining its requested product; however, when allocations were cut back, product was allocated to processors pro rata based on each processor’s historical base.
44. Part 7 effectively formalises the huddle system. Given that processors are allocated production based on historical production, similar to the way the national system allocates to each province, differential growth is a challenge. In reality, the way for processors to grow their markets is to work collectively to increase BC’s allocation and make the pie bigger rather fighting over the size of each piece.
45. The Chicken Board says that the flaw in the arguments of the Appellants is that the system which worked well was one where processors agreed to exercise restraint in internal competition for product and concentrate efforts externally, expanding markets for BC chicken. The past system was not the unrestricted internal competition advocated by the Growers’ Association. What has lead the Chicken Board to exercise control to restore orderliness in the market place is Lilydale’s recent attempt to change the status quo and introduce market instability through the unrestricted sign up of growers in excess of its market share. Part 7 does not represent a change in the regulatory environment; it continues the existing system. The real change is Lilydale’s decision to increase its allocation at the expense of other processors’ markets.
46. As for consultation, the Chicken Board argues that the General Orders were the product of exhaustive consultation over more than a year. In the early consultation with the processors including Lilydale, the Chicken Board was urged to adopt allocation procedures that included historical utilisation as opposed to

- actual utilisation for each processor's base. The Chicken Board also consulted with the growers and was well aware of the opposition by the Growers' Association to assurance of supply. However, consultation does not require agreement. As to the suggestion that further processors or retailers should have been consulted, the Chicken Board maintains that there is no evidence to suggest that these downstream parties had any concerns despite the fact that the regulatory review was well known throughout the industry.
47. The Chicken Board submits it based Parts 7 and 8 in part upon the Ontario system of assuring supply to processors. The Chicken Board's Ontario equivalent (Chicken Farmers of Ontario) recognised that in an open contract system, the balance of power is in the hands of growers. In a total lock-in, the balance of power shifts to the processors. The idea was to find a middle ground where there is protection for the processors but also some ability for growers to move. The Chicken Board tried to achieve a middle ground through a system where processors receive an assurance of supply from "monopoly suppliers" and where cut backs in allocation are applied *pro rata*. Growers have a guaranteed market for their product but may not be able to ship to the processor of their choice. Supply management does not guarantee that a grower will be able to ship to his processor of choice, rather supply management guarantees that the grower's product will have a home at a predictable, reasonable price. The current two-cycle notice provides a safety valve for growers, giving them some limited ability to move.
  48. The Chicken Board submits that the Competition Bureau's letters on which so much emphasis was placed during the hearing, have very little application to a regulated market where supply is limited by a legislative scheme designed to ensure that the market does not operate freely. The Chicken Board says it is ironic that the Growers' Association places so much virtue on the free market when growers operate within a closely controlled market with significant barriers to entry and a fixed pricing system. No grower suggested that the model advocated for processors would be acceptable to growers. A further irony is that the only real relevance of the *Competition Act* arguments is that if one accepts that orderly marketing requires processors to be assured a reasonable supply, it is highly desirable that this assurance be delivered through a regulatory regime. Processors opting for a self-help remedy would find themselves in legal difficulty.
  49. As for Part 8, the Chicken Board argues that if there is assurance of supply, the necessary corollary is restrictions to new entrants similar to the restrictions to growers entering the chicken industry. Part 8 recognises that there is a need for new entrants in the industry and attempts to strike a reasonable compromise.
  50. Finally, the Chicken Board addresses the Growers' Association six-cycle notice period proposal as a way of achieving assurance of supply for processors without guaranteed market share. The Chicken Board argues that in a restricted supply market, the distinction proposed by the Growers' Association is largely semantic.

If supply is to be assured in a market where increases to that supply are slow, some degree of market protection is an inevitable consequence. By accepting some degree of assurance of supply, the Growers' Association is no longer arguing whether there should be assurance of supply rather they are arguing about the proper length of the assurance. Clearly, the Growers' Association has recognised some degree of assurance of supply is necessary to support the significant investments and obligations of processors.

51. The Chicken Board acknowledges that the market share protection inherent in the assurance of supply policy cannot last forever. The program will be amended and refined as circumstances change. The intent of the policy is to provide long-term assurance to processors that they will receive their share of a restricted supply of product, consistent with their historical base. Similar programs are found in other major chicken producing provinces. The Chicken Board maintains that policies contained in Parts 7 and 8 are reasonable and as such should be confirmed by the Provincial board.

### **Hallmark and Sunrise**

52. The Processors adopt the Chicken Board's submissions and support the policy to provide an assurance of supply to BC processors in accordance with their proportionate use of BC's allocation in the previous year and, to the extent possible, their allocation requests each period. The Processors argue that Parts 7 and 8 are essential components of supply management in BC. They do not agree that Part 7 creates a fixed market share. While it does slow changes in market share, it still allows for differential growth. In the highly regulated, highly competitive environment in which processors do business, the Appellants' position that supply management stops at the farm gate and exists solely to create a monopoly for growers with no corresponding responsibilities or burdens on growers, is untenable. To argue that processors are not already regulated within supply management is to be wilfully blind to the extensive regulation of processors already in place.
53. The Processors point to s. 2.01 of the *Scheme* which provides that "[t]he purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the powers of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product within the Province". Of these terms, "transportation, processing, packing, storage and marketing" relate to the processing sector. Further, the powers of the Chicken Board set out in s. 4.01 of the *Scheme* have been held the Court of Appeal to extend to the purchase of chicken by processors in specific amounts.<sup>10</sup> The FPA recognises processing as part of its definition of marketing, CFC has licensing powers over persons engaged in marketing (such as processors) and the Operating Agreement to the FPA requires consultation with

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<sup>10</sup> *B.C. Chicken Marketing Board v. Hallmark Poultry Processors Ltd. et al*, October 11, 2002 (BCSC); appeal dismissed, 2003 BCCA 356

- processors in setting allocations. Processors through CPEPC are also members of CFC. Processors' access to import quota is restricted and controlled by the supply management system. The General Orders of the Chicken Board regulate processors by restricting who processors can buy chicken from, imposing licensing requirements, use of prescribed forms and notice requirements, through payment obligations, access to market development quota, payment of levies, requiring access to records and audits. In addition, processors participate as members of the Pricing and Production Advisory Committee.
54. The Processors submit recognising supply management as extending beyond the farm gate is not a new concept. As far back as 1938, the Saskatchewan Court of Appeal confirmed that the purpose of the *Milk Control Act* was to 'regulate the production, distribution and sale of milk...in order to protect the interest alike of the producer, processor and consumer'.<sup>11</sup> The need to achieve a fair balance between the conflicting interests of all stakeholders within supply management was an express goal of the Chicken Board appointed in April 2003. Likewise the Provincial board has recognised this same need to balance the needs of industry stakeholders, ensuring stability of the market place without preferring one interest to the other. The Processors submit that one of the trade-offs of supply management is an exchange of unfettered growth for stability and the stability and prosperity of the industry requires the Chicken Board to take into account the interests of the processing sector.
55. The Processors argue that assurance of supply is nothing new; it has existed in BC for over 10 years and in Ontario for a similar time frame. In 2000, when the Chicken Board enacted new policy rules in anticipation of BC re-entering the national system, the Chicken Board developed the huddle process to provide the processors with an assured supply to replace the certainty of supply offered through the export program. This was not done to "placate" processors but was done as a matter of good policy for the industry as a whole, in recognition of the importance of assured supply for the processing sector. The Processors maintain that they supported BC's entry into the FPA based on assurances that their market needs would be met. However, as the FPA has not delivered the product they require, some system must be put in place to ensure that BC processors get a fair proportion of the provincial allocation.
56. The Processors note that the current methodology for distributing provincial allocation has been in place since April 2001, when the current system came into effect for Period A-39 as a result of the August 2000 General Orders. All that Part 7 does is provide transparency in the industry by formalising the process. Contrary to the position of the Appellants, this is not regulation for the purpose of regulation. Rather, this method of distributing provincial allocation between processors was designed to address the very serious interruptions that the August 2000 policy rules could potentially create in the processors ability to supply to

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<sup>11</sup> *Cherry v. The King ex. rel. Wood*, [1938] 1 D.L.R.156

their plants. Each processor's entitlement to participation in the allocation is grounded in that processor's proven need for the production.

57. The Processors say it is significant that this system was put in place at the request of *all* processors, following investigation into how other jurisdictions dealt with CFC allocations. The Processors say that the Ontario experience is relevant, since it has experienced a wide range of regulatory options dealing with this issue. Open sign up did not work; it was an unmitigated disaster resulting in premium wars. It allowed growers to exploit their monopoly control over supply and undermine the live price negotiated in good faith. In contrast, under the system of assurance of supply, healthy competition has continued in Ontario and there is strong support by the entire processing sector. As with BC, and as seen nationally, differential growth under a supply managed system presents challenges. The fact that Ontario is still struggling with this issue does not detract from the need for an assurance of supply policy.
58. The Processors argue that assurance of supply promotes stability in the industry as it allows processors to plan their businesses to meet customer demands rather than chasing supply. The fact that there is a shortage in the supply of chicken has created stress on the system. However, the solution to this stress is not the "free for all" created by open sign up. This would put processors' large national and regional contracts in jeopardy, risking penalties or outright loss of contracts and if such losses were to occur, there is absolutely no guarantee that the contract would be filled by another BC processor.
59. The Processors address the Appellants' argument that growers should be able to sell their production (both domestic and export) to the processor of their choice. If, as happened with Lilydale, that processor has not requested export product, all the production received by the processor enters the domestic market without a corresponding obligation to export. Conversely, processors who request export product must export that volume irrespective of whether they in fact ever receive it. This causes obvious unfairness without assured supply.
60. The Processors argue that the General Orders do not restrict competition in a manner inconsistent with the highly regulated bottom up supply managed system. The orders do not lock in market share but rather recognise historical participation in BC's allocation as it changes over time. Rather than stifle competition, these policies have provided the stability to allow investments in innovation.
61. Removal of assurance of supply would have a significant impact on the competitiveness of processors within the province. By knowing that they have an assurance of supply at least equal to historical usage, BC processors have maximised the use of their product. Restricted supply has inspired innovation not stifled it. Where there is no assurance of supply, there will be no investment and

- processors will have to fight amongst themselves for shares of an already short provincial allocation.
62. The Processors address the impact of open contracting, and argue that despite the justification advanced by the Growers' Association, the growers' real motivation is purely financial. It is naïve to suggest that premiums would never get too high in BC; the Ontario experience bears out that the result of an open contracting system is a battle for supply using ever-escalating premiums. People are people, and there is no reason why the BC experience would be any different. This would be particularly problematic for processors now that the live price is unaffected by the wholesale price.
  63. The Processors argue that in assessing open contracting, the Ontario and Quebec experience is more relevant than Saskatchewan and Alberta. The industry in the latter provinces is in decline; they do not grow their allocations nor do they export. The fact that BC did not see premiums in the past 15 years during times when there was no assurance of supply policy can be explained by the fact that processors respected grower/processor relationships. However, Lilydale has delivered the very strong message that there will be active competition for growers if Part 7 is struck down.
  64. As for Part 8, the Processors agree that an assurance of supply policy must have some allowance for new entrants and the system found in Part 8 is reasonable. While the Appellants have focussed their arguments on this issue on the Vancouver Island situation, that is not the subject of this appeal. While this appeal may have some impact on what happens on Vancouver Island with the Island Pride plant, the converse is not true. The participation of Mr. Arabsky (Hallmark's representative at these appeals) in that proposal, the consultation that has taken place with respect to that proposal and the legal meaning of the Order in Council are not relevant to the issues on this appeal.
  65. Finally, with respect to the six-cycle notice proposed by the Growers' Association, the Processors argue that this proposal does not address the underpinnings of a true assurance of supply; it merely postpones the loss of production without addressing how that production will be replaced without a premium war.

## **DECISION**

66. Part I of this decision addresses the legal issues raised by the Growers' Association. Part II addresses the issue of consultation, raised by both Appellants. Part III addresses the core subject of these appeals, the difficult policy question of whether Parts 7 and 8 represent sound and proper marketing policy for BC's chicken industry.

## I. Law

67. The Provincial board's September 17, 2004 decision in the 7 Growers and Lilydale appeals dismissed the argument that the Chicken Board lacks statutory authority to direct production subject to a BC101 contract in a manner different from that agreed to by the two regulated parties to that contract. The Appellants' arguments, and our reasons for dismissing them, are set out at paragraphs 27-42 of that decision. We will not repeat that analysis here.
68. At the November 2004 hearings, Lilydale did not contest the Chicken Board's authority to make the marketing policy found in Parts 7 and 8. The Growers' Association did, however, advance additional argument. The Growers' Association argues that the Chicken Board has no regulatory authority to make economic policy that results in fixing processor market shares; that this is the Minister's function to address issues promoting the processing industry, and that unlike Ontario, neither the *Scheme* nor the *Natural Products Marketing (BC) Act* (the "*Act*") makes reference to processing in the definition of "marketing". The Growers' Association strenuously argues that supply management was never intended to extend beyond the farm gate. Further, because governing legislation does not authorise this regulation, Parts 7 and 8 operate contrary to the federal *Competition Act*.
69. In our opinion, the Growers' Association position on this issue is without merit. What the Growers' Association seeks to refer to in isolation as the "processing industry" is in truth an integral part of the chicken industry. In regulated marketing, production and processing are inextricably interlinked in theory, in experience and in common sense and have long been recognised as such: *Cherry v. The King ex rel Wood, supra*.
70. Processors are subject to extensive regulation aimed at ensuring the supply management system's task of arriving at a proper balance of competing interests in order to achieve orderly marketing. This is why processors are subject to both federal and provincial licensing, why the very basis for the present FPA is a "bottom up" allocation model founded on processor market requirements and why processors participate fully in the price determination process. Processors are subject to regulation in their payments to growers, in their obligation to ensure that all production grown in the province has a home and in their growth of export (market development) production. Processors are subject to levies and must provide the Chicken Board access to records for purposes of audit.
71. Further, the extreme position that the "processing sector" is not subject to regulation runs in the face of the clear words of the *Act* and *Scheme*. This is obvious from the very definitions of "natural product" and "regulated product" in s. 1 of the *Act* and of "regulated product", "marketing" and "processor" in s. 1.02 of the *Scheme*:

**Natural Products Marketing (BC) Act**

“**natural product**” means a product of agriculture or of the sea, lake or river and an article of food or drink *wholly or partly manufactured or derived from such product*;

“**regulated product**” means a *natural product the regulation of the marketing of which is provided* for in a scheme approved or established under this Act;

**British Columbia Chicken Marketing Scheme, 1961**

“**regulated product**” means any class of chicken under 6 months of age not raised or used for egg production and *any article of food or drink wholly or partly manufactured or derived from the regulated product*;

“**marketing**” *includes producing, buying, selling, disposing of and offering for sale or other disposition*;

“**processor**” means any person who changes the nature of the regulated product by mechanical means or otherwise, and markets, offers for sale, sells, stores or transports the processed or manufactured product.

72. These definitions shed light on the scope of s. 4.01(a) and (l) of the *Scheme*, the breadth of which was emphasised in the court decisions quoted at paragraphs 32 and 34 of the 7 Growers and Lilydale decision<sup>12</sup>:

4.01 Subject to section 4.02, the board shall have power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore or hereinafter enumerated, and without limiting the generality thereof shall have the following powers:

- (a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be packed, stored or marketed; to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be produced, transported, packed, stored or marketed by any person at any time; to prohibit the production, transportation, packing, storing or marketing of any grade, quality or class of any regulated product; and to determine the charges that may be made for its services by any designated agency....
- (l) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storing or marketing of the regulated product, and to amend or revoke the same.

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<sup>12</sup> *British Columbia Chicken Marketing Board v. Sunrise Poultry Processors Ltd.*, Oct 11, 2002, *Money’s Mushrooms Ltd. v. British Columbia (Marketing Board)*, [2001] BCJ No. 1412 (CA) *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd.*, 2003 BCCA 356.

73. The common law freedom of regulated actors to trade with one another is subject to the Chicken Board's express power to determine that regulation is necessary or advisable in order to promote, regulate or control the production, transportation, storage or marketing of the regulated product. The plain words of the *Scheme* confer a jurisdiction to regulate a chain of activities that extend beyond the farm gate. Parts 7 and 8 do no more or less than set out the policy rules that determine the quantity and manner in which the provincial supply of chicken is to be marketed between the system's two core regulated actors (growers and processors) for the benefit of the BC chicken industry as a whole. The Chicken Board's power to enact Parts 7 and 8 is plain and obvious, and falls squarely within the core regulatory powers conferred on the Chicken Board by its *Scheme*.
74. Whether regulation in any particular area is desirable or wise as a matter of sound marketing policy is of course a very different question, as discussed in Part III of this decision. Before addressing the substance of the policy, however, we address the issue of consultation.

## II. Consultation

75. The Growers' Association alleges that the consultation process used by the Chicken Board prior to issuing Parts 7 and 8 was deficient not only in failing to substantially address or accommodate growers' concerns (particularly since growers were not consulted before the huddle process commenced), but also in the failure to consult with the food services or restaurant sectors. Lilydale submits that retailers, consumer groups, the general public and the Competition Bureau "among others" should have been consulted.
76. Neither Lilydale nor the Growers' Association alleges that their right to procedural fairness has been breached. Even if such a right could be said to exist in development of general industry rules<sup>13</sup>, Lilydale and the Growers' Association were in fact consulted and given the opportunity to be heard before Parts 7 and 8 were put in place. The fact they were not agreed with does not mean they were not heard.<sup>14</sup>
77. The question whether others, such as the food services or restaurant sectors, the general public or the Competition Bureau ought to have been consulted is a matter of discretion and policy. In our view, the Chicken Board committed no policy error in deciding to limit the consultation to those who would be subject to regulation, growers and processors, in addition to the other consultations it undertook in respect of the systems of other provinces. The Chicken Board was permitted to draw a line where consultation would stop. Given Lilydale's initial support and then subsequent challenge to the industry status quo commencing in

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<sup>13</sup> See *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 FC 247 (CA); application for leave to appeal to SCC dismissed [1994] SCCA No. 99.

<sup>14</sup> Indeed, the fact that the Chicken Board was apparently divided in its decision to adopt the policy suggests that the Appellants' point of view was heard and debated at the Chicken Board table.

- period A-58, the Chicken Board cannot in our view be faulted for undertaking its deliberations and making its decision on the available information and consultation process.
78. The other obvious point to be made is that the matter has now been vigorously argued before the Provincial board over seven very full hearing days spanning three months. Our appeal is in the nature of a rehearing. The Chicken Board's characterisation of this as being a "good appeal" emphasises that the Chicken Board was itself divided on the policy issue and was content to have the Provincial board review the entire issue in detail in order to receive our independent decision. The Appellants, Respondents and Intervenors have each called numerous witnesses, tendered multiple documents, and extensively cross-examined opposing witnesses.
79. With respect to downstream stakeholders and the general public, it was open to the Appellants to call such persons as witnesses at this hearing. The Appellants' witness, Tony Spiteri, testified that Brian Walton of the Canadian Council of Grocery Distributors was aware of this issue, and further that Mr. Spiteri discussed it with named executives from Thrifty Foods. Mr. Spiteri conveyed the perspective of food service retailers toward supply management in general, as well as the natural retail position of wanting to defend flexibility on the purchasers' side. We acknowledge and have taken these views into account in this decision. Recognising the stability of price and predictability of supply that regulated marketing offers, there have always been and always will be tensions between the retail interest of purchasing the greatest amount of production at the lowest possible price and the interests of both growers and processors operating in a regulated marketing environment.
80. With respect to the Competition Bureau's application to intervene in this appeal, our November 26, 2004 interlocutory decision explains all the reasons why the Panel declined to grant the Bureau's application for intervention, received four days prior to the final hearing day. The Panel has of course considered the evidence tendered by the Appellants as to the Competition Bureau's representations in the Ontario context, together with the Appellants' extensive reference to those representations in their tendering of witness evidence and in submissions.

### **III. Policy**

81. Arriving at a policy judgment regarding this contentious issue has required a considerable amount of risk prediction about the consequences of one policy approach versus another, and a weighing of competing benefits against risks in the BC context. We have undertaken that process to the best of our ability, recognising that despite the broad legal power to regulate, the decision to exercise regulatory power in any particular case requires sound justification. Whatever

their legal powers, marketing boards should not regulate for the sake of regulating.

82. As seen in the argument summaries above, each party has advanced its case strongly. In this context, we wish to candidly state that anyone who believes that *any* of the positions advanced before us is a magic bullet that is “all good” or “all bad” is either being naïve, less than honest or perhaps, to use Mr. Wakefield’s term, an evangelist. Beyond the superficial appeal of certain rhetoric, very few policy questions in this area have a black or white answer. It is more common to have to make policy choices between difficult options, recognising that policies are never final judgments; they change with the circumstances and with experience.
83. Finally, we are not determining these appeals according to which party can claim the moral high ground. There is enough of what some parties have called “irony” to go around on all sides. It does not surprise us that individual parties wish to aggressively advance position in their economic self-interest. Our task is not to reward or penalise them for consistency or hypocrisy, but to look at all of the positions and argument and determine, according to our best assessment, which *position* will on balance best serve the interests of the BC chicken industry as it exists today.

### **Terminology**

84. The next point to be addressed concerns the terminology used by the parties. The Chicken Board and Processors refer to Parts 7 and 8 as a policy of assurance of supply. The Growers’ Association and Lilydale refer to it as a policy of frozen or locked-in market share; they even take exception to describing Part 7 as assurance of supply. They would reserve the use of “assurance of supply” to a situation where supply is assured for a particular period of time, preferably through a contract negotiated between a grower and processor.
85. We understand why the Appellants might consider it useful to re-label Part 7, and we understand that Mr. Kocsis uses the term assurance of supply in a more narrow fashion than does the Chicken Board. But we think it only confuses matters to adopt the suggestion that Part 7 is not accurately referred to as assurance of supply. On any reasonable understanding of the English language, assuring supply to processors means providing processors with some assurance that they will have an ongoing supply of chicken.
86. Whether or not other models might also properly be called assurance of supply is beside the point. Assuring supply is precisely what Part 7 purports to do. The Appellants’ complaint is really that the means by which Part 7 assures supply to processors are too rigid. The regulatory assurance of supply adopted in Parts 7 and 8 diminish any particular processor’s ability to privately procure its own contractual assurances from growers and to grow differentially from the others.

Rather than dwelling on semantics, we think it better to recognise that Part 7 does assure supply, and in that context to consider and assess its *substance and effect* by comparison with the alternatives.<sup>15</sup>

### **The effect of Part 7**

87. Part 7 provides that for any given allocation period, a processor shall receive a share of the provincial supply of chicken proportionate to its share of BC's allocation in the three equivalent periods of the prior year. A processor's base will however be adjusted downward to the extent that the processor slaughters 2.5% above or below its allocation. This formula does provide for differential growth to the extent that processors under or over-utilise their allocation pursuant to the 5% sleeve. But its main thrust, consistent with its heading, is to assure processors access a supply base with which to serve their established markets where they demonstrate on an ongoing basis that they are continuing to serve those markets.
88. The Part 7 formula will have less practical relevance in a period where the processors have access to all the production they desire. Where every processor has access to all the production it can sell to its markets at an appropriate price point, it is difficult to envision complaints about relative market share *per se*. The real impact of Part 7 on processors arises where BC's allocation does not provide all the production that processors can sell. In this situation, the clear effect of Part 7 is to provide that the "pain" is to be shared pro-rata by processors who have demonstrated that they are continuing to serve their markets. Whatever label the Appellants may attach to Part 7, open contracting it is not.

### **Open Contracting**

89. The first question we have considered is whether a system of open contracting would be preferable to assured supply as set out in Part 7. The Growers' Association has argued that there is "no evidence" to counter their position that Part 7 operates contrary to the best interests of the BC chicken industry. We do not agree.

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<sup>15</sup> The Appellants took issue with the Chicken Board's description of Part 7 as enacting a middle ground between open contracting and a true "lock-in". Without getting caught up in the parties' competing claims for the middle ground, we would note for comparative purposes that a true lock-in of processor market share and quota may be seen in past proposals by Lilydale and (more recently) Island Pride respecting the viability of a Vancouver Island processing plant. Under those proposals, which were rejected by regulators, regional quota would be locked into Vancouver Island and production assured to that regional processor; no grower would be permitted to sell either off Vancouver Island or to another processor. By contrast, nothing in Parts 7 and 8 prevent growers from transferring quota anywhere in the Province; growers do have scope under these orders to change processors; and differential growth (albeit small) is provided for. In addition, any direction of growers to another processor that takes place under the present policy takes place for a limited time. Further, under our directions below, the Chicken Board will further review and report on providing any opportunities for differential growth between processors in a growth environment, and providing for one-way grower movement in appropriate circumstances.

90. Evidence regarding how the system can be expected to operate under Part 7 can be gained from examining how the system has operated for the past decade, during the majority of which time processors enjoyed *de facto* assurance of supply. We agree with the Chicken Board that Part 7 is not properly understood as enacting some sort of fundamental sea change in the *practical* operation of the chicken industry.
91. The question whether that practical operation should continue is what we must decide. But we think it only fair to recognise that the fundamental purpose of Part 7 was, as requested by all processors including Lilydale in May 2003, to codify or formalise the industry status quo. From at least the mid-1990s, the processors acted so as to maintain historical market shares and did not increase their relative market share at each other's expense.<sup>16</sup> After August 2000, the same result was achieved through the Chicken Board's huddle process arising as a result of the regulatory requirement for growers and processors to rationalise their activities on a period-by-period basis.
92. The Appellants' insistence that Part 7 is different because it is compulsory misses the point. Even if we accepted that the processors' preservation of stable relative market share over that entire period was voluntary<sup>17</sup>, the industry experience during that period still provides a useful baseline by which to consider what took place when BC's processors were *not* competing for production. A review of the past decade provides us with a reality by which to assess the competing arguments about economic theory and philosophy that have been debated before us. Like the period in which we are presently engaged, the past decade saw rapid change, consolidation in the retail and food service industries and transformation in processing itself.
93. As a result of our examination of the past decade, we find it difficult to accept the Appellants' position that processor assurance of supply has undermined industry growth, competitiveness and stability. We say this fully recognising that such a policy might well have had that undesirable effect when the BC processing industry was less mature, as reflected in the Appellants' reference to the industry's evolution from the frozen fryer to the fresh market. Indeed, we are quite prepared to agree that assurance of supply may again become undesirable if industry circumstances change. But in the present mature and competitive BC industry environment, the reality appears on balance to support the Processors' argument that by knowing they have an assurance of supply at least equal to their historical market usage, BC processors have been able to effectively innovate, compete vigorously, and grow the industry.

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<sup>16</sup> As Mr. Heppell noted, the only exception to this arose in connection with Lilydale's closure of its Vancouver Island plant in the 1990s, and the transfer of an Island producer (Mr. Mundhenk) to Sunrise.

<sup>17</sup> An argument that was rejected in the September 17, 2004 decision on the basis of our finding that the huddle process, initiated in the wake of the August 2000 regulations, was subject to Chicken Board direction if consensus were not reached

94. When one considers the objectives espoused by the Appellants, the Processors and the Minister's *Regulated Marketing Economic Policy* promoting industry growth and innovation, the ability to serve regional and national clients in competition with processors from outside the province and providing economic value to growers, the BC processing sector has been a success story over the past decade.
95. Viewed in this light, the question of whether Lilydale as an individual processor who has received 21.5% of production, might take a larger piece of BC's production pie from other processors under an open contracting system is less important from a systemic perspective than the question of whether the processing sector as a whole has been and continues to be vibrant and competitive with assurance of supply. We answer this question "yes".
96. The four market streams spoken of by all processors in evidence, retail, food service, export and commodity (spot market), carry differential opportunities for profit and growth such that competition has been and remains vigorous. This is evidenced by the fact that both Lilydale and the Processors have won and lost major contracts to the others during the past several years. We can well understand why Lilydale or any processor would wish a greater reward for growing the market, but the "size of the prize" has obviously not prevented rigorous competition, innovation, growth and ongoing investment.
97. We do not wish to be taken as holding that there are no risks to growth and competition in adopting Part 7. But in the present circumstances of a mature BC chicken industry with its particular configuration, we see no evidence of a stifling of competition, or of moribund processing sectors as exist in Alberta and Saskatchewan (the latter has only one processor, the former has two with Lilydale enjoying 65% market share). Other than by way of some suggestions for further Chicken Board consideration to refine the policy which we make below, we are disinclined to "fix" that which has not been shown to be fundamentally "broken" in BC. This said, we recognise the value of providing appropriate opportunities for differential growth, which is why we will be issuing directions to the Chicken Board to examine how this objective might be better achieved under Part 7 in periods of increased provincial supply.
98. The fact that the present system has operated well does not mean that open contracting would not work better. However, on our assessment of the evidence before us, the risks of proceeding with an open contracting system seem to us sufficiently serious and real that we should not at this time upset a system that is working.
99. The first risk is the one that Mr. Tavares and the Processors described, namely, the *negative* impact on market competition and innovation when processors are unduly focused on the procurement of supply. As was pointed out in evidence, it is one thing for companies to procure production when there is no monopoly on

- production. When supply is regulated as here, and especially when supply is short, competition to procure supply can easily become an industry preoccupation at the very time that processors should be focusing their efforts on serving and maintaining markets. For an industry that operates in such a competitive market environment, including competition with processors outside the province, we do not see such a change in focus as being one that promotes industry development, innovation and growth, quite apart from the question of premiums.
100. The second risk of open contracting is the risk of loss of growth to the BC industry caused by one or more processors losing large shares of production at the expense of another, resulting in the loss of large customer contracts. On this issue, it is interesting to note that while Lilydale suggested in evidence that open contracting would not result in very significant shifts in overall market share as between the processors, the facts of the A-61 appeal before us involved Lilydale's attempt to sign up production that would have amounted to 8% of Hallmark's total supply or 17% of Lilydale's production. This is significantly more than Lilydale had itself proposed under the bottom up allocation process. The regulatory concern here is of course not for Hallmark personally, but rather for the fact that if regional or national contracts are lost they are not necessarily going to be filled by BC processors. Whatever short term gains one processor might make at the other's expense carries a real risk, in the longer term, of lost contracts to BC and thus a real risk to the industry's stability and growth.
101. The Provincial board has in the past accepted that the importance of preserving long-term contracts may require a commodity board to act in the best interests of the entire industry, for example see *Island Egg Sales Ltd. v. British Columbia Egg Marketing Board*, April 25, 2003 where a panel of the Provincial board stated:
48. Although the Panel is of the view that the Egg Board overstates the impact of the EFP Program on Golden Valley, we recognise that transfer of production between grading stations makes for difficult decisions for the Egg Board. As BC is under allocated, decisions of how to balance production needs of grading stations are difficult – those decisions are not simply a contest between competing grading stations; they affect the entire industry. The Panel agrees with the Egg Board that the downside risk of Golden Valley losing one of its large retail customers is so significant that it warrants special measures. The loss of a contract, which takes up 20% of BC's production, would be catastrophic to BC's entire egg industry. The Egg Board has the statutory responsibility to regulate the BC egg industry. It has looked at this issue and determined that at this time, there is too great a risk to transfer production from Golden Valley. The Panel is convinced, based on the evidence, that this risk is far from speculative. It is real and significant. We are satisfied that that the Egg Board's decisions to not approve the specific applications for transfer of production were, in principle, sound.
102. The third risk of open contracting lies in the risk that, in the effort to maintain their supply, processors will decide, either at their own initiative or at the invitation of growers, to offer payments or inducements to growers for their chicken, completely unrelated to rewarding better service or quality. On this point, we make reference to the November 27, 2004 evidence of Mr. Tavares:

- Q. How did this open contracting system work out in Ontario?
- A. It was a -- in my characterization, just a disaster. Again, you had -- as soon as the -- you know, the other regime was lifted, you had an immediate return to uncontrolled premiums, again a lack of attention and a lack of focus on meeting a spec and meeting customer demands, and general inability of processors to run their business as a -- as a business.
- Q. During this period were the premiums simply set as a number of cents per kilogram, or were they in different forms?
- A. What -- believe me, it takes all forms. And it's, I'd say, some of the most creative financial incentives anywhere are those -- in my career, have been those associated with the procuring of live chicken. And it -- you know, it -- the demands -- I'll say the demands, because at the time I was working for Maple Leaf Poultry, part of Maple Leaf Foods, a public company, and a lot of what was requested of us we couldn't legally do. But the demands would range from financial payments under the table cash in a brown bag, literally, which again, you know, we couldn't participate in, to don't declare the production, you know, somehow don't declare it, let me produce some more, to just everything under the sun. It's really a Pandora's Box of anyone's imagination, basically. If -- if you can conceive it, somebody will ask it of you.
- Q. Is it --
- A. And did.
- Q. Is it feasible in your experience to sort of mitigate the effects of premiums by introducing or mandating production quality standards?
- A. It's -- it's -- it's quite the opposite. What you have -- I think everyone will realize that the vast, vast majority of producers in Canada, in Ontario and undoubtedly here, are very well-meaning, very industrious people who want to do a good job. There is a small minority perhaps, who don't do as well as others financially because of practices and whatever history. And really, that's how it snowballs. It's a small minority that are unhappy that threaten to leave, you need the volume anyway, a friend tells a friend tells a friend, and quickly it sort of snowballs and your ability to demand reasonable demands, production standards, production quality, just severely eroded if you don't have the ability to retain that -- that producer when you make the demand. And you know, literally what I'd get is, you know, that's fine, Mr. Tavares, we understand. At the time we were launching the Prime program in '92, we understand you want to do that, we understand the quality standards and -- and the requirement for a weight spec, but, you know, the competition isn't asking any of this and they're willing to pay me cash under the table and not declare it. And you just can't compete with that. And you can't run a business that way.
- Q. Now sir, do you recall roughly how long this period of open contracting continued in Ontario?
- A. Just under two years, if I remember.

103. The Appellants point out that the evidence does not support such extreme behaviour having ever happened BC, beyond perhaps the payment of premiums to match dividends given to Lilydale coop members and the granting of no-interest loans to purchase quota, both of which were referred to by Bill Vanderspek. We agree with the Appellants about the state of the historical evidence before us. We also agree that we must take into account the unique circumstances of the BC industry, which has fewer growers and processors than Ontario. On the other hand, there are sufficient growers and processors in BC to make it difficult for us to disagree with the Processors' suggestion that "people are people". It would be naïve to believe that in the right circumstances, for example in a mature industry faced with restricted supply and with large contracts in jeopardy, BC processors and growers would not succumb to the same pressures and temptations faced by their counterparts in Ontario.
104. This leads to the question, "what is so bad about premiums?" As pointed out by the Appellants, a premium may be thought of as nothing more or less than giving

growers the real value of a product in restricted supply. In principle, we agree. The difficulty is that the only reason the product is in restricted supply is because of regulation. And in this context, regulators have made the further choice, in the interests of the chicken industry, to de-link the live price (the price processors pay growers) from the wholesale price (the price processors charge their customers). This was done in large part to provide growers with a more reasonable and predictable rate of return. It is now the processor that bears the risk of lower wholesale prices. Grower premiums unrelated to quality or service undermine chicken pricing and add business costs and risks to the processing sector that the pricing formula has sought to balance. The larger the gap between the regulated price and the actual price paid to growers, the more difficult it is for the processing sector to operate in a stable and successful manner and the more difficult it is to compete regionally and nationally. All of which undermines growers' long term interests, even if it adds money to their pockets in the short term. We do not see the same systemic disadvantages arising where processors occasionally engage in purchasing product from one another, even recognising that this practice can be viewed as giving certain "premium" benefits to processors.

105. The fourth risk, as evidenced by the Ontario experience, is that processors may change their minds and collectively determine that competing for growers in a regulated supply market is no longer in the industry's best interests. We refer to Mr. Heppell's September 9, 2004 evidence in response to a question from the Panel:

What I would suggest to you is that – is that if we roll – we roll this picture forward a couple of years and we're operating in a – in an unfettered competitive environment and we find ourselves in a situation that is unacceptable, in my view there is nothing that stops us as processors from coming back together and saying how are we going to address this, and we could – we could agree to reenter a huddle process. There's a number of different ways. I would hope that we could solve that issue at a – a higher level of thinking than – that what we were at, you know, the last time around. That might be wishful thinking, but certainly that option is open to us at any point in the future.  
[emphasis added]

106. We take this to be a fair acknowledgement of the point we made at the outset; no system, including open contracting, is a panacea.<sup>18</sup> The fact that Ontario adopted open contracting in 1992 and then rejected it in 1994 is an historical reality to be taken seriously, despite the differences between BC and Ontario and despite the imperfections in the Ontario model described by Messrs. Kocsis and Tavares. Even Mr. Kocsis agreed that open contracting shifted the balance of power too far in favour of growers, particularly where supply was chronically short.

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<sup>18</sup> The suggestion that "there is nothing that stops us as processors from coming back together" to address the issue if processors find the situation to be "unacceptable" is also interesting in light of Mr. Tavares' evidence of the legal advice he received concerning the difficulties of processor self-help outside of a regulatory structure. The point here was to the effect that there may well be *Competition Act* issues involved in a purely voluntary huddle that cease to be relevant where allocation process is regulated.

107. An additional risk to be taken into account concerns the industry implication of open contracting for what chicken grower Dave Janzen referred to as BC's "three dynamic processors". In this regard, we refer to the November 9, 2004 evidence of the current Chicken Board Chair, Ron Kilmury:

We work in a regulated environment, and if we were to subscribe fully to Mr. Heppell's economic model of yesterday and today, I ultimately believe in an unfettered way you would see very considerable processor consolidation and you would see alignment of the industries above and below that, with the exception of the growers, and largely in a corporatized environment. In my view that would leave the growers as an island whose only economic protection is the minimum price.

108. The Chicken Board clearly wishes to encourage the present industry structure, including three large competitive processors, in BC. In this respect, Mr. Kilmury clearly does not share the views of Mr. Tavares regarding the obvious benefits of processor consolidation. We think his concerns have merit. Mr. Kilmury's conclusion that an open contracting environment would lead more quickly and assuredly to processor consolidation than would otherwise be the case with Part 7, is in our view legitimate. Mr. Heppell's evidence made clear that he supports further processor consolidation. He sees open contracting as facilitating that process by lowering the cost of consolidation. We do not take Mr. Kilmury as suggesting that Part 7 would stop consolidation for parties motivated in doing so. However, given the advantages of the existing processing sector dynamic, we consider his view to be a legitimate factor to consider in support of Part 7, particularly when viewed in light of the Alberta and Saskatchewan experience.<sup>19</sup>

### **Growers' Association Concerns**

109. The Growers' Association, while joining with Lilydale on many issues, emphasises other concerns that were not given as much emphasis by Lilydale. These concerns are more particular to the self-interest of growers. The Growers' Association argues that Part 7 removes the incentive of processors to foster positive relations with growers. Growers are in business too, and allowing growers to move between processors ensures not only that growers are treated with respect, but ensures processors have the motivation to offer growers more responsiveness, profitability and better services regarding such things as shipping ages, bird genetics and service quality.
110. The Growers' Association submissions about respect are genuine, and reflect one of the ever-present tensions in the chicken industry and indeed in any regulated marketing sector where growers and processors have to live together. We agree

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<sup>19</sup> It follows from this that if significant processor consolidation were to happen in the BC industry in any event, this would constitute a significant change in circumstances that regulators would have to take into account in considering whether marketing policy should be revisited. As noted below, BC processors should not automatically assume that the production they receive under the present orders would necessarily "follow them" after a consolidation. Any such step would clearly require regulatory judgment to be exercised. The Growers' Association view that Parts 7 and 8 encourage "the stuff of which monopolies are made" should not be assumed.

that processor insecurity about a grower's ongoing supply will cause the processor to pay closer attention to the grower's needs and demands. This said, we do think it important to place the Growers' Association's concerns in perspective. There was very little direct evidence of oppressive processor behaviour toward growers in general, apart from evidence we have heard on previous appeals concerning pressure to purchase chicks from a processor owned hatchery, which issue has now been dealt with in the Chicken Board's orders. Further, all three processors agreed that if Parts 7 and 8 were upheld, they still have a significant incentive to foster positive relationships with growers. Further, growers do have a certain amount of mobility under the General Orders as evidenced by the fact that Mr. Thiessen himself was able to move to Lilydale, albeit not as quickly as he would have liked. We do not doubt that chicken growers might be hesitant before complaining about individual processors, but our experience tells us that serious and specific complaints have a way of coming to the attention of regulators. In our view, it is not unreasonable, barring proof of oppressive or unreasonable processor behaviour, to require a switching of growers when a grower wishes to transfer processors.

111. As to grower profits, while we understand this concern, we frankly believe that the concern for more grower profit does not tip the balance in favour of open contracting. Chicken growers derive many benefits from the regulated marketing system. Not only do they enjoy all the economic benefits of quota, which restricts competition between growers and limits new entrants, they receive a price for their chicken insulated from the ups and downs of the wholesale price. Chicken growers bear no business risk that their chicken will not find a home; they have the right to insist on regulatory intervention in the event that a processor refuses to purchase their chicken. (Not surprisingly, to this extent, chicken growers have always insisted that regulation apply to processors.) Moreover, chicken growers have been granted rights to grow export production even where their processor has not requested an allocation to do so.<sup>20</sup>
112. We agree with Mr. Janzen that grower concerns about mobility, individual processor behaviour and issues such as pricing are better addressed directly by the Chicken Board rather than indirectly through a system that, as we found above, carries significant risks to the chicken industry as a whole, which risks apply to growers as well as processors given the close connection between those regulated actors.
113. For all the reasons we have given, while there are legitimate arguments in favour of open contracting and against assurance of supply as set out in Part 7, we have

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<sup>20</sup> Given the growers' very understandable wish to ensure fair treatment and respect, it is interesting to consider the question whether growers would see any regulatory role for the Chicken Board in an open contracting environment. If experience in other commodity sectors is any guide, one might well expect growers to advocate Chicken Board intervention to ensure that the terms of those contracts are fair, and even to intervene on behalf of growers in the event that a grower feels a processor has breached the terms of the bargain.

concluded that in the present circumstances and configuration of the BC chicken industry, the disadvantages of open contracting outweigh the advantages. We do not support open contracting at this time for BC, and we say this in full awareness that this is a difficult policy judgment, that both Alberta and Saskatchewan are promoting open contracting in the circumstances of their industries, and that Sunrise and Hallmark are taking advantage of these opportunities. Further, Sunrise is proposing to re-enter the BC turkey industry. As useful as these comparisons might be for rhetorical purposes, we have pointed out above that there are enough ironies to go around on all sides in this case. Our fundamental task has been to make the best policy decision for an ongoing and vibrant BC industry based on all the information before us. In our opinion, the circumstances are not right for open contracting in the BC chicken industry.<sup>21</sup>

### **The Six-Cycle Proposal**

114. The Growers' Association proposed a "middle ground" that would assure processor supply while at the same time grant growers greater mobility than they presently enjoy. Under the six-cycle proposal, a grower would have an automatic right to change processors on giving his processor one year's notice. This proposal was communicated by the Growers' Association to the Chicken Board Chair, Mr. Kilmury, for the first time in conversation on October 22, 2004. The parties were unable to agree to terms on which the issue could even be discussed despite the pending November hearing dates. Unfortunately, this is not uncharacteristic of the history of grower/processor interactions in the chicken industry.
115. We tend to agree with those who characterise this proposal as merely postponing the loss of supply. It does not address the fundamental objective of Part 7, to assure the ability of processors to meet their customer demands especially in circumstances of short national supply. Further, a 12-month notice period would seem to have some undesirable side-effects on the processor/grower relationship once notice has been given. Long divorces can get ugly.
116. It may be that there is a variation on this admittedly conceptual proposal that industry members can agree upon if they ever find themselves in a position to talk about it.

### **Part 8: New Entrants**

117. All parties recognise that any assurance of supply policy should make provision to accommodate new processor entrants. The difficult question is whether there should be any limitations on new entrants, and if so, what those limitations should be? If one accepts, as we do, that protecting the historic base of the existing processors is valid, it would be inconsistent to create a new entrant policy that

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<sup>21</sup> Time will tell whether the Alberta or Saskatchewan boards would move to a policy of assured supply if their industries operated like the BC industry.

would significantly threaten that base. For this reason, we agree with the Chicken Board's approach of allocating growth to new entrants. As for the specific impact of Part 8 on Rosstown, our decision on that appeal is fully canvassed in our separate but companion reasons.

118. We do not agree with Lilydale's suggestion that the new entrant policy is a "sham". Rather, it is a principled and responsible way to encourage smaller processors to start out by developing and serving niche markets without undermining the system as a whole. Whether circumstances might arise whereby greater growth might be allocated to a processor who can show a special opportunity and unique circumstances is a question the Chicken Board can consider if and when it arises.

### **Further policy development**

119. Our decision to uphold Parts 7 and 8 does not mean they cannot be improved. The Appellants raised several issues and interests that we believe should be carefully reviewed in the context of these policies. We therefore direct the Chicken Board to review and report upon them to the Provincial board in its supervisory capacity, after appropriate industry consultation<sup>22</sup>:
- Provide an analysis of options that might be workable in providing for differential processor growth where allocations are being met.
  - Recognising that the Chicken Board's present Orders allow growers to change processors where another grower can be found to replace the grower that wishes to move, provide an analysis and options as to whether the Chicken Board should provide in its Orders (a) a discretion to authorise a grower to change processors without a transfer, for example based on improper or oppressive conduct by the processor; and (b) the ability to change processors on less than two periods' notice where this can be carried out practicably.
  - Provide an assessment of the recent trend in the chicken industry from local processors serving local growers to processors with a regional or national perspective and what considerations and strategic analysis are necessary to properly position the BC chicken industry going forward.
  - Provide an analysis and options as to how the Chicken Board's pricing schedule might be amended to address the concerns outlined in the evidence of Dave Janzen (November 9, 2004, pp. 95) concerning pricing in relation to the size of birds required by different processors.

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<sup>22</sup> Such consultation is to include the British Columbia Broiler Hatching Egg Commission.

- Provide an analysis and options pertaining to any other issue that the Chicken Board considers ought to be addressed arising from the experience administering Parts 7 and 8.

### **Changing circumstances**

120. No one should be under any illusion that Parts 7 and 8 confer personal rights on any processor. Ours is a systemic decision, which we consider to be in the best interests of the chicken industry.
121. In this context, we wish to recognise, as did the Chicken Board, that Parts 7 and 8 are not forever. While the best policies are those that can accommodate a substantial degree of change, it is also true that the best regulators are those that remember the reasons behind the rules and are prepared to jettison rules where those reasons no longer exist.
122. As reflected in our direction to the Chicken Board to examine differential growth in a growth environment, the assurance of supply being protected here is mainly directed to protecting industry stability in times of supply shortage. Even here, any significant change in circumstances, as for example, a major consolidation in the processing sector, evidence that the industry has become stagnant or other factors that we cannot now foresee, might require major revisions to Parts 7 and 8.
123. The Panel would confirm finally that it has considered all the evidence, even if a specific piece of evidence was not referred to in this decision. The Panel has also not overlooked the Appellants' submission, made in September 2004 but not pressed in argument, that Chicken Board direction of product gives rise to health and safety concerns by unnecessarily increasing movement in the industry. Since open contracting also invites movement of product for reasons other than health and safety, it is obvious that those issues require direct analysis and attention, as they are in fact receiving in other forums and government processes.

### **ORDER**

124. For the reasons given above, the Panel dismisses the appeals of Parts 7 and 8 subject to the directions given, and dismisses the policy arguments that remained outstanding in September 17, 2004 Lilydale & 7 Growers appeals.
125. There will be no order as to costs.

Dated at Victoria, British Columbia, this 21st day of February, 2005.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

Per

*(Original signed by):*

Richard Bullock, Chair  
Christine J. Elsaesser, Vice Chair  
Garth Green, Member