

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN
MARKETING BOARD REFUSING TO ANNUALIZE SEASONAL PRODUCTION

BETWEEN

MARK ROBBINS dba K&M FARMS

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Daphne Stancil, Presiding Member
Peter Donkers, Chair
Al Sakalauskas, Vice Chair

For the Appellant:

Mark Robbins
Jill Azanza

For the Respondent:

Claire Hunter, Counsel

Date of Hearing

July 15, 2018 and closing submissions

Place of Hearing

Abbotsford, BC

INTRODUCTION

1. The appellant, K&M Farms (K&M) raises about 150,000 kilograms (kgs¹) of chicken annually in Abbotsford, BC. K&M grows about 20% of its chickens seasonally on outdoor pasture and the rest, about 80% of its production in-barn, over a year (seven production cycles).
2. In January 2018, and as it had done in the past, K&M applied to the British Columbia Chicken Marketing Board (Chicken Board) to annualize its pasture-raised bird production, from May until October, to avoid production penalties, and to produce the barn-raised chicken at a consistent level of production per cycle (17,000 kgs).
3. In its decision of March 5, 2018 (annualization decision), the Chicken Board denied K&M's application to have its seasonally raised pasture production annualized and without this approval, K&M would continually be in an "over" or "under" production situation for all production cycles over the year, and subject to penalty, unless it found a different way to manage the production on its farm. The letter stated:

Your request is inconsistent with the BCCMB General Orders and the principles of orderly marketing and period-by-period compliance....

You will be required to produce within your periodic allotment, but can adjust the percentage of range versus in-barn production each period according to the needs of your market. This can be done in advance of each period by specifying your intentions on your BC 101 contract.

I would also take this opportunity to remind you that when you accepted a significant increase to your deemed new entrant quota, that you signed an undertaking agreeing to abide by the January 26, 2011 BCCMB General Orders.

4. On March 8, 2018, K&M wrote the Chicken Board to confirm its request for production annualization for 2018 and filed an appeal to the British Columbia Farm Industry Review Board (BCFIRB) on March 9, 2018.

K&M appealed a separate decision of the Chicken Board regarding its request for an order to direct a processor to continue to provide primal cut processing services for chicken on March 23, 2018 and the appeals were heard concurrently. Following the appeal hearing, K&M secured the services of a processor to further process its chicken and as such, on July 6, 2018 withdrew that appeal. This decision pertains only to the appeal of the Chicken Board's decision regarding annualization of production.

5. Several organizations intervened in the combined hearing of the appeals but as their applications to intervene were based on their interest in the further processing issue, the panel has not considered those submissions in this decision. The panel considered any evidence given on day two of the hearing (N1803), but relevant to this appeal (N1801), in coming to this decision.

¹ Kgs are a measure of live weight prior to slaughter.

6. Closing submissions were made in writing with the last submission received on June 15, 2018.

BACKGROUND

7. In 2001, K&M grew about 50 chickens on pasture for sale to family and friends. By 2005, K&M's production increased and the Chicken Board began regulating K&M as a new entrant producer.
8. In 2017, the Chicken Board made an offer to allocate all new entrants including K&M, an amount of quota to bring production to about 20,000 kgs per cycle or just over 130,000 kgs annually. K&M accepted this offer and planned to continue its annual pasture production of about 31,000 kgs and to build a barn in which to raise the balance of production (about 17,000 kgs) as free range broilers on a year round eight week cycle.
9. K&M accepted a further Chicken Board offer of "buy one get one" incentive quota, by which K&M could maximize its chicken production to 40,000 kgs every eight-week quota production cycle. In accepting these offers, K&M undertook (December 12, 2016 for the first offer and July 18, 2017 for the second offer), to meet various conditions of operation and quota management imposed by the Chicken Board.
10. From 2005 to 2017, K&M applied for and received approval from the Chicken Board under section 22.9 of its General Orders to grow and slaughter pasture-raised chickens seasonally over three production cycles instead of seven. This is called annualized production and enabled K&M to take advantage of the weather to achieve seasonal outdoor production and to use this production practice as a marketing tool. K&M has developed a niche market for pasture-raised poultry products sold from its farm store and self-marketed farmers' markets.
11. On January 28, 2018, K&M applied to the Chicken Board requesting that "the Board find a way to account for seasonal and per cycle production in a manner that does not incur production penalties provided production, over the calendar year, is within the normal sleeve of the total allocation".
12. The Chicken Board considered K&M's request for its mainstream production during its meeting of February 28, 2018 and denied K&M's request on March 5, 2018 (see paragraph 3 above).

REGULATORY FRAMEWORK

13. The following is a brief summary of the legal framework governing this matter. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (*NPMA*) the Lieutenant Governor in Council has the power to establish boards and commissions and to confer

upon them certain powers (section 11). Pursuant to this power, the Chicken Board is established by the British Columbia Chicken Marketing Scheme, 1961 (Scheme)²:

2.01 The 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, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

14. The Scheme grants the Chicken Board broad powers under section 4 and the Chicken Board has made rules to exercise these powers through its General Orders³ which among other things:

- Defines in Part 1 defines classes of quota and regulated product:

“**Mainstream quota**” is

a class of expressed in kilograms of live weight for the production and marketing of chicken allotted by the Board. Mainstream quota is for the production of regular broilers, roasters, Cornish or certified organic and is derived from a commercially available broiler chick stock, such as, but not limited to Hubbard ISA, Cobb Vantress, or Ross Breeders.⁴

“**Specialty quota (SQ)**” is

a class of quota expressed in kilograms of live weight for the production and marketing of chicken allotted by the Board. Specialty quota is designated by the Board for the production of specialty chicken including Asian chicken, such as Silkies and Taiwanese Chicken. The Board may designate specialty quota for the production of innovative new products that do not currently exist in the marketplace including those derived from a traditional or heritage breed. Effective with the commencement of quota period A-126 (September 7, 2014) Redbro is no longer classified as Specialty chicken.

“**Regulated product**” is given the same definition as provided in the Scheme and means any class of chicken under six months of age not raised or used for egg production and includes any article of food or drink wholly or partly manufactured or derived from the regulated product.

- Requires only registered producers with valid quota or permits produce regulated product (Part 3).
- States the general powers to establish, issue, permit transfer, revoke or reduce quotas and the terms and conditions of issue, revocation, reduction and transfer of quotas.(Part 21)
- Establishes rules pertaining to quota production periods, cycles and annualization (Parts 22, 23), penalties for over and under marketing (Part 26 and 27) and barn stocking density (Part 33)

15. Specific to this appeal are the following annualization rules:

22.9 Annualization (defined as on a calendar year) of mainstream quota is not permitted. Exceptions may be considered at the discretion of the Board for, but not limited to; self-

² BC Reg B.C. Reg. 188/61 as amended to 2016.

³ British Columbia Chicken Marketing Board, General Orders, August 26, 2011 as amended to 2017.

⁴ The definition was amended on April 8, 2014 to include certified organic chicken formerly defined in the specialty class of quota.

marketers or for those who produce on a seasonal basis, upon receipt of a yearly written request signed by both the grower and processor of record, accompanied by a detailed proposed production schedule for the year in the prescribed form. The production schedule may not produce more than 65% of the annual allotment in the first or last 6 months of the year.

22.10 The Board, at its sole discretion, may permit the annualization of specialty quota under this program, upon receipt of a yearly written request from the grower and processor, along with a detailed proposed production schedule for the year in the prescribed form. The production schedule may not produce more than 65% of the annual allotment in the first or last 6 months of the year.

22.11 Where annualized production has been approved by the Board, growers will be expected to conform to all provisions of period-by-period compliance, with the exception of periodic under and over tolerances.

16. Part 26 establishes penalties for under producing quota and section 26.5 provides that the penalty does not apply for growers receiving annualized production. Similarly Part 27 requires that growers must not over produce their grower allotments in any production period and establishes penalties. Part 27.3 operates to exempt growers from the penalty provision if their production is annualized.
17. Similar provisions regarding annualization, and over and under marketing penalties apply to new entrants (Part 49 - New Entrant Program for Growers).

ISSUE

18. The central issue on this appeal is whether the Chicken Board's decision to deny K&M's request for annualization reflects sound marketing policy?

SUMMARY OF KEY EVIDENCE

19. While the panel has heard and considered all evidence provided in the hearing, the following is a summary of key evidence and findings.
20. Mark Robbins represented K&M in these proceedings and testified regarding the history of its chicken production and applications (over the years 2004 to 2017) for relief from period-by-period production compliance. The Chicken Board's approvals pursuant to section 22.9 of the General Orders enabled K&M to bring fresh seasonal, outdoor pasture-raised chicken onto the market from June to October without incurring over or under production penalties.
21. In 2017, the Chicken Board granted quota to K&M for a further 16,625 kgs of production per period. In accepting the offer of quota, Mr. Robbins made a number of undertakings on behalf of K&M on December 12, 2016. These deal with:

- ensuring that a barn when built can accommodate the production amount allocated or bird density in accordance with the General Orders⁵ -
- setting the effective date for future transfer assessment on quota if necessary,
- determining the processor that the producer will ship the production from the new allocation to and agreeing to the steps necessary to make a change of processor,
- determining the region that the production will take place in,
- permitting the purchase of additional quota,
- eliminating pro rata issuances of quota to those accepting the offer until January 1, 2020,
- establishing time periods for the acceptance of the offer and dealing with processors specified by the Chicken Board under other issuances of quota,
- establishing the end date for identifying the producer as a new entrant, and
- establishing the implications of accepting an offer of quota under Part 2 of the quota offer on the timeline for grower commitment to a processor under this offer (December 2016).

22. K&M did not plan to abandon its seasonal pasture raised chicken production simply because it built a barn to raise the production from the incentive quota. Mr. Robbins indicated that K&M plans to manage in-barn production at lower bird density than the standards set out in the General Orders and provide a farm differentiated product known as “free range” based on the standard of bird density established for organic production. K&M does not plan to meet other standards for organic production which require organic certification of the barn and practices. K&M will manage the barn-based production to meet its obligation for period-by-period compliance. In summary, K&M’s business plan requires the growing of two types of farm differentiated product based on different production practices, one pasture-raised and the other barn-raised but at a lower bird density (requiring more space) than required by “conventional” chicken production practices prescribed by the General Orders.
23. Mr. Robbins stated it was a significant decision for K&M to accept the incentive quota, because K&M’s business model is based on consumer responsiveness and producing a chicken product differentiated by farm-based production practices that consumers want and are willing to pay a premium for. He indicated that “he liked growing chicken for people who want to buy K&M chicken”.
24. Mr. Robbins referred to the chicken grown in barn to meet the minimum density standards of the General Orders as “conventionally” raised chicken produced using mainstream quota. He uses the term “conventional” in connection with the growing of chicken by other growers who meet this minimum density growing standard. Under cross-examination,

⁵ I accept the offer of the British Columbia Chicken Marketing Board (“BCCMB” or “the Board”) for incentive mainstream quota in the amount of 16,625 kilograms live weight per fifty-six (56) day cycle, which I understand is subject to all of the conditions set out below.

1. I am eligible for increased allotments in the next unallocated period provided that I have sufficient barn space (at 31 kg live weight per square meter (sic) or to a maximum of 35.5 kg live per square meter (sic) if I have qualified for high density) as per Part 33 Barn Space of the August 26, 2011 General Orders of the Board.
2. If I have insufficient barn space, I will be given until December 1, 2017 to provide sufficient measured space to receive the additional quota for which I am eligible. I understand that I will forfeit the amount of quota for which space has not been provided by December 1, 2017. [emphasis added]

Mr. Robbins advised he was familiar with the Part 1 – Offer (the offer) K&M signed December 12, 2016, and understood the conditions of that offer to be connected to the incentive quota granted by the Chicken Board (not his entire production). He agreed that K&M accepted the conditions of the offer of incentive quota, that the General Orders would apply to that production and he understood that the issuance of incentive quota was not conditional on any specific growing practice. He noted that the only specific growing practices that the offer requires is that barns built to grow chicken must meet the minimum standards set by the Chicken Board General Orders for bird density which his does.

25. Mr. Robbins suggested that it is a simple administrative procedure for the Chicken Board to account for the variances in production introduced by summer and fall harvesting of K&M's pasture-raised chicken and the absence of harvesting in the winter and spring within the context of BC's mainstream production. Mr. Robbins estimated that K&M's pasture-raised production amounts to one thousandth of 1% of the total mainstream production and this small portion of mainstream production would not alone cause the provincial production to fall into either over or underproduction and result in penalties at the national level.
26. Robin Smith, Chair of the Chicken Board since October 2013 and at the time of the March 2018 decision, and William Vanderspek, General Manager since 2004, provided evidence as a panel. Mr. Vanderspek explained how the allocation is set nationally by the Chicken Farmers of Canada (CFC) with BC receiving 14.5% of the total national allocation which the Chicken Board then divides pro-rata amongst the 325 or so registered producers, based on each producer's quota holdings. Typically, broilers are grown over an eight week cycle, but specialty and other mainstream birds such as roasters are grown over longer periods (up to 12 weeks or 16 weeks). Some producers produce to a five or six week cycle but the Board is required to approve anything other than the eight week cycle.
27. Mr. Vanderspek explained the Chicken Board rules requiring period-by-period compliance and their importance to supply-managed production for growers, processors and consumers. He described the over and under production rules (Parts 26 and 27 of the General Orders), advising that the growers could essentially rely on a 6% sleeve, provided that their overall annual production met its annual allotment. If a producer goes above the 6% sleeve in any one period, the producer must pay an overproduction levy and the increment of the overproduction is deducted against future production periods to bring the production into alignment for the allotment target. If under produced, the producer can produce an additional increment equal to the amount of the under production, in the next production period. Consistent under production can result in loss of allotment from the Chicken Board.
28. If BC's total production exceeds 102% of the allocation for two periods, the Chicken Board is levied a penalty by CFC. Mr. Vanderspek advised that CFC levied a \$250,000 penalty for over production in periods A-148 and A-149⁶ against BC. Individual growers are penalized if they exceed the range of 94 to 106% tolerance for under or overproduction

⁶ Mr. Robbins testified that Period A-147 had ended and period A-148 was about to begin in January. Period A-149 also would in the winter of 2018 and end in early spring of 2018.

outlined above. If no individual grower exceeded the 6% sleeve in periods A-148 and A-149, the entire penalty would come from the pool of grower levies collected by the Chicken Board, equalizing the impact on all growers. Mr. Vanderspek’s evidence is that K&M’s uneven pasture-raised production could be a factor contributing to any total over or under production.

29. Mr. Vanderspek described the two classes of quota created by the Chicken Board – mainstream and specialty. Within the mainstream class, the Chicken Board establishes a price for live chicken and also a price for organic live chicken. The Chicken Board recognizes that organic production is different from routine barn-based production which requires the Chicken Board to establish a price to reflect that difference. Producers and processors establish a price for other types of farm differentiated chicken production independent from the Chicken Board, but for Chicken Board purposes this chicken is categorized as mainstream. Mr. Vanderspek recognized that some chicken is sold and marketed based on the type of farm practice used to grow the chicken.
30. Mr. Vanderspek advised that the Chicken Board did not approve annualized production for any mainstream producers in 2018 but almost all specialty chicken production is annualized due to market demands at specific times of the year related to major festivals.
31. Mr. Smith emphasized that producers have often desired flexibility in production but noted that this flexibility, while serving the producer well, does not serve the processors or the market. In his view, the default must be period-by-period production compliance. His view is that the increase in mainstream production to K&M from the grant of incentive quota put K&M “in a conventional production” role as “we are an industry of rules and regulations”.
32. Mr. Vanderspek conceded that the Chicken Board does allow some variability regarding production cycle depending on the type of chicken a producer aims to produce. He acknowledged that a few mainstream producers grow chicken through two production cycles, for example, producing some average-sized and some larger-sized roasters.
33. About a year after receiving the additional incentive quota allocation, K&M applied to the Chicken Board on January 28, 2018, to continue to produce the 31,000 kg total annual pasture-raised production on an annualized basis. K&M included the following table in its letter of application, showing a separate accounting for the barn-raised birds (to follow period-by-period compliance) and its pasture-raised birds over three periods for which it sought relief from period-by-period compliance:

Period	Allocation	New Barn	Pasture	Total	+/-Kg	Cumulative +/- Kg	% of Allocation
147	21,376	17,000	0	17,000	4,376	4,376	20%
148	22,463	17,000	0	17,000	5,463	9,839	24%
149	22,933	17,000	0	17,000	5,933	15,772	26%
150	22,606	17,000	9,000	26,000	3,394	12,378	15%
151	20,000	17,000	9,000	26,000	6,000	6,378	30%
152	20,000	17,000	13,800	30,800	10,200	3,822	51%
153	20,000	17,000	0	17,000	3,000	822	15%
Total	149,378	119,000	31,800	150,000	+822	+822	.5%

34. The Chicken Board provided its briefing notes prepared in response to K&M’s previous requests for annualization. The 2014 note indicated that there were two other producers raising chickens on pasture but Mr. Vanderspek’s evidence is they are no longer in that business, and that one producer, larger than K&M, produces pasture-raised birds and raises chicken in barns and manages its period-by-period compliance obligations internally.
35. The Chicken Board provided copies of two briefing notes prepared in response to K&M’s 2018 request for relief from period-by-period production rules for its pasture-raised production dated January 30, 2018 and February 16, 2018, The first note recommended denying the request, advising in part:

By accepting the new incentive offer (notarized) he agreed to the terms, to comply with all aspects of the General Orders and be a “conventional farmer”; following rules such as period-by-period compliance rather than annualization, and 6% tolerance.

His barn space at 7,197 square feet can accommodate his quota of 20,000 kg at 2.88 and not at the organic density as he claims in his letter [emphasis in the original]. He did not build the barn large enough to grow 100% of his quota at a density larger than 2.88 kg/sqft. Organic density is at 1.95 kg/sqft – he could only place a maximum of 14,034 kg in the barn. He has the ability to apply for high density.

He has the ability to lease out every cycle like all other conventional growers.

He has the ability to on every contract, every period to determine the amount of self-marketed product versus product to go to his affiliated processor. ...

Staff has determined that he does not need to be annualized or receive a larger tolerance sleeve. The calculations provided do not follow BCCMB rules and are not correct.

36. The February 16, 2018 briefing note prepared after meeting with Mr. Robbins includes a table which shows how K&M could meet period-by-period compliance:

A-Period	Quota	Barn	Pasture	Lease In - to fill barn
A-1 47	20,000	20,683	0	0
A-148	20,000	20,683	0	0
A-149	20,000	20,683	0	0
A-150	20,000	5640	15,043	15,043
A-151	20,000	5640	15,043	15,043
A-152	20,000	5640	15,043	15,043
A-153	20,000	20,683	0	0
Totals	140,000	108,200	45,129	45,129

37. The Chicken Board explained that the estimates of per cycle production are based on:
- filling the barn to maximum production density (32.5 kilograms per square metre or 3.01 kilograms live weight per square foot) to enable barn production of 20,000 kg per cycle, or

leasing out about 3,000 kg for each of the four periods when only barn production takes place, dropping the density of the production on farm in barn to 17,000 per cycle,

- pasture production for three periods at about 15,000 kg per period for a total annual production of 45,000 kgs pasture production,
- barn production levels of about 5,600 kg for the three periods K&M is producing pasture raised birds, and
- a top up from leasing in barn production from another source of about 15,000 kg per period for those same three periods to bring the total barn production to just over 20,000 kg per period.

38. Mr. Smith testified that the Chicken Board considered the staff recommendation and decided that annualization of K&M's pasture production was unnecessary as summarized in the annualization decision:

Your request is inconsistent with the BCCMB General Orders and the principles of orderly marketing and period-by-period compliance....

You will be required to produce within your periodic allotment, but can adjust the percentage of range versus in-barn production each period according to the needs of your market. This can be done in advance of each period by specifying your intentions on your BC 101 contract.

I would also take this opportunity to remind you that when you accepted a significant increase to your deemed new entrant quota, that you signed an undertaking agreeing to abide by the January 26, 2011 BCCMB General Orders.

39. Mr. Vanderspek commented that during the time K&M harvested its pasture-raised birds, it could not expect to be operating its barn at full capacity, unless K&M leased in birds to ensure the barn could operate at maximal efficiency.
40. K&M sent another letter to the Chicken Board dated March 8, 2018 again requesting annualization for the pasture-raised production and indicating that K&M intends to produce free range chickens in the barn and that this production is "a different production system". K&M included the plan for production provided on January 28, 2018.
41. Mr. Vanderspek's evidence was that, other than K&M, there were no "commercial" sized producers of mainstream chicken seeking annualization. Every producer is required to have "space for" and grow the amount of chicken the Chicken Board allots each period. He conceded that the General Orders allowed the Chicken Board to exercise its discretion to adjust that rule regarding period-by-period compliance to allow for seasonal production and that if K&M had continued to grow pasture-raised chicken only, the Chicken Board would likely have annualized that production for 2018.
42. Mr. Smith also acknowledged that producers can and do differentiate production based on farm practices, but noted that this must be done within the context of the General Orders. He agreed that the General Orders were the same with respect to annualization for the years 2015 to 2017; the Chicken Board had amended the General Orders in 2014. He noted what had changed was that by 2018, the volume of K&M's production had increased substantially.

43. After confirming that the Chicken Board did not consider chicken produced on pasture to be specialty product, Mr. Vanderspek advised that he was not aware of producers in other provinces raising chickens on pasture, with the exception of those raised under permit in Nova Scotia. Mr. Smith advised that some organic production in Alberta was raised on pasture. Mr. Vanderspek noted that the General Orders do not interfere with producers who wish to raise chicken using non-conventional farm practices, and advised that one producer raised large roasting chickens for sale at Christmas time, without requesting or relying on annualization. He also noted that, in the past, a few organic producers had requested and been denied the opportunity to annualize their production. To make policy changes to the rules regarding chicken production would require a referral to the pricing and production advisory committee (PPAC). He also noted that a “processor of record” had not signed off on K&M’s request for annualization.

ANALYSIS

General Orders and Period-by-Period Compliance

44. The Chicken Board’s argument on this appeal is that the appellant’s circumstances do not require an exercise of discretion under section 22.9 relying on a number of supporting reasons:
- by accepting incentive quota, K&M ceased being a seasonal producer and became a conventional producer⁷ with an obligation to produce that chicken and meet its overall quota obligations for its entire production
 - K&M accepted the terms of the offer which require compliance with all the Chicken Board’s General Orders as a condition of acceptance which means producing to meet period-by-period production compliance.
 - the volume of barn-based production as compared to pasture-based production is at least four to five times more which makes K&M a “full fledged” mainstream producer and a “conventional” farmer
 - since there is little or no flexibility in the pasture-raised production, the Chicken Board’s expectation is that K&M should fully utilize its barn space to grow as many chickens as possible
 - the issuance of incentive quota obligates K&M to fill its barn as much as possible to offset the degree of under and over production created by pasture-based production to meet its period-by-period production requirements.
 - the fact that the barn can be utilized to avoid the need for annualization of pasture-based production is an important factor in its consideration of whether or not to exercise its discretion regarding the annualization of production.
 - if the barn cannot be used to meet period-by-period compliance, K&M should consider leasing production in and out of the barn to even out the total period-by-period production and achieve compliance by K&M.

⁷ While the terms “conventional production” or “conventional producer” are not defined by the Chicken Board General Orders, the panel understands the use the word conventional to refer to practices commonly used within the industry to raise chicken in barns, relying on the commonly used technology (for example, for feeding, watering, ventilation and lighting) and growing chicken at the densities specified by the General Orders and in conformance with other generally applicable requirements such as food safety and biosecurity requirements. Conventional chicken are often marketed with processor brands, but usually without any declarations regarding production practices.

45. The Chicken Board's position appears to be that as period-by-period compliance is a fundamental principle of supply management and because the grant of incentive quota allows the appellant to achieve overall period-by-period compliance by making adjustments to its business and production models, it is obligated to do so. These adjustments include:
- operate "conventionally" and fill its barn to the maximum density standard to produce chicken as needed in months to adjust for the absence of pasture-based production; and
 - operate its barn at a low production volume (about 30%) in the spring and summer months, to compensate for the harvest of the pasture-based production.
46. In its view, period-by-period compliance should only be departed from in a principled manner taking into account broader interests. It must ensure its national obligations through compliance with the CFC's allocation to British Columbia. By meeting this objective, the Chicken Board reasons, it will meet the objectives of sound marketing policy for all market conditions and thereby, as stated by Mr. Vanderspek, avoid payment of penalties to CFC for overproduction in 2018. This was in large part the Chicken Board's justification for its decision.
47. K&M acknowledges the importance of and need for period-by-period compliance and points out that the General Orders establish the rules that growers must meet to achieve this. K&M further submits that the rules also provide for an exception for seasonally raised chicken such as pasture-raised production, and submits that the Chicken Board should have applied these rules to K&M's pasture-raised production. K&M submits that the period-by-period compliance rules can be limited in scope by an exception, K&M's pasture-based production comes within the exception, so the scope of the period-by-period compliance should be limited.
48. There is no dispute that the Chicken Board has the authority to determine the quantity of the regulated product that shall be produced by any person and the time that any person shall produce that regulated product. It has the power to prohibit production and to revoke or reduce quota. Producing to meet quota holdings and allotments, depends on having a licence to produce. The Chicken Board has the express power to cancel a licence for violating board orders. All of these authorities are established in the Scheme and then implemented and applied to actual production through the Chicken Board's General Orders.
49. The panel acknowledges that period-by-period compliance is a pillar for stability in the supply management of chicken across Canada. Through the rules that the Chicken Board has set in its General Orders, the Chicken Board lessens the risk of BC being penalized for over or under production by CFC, which not only promotes orderly marketing, but benefits the entire industry by avoiding the payment of fines.
50. However, in this case it appears that what has transpired is that the Chicken Board, once satisfied that period-by-period compliance was possible, did not go further and consider the implications of requiring period-by-period compliance for all of K&M's production and whether there was a sound marketing policy justification for annualization. In its view, to

allow annualization in circumstances where a grower could achieve period-by-period compliance, even though the grower would have to adopt a change in production practices or make some other growing adjustments based on leasing, would be an unprincipled exception with significant consequences to BC and its ability to produce to its CFC allocation.

51. In our view, the Chicken Board erred in confining its gaze to the ability of K&M to meet period-by-period compliance. In this regard, we have been guided by two earlier decisions of this board involving a commodity boards exercise of discretion: *Jim Hong v. British Columbia Chicken Marketing Board* (October 2, 2001) and *89 Chicken Ranch et al. v. British Columbia Chicken Marketing Board* (August 3, 2001). In *Hong*, the panel accepted that past decisions of a commodity board may inform an exercise of discretion to grandfather certain production levels. In *Mundhenk*, the panel concluded that by applying a “policy against leasing” despite the fact that its own rules contained an exception to allow leasing in special circumstances, the Chicken Board fettered its discretion.
52. In a similar fashion here, the panel concludes that the Chicken Board relied on a policy of period-by-period compliance despite the fact that paragraph 22.9 contains an exception to this general rule and self-marketed and/or seasonal production are factors to be considered in determining whether to allow the exception. The Chicken Board did not consider the exception or the relevant factors as presented by K&M’s application of January 28, 2018.
53. As a result, in our view the Chicken Board engaged in a very narrow analysis and failed to turn its mind to the broader implications of its decision and whether, despite the fact that period-by period compliance was possible, there was a sound marketing policy justification to allow annualization under paragraph 22.9. It is to that issue we turn to next.

Sound Marketing Policy and Section 22.9

54. The management of supply of chicken to market as enabled by the supply management system in Canada is critical to avoiding the challenges that producers faced before supply management with uneven and non-profitable returns from a “boom and bust” approach to production. The processing sector has evolved in Canada based on a steady supply to the market and the development of period-by-period production compliance is recognized as a key element of avoiding the past challenges to producers, processors and consumers. Certainty and predictability of supply are essential to the success of the chicken industry.
55. The Chicken Board submits period-by-period compliance is the general rule to avoid the challenges of the past and to ensure certainty and predictability, and should only be departed from in a principled manner.
56. K&M’s position is that the Chicken Board should not only manage supply to ensure period-by-period compliance to avoid national penalties, it also has a responsibility to regulate in a manner that enables, or at a minimum does not interfere with, growers responding to market niches with farm-differentiated product. Contrary to the chair’s evidence at the hearing, K&M says the Chicken Board is not supporting differentiated

production at the farm level. K&M submits that where the Chicken Board suggests that a farm, developed around self-marketing differentiated product at the farm gate, should suddenly and notionally be changed to one of conventional production, is inconsistent with the Regulated Marketing Economic Policy (2004) which encourages and facilitates differentiated production at the farm level. K&M makes this argument even though K&M's allocation *could* be produced conventionally using the lowest production densities and/or relying on leasing in and out of some production.

57. The appellant also argues that encouraging farm differentiated product for market is consistent with the purposes of the *NPMA* and the 2005 specialty review which recognize the benefits of a segmented market and the advantage this can create if growers are willing to respond. K&M argues that by refusing to assess whether or not to annualize its production simply because its barn capacity at "conventional" production density standards eliminates the need to annualize production, the Chicken Board is limiting K&M's ability to pursue a new niche market to supply free range chicken to the market.
58. The panel does not question that the Chicken Board has embraced the policy directions of the 2005 specialty review, as confirmed by the more recent supervisory decision⁸, by bringing many new entrants into the chicken production industry. But the Chicken Board's performance in achieving this policy direction is not at issue in this appeal; what is at issue is whether the Chicken Board considered the policy of supporting the supply of niche markets. On this issue, the panel finds the evidence is much less clear that the Chicken Board gave sufficient weight to, or truly considered the policy direction, regarding the need for support from marketing boards to ensure that niche markets are met. The 2005 specialty review encouraged marketing boards to be innovative and flexible in their approach to rule-making to ensure that producers are not prevented from responding to market niches.
59. The panel has considered the February 2018 briefing note that provided some information to the Chicken Board for its consideration of how K&M could support two streams of farm differentiated production (pasture-raised chicken and a small amount of barn-raised free range chicken) targeted to niche markets, without annualization plus grow over half its production (as noted above in paragraphs 35 and 36) conventionally. The option the Chicken Board considered was the leasing out (for four periods) and leasing in (for three barn periods) of barn production. For this to be effective, K&M would have to cooperate with other growers whose business model was also based on a lower density production system. The panel was not provided any evidence of how likely the Chicken Board considered it would be for K&M to put such arrangements in place. Mr. Robbins' evidence was that the option would be impractical and he doubted whether K&M could find such cooperative growers, as he had no information about growers potentially interested in such an arrangement.
60. The panel finds, based on K&M's response, that in the short term this option was not immediately available to K&M and as such was not a viable option for its 2018 production. The panel also finds that this option has the potential to result in a serious reduction of the

⁸ In the Matter of the Natural Products Marketing (BC) Act and Quota Assessment Tools Supervisory Review (February 2, 2018)

planned production of free range chicken to less than half if K&M cannot find a suitable grower for 3,000 kg live weight of free range chicken for the four periods necessary to meet the 17,000 kg live weight per cycle objective.

61. On this basis, the panel concludes that the Chicken Board did not give due consideration to whether the market niches that K&M is targeting through its production practices would be met without annualization. In the absence of this consideration, it was impossible for the Chicken Board to weigh these potentially competing objectives (the need for period-by-period compliance and the need to meet niche markets) as a basis for properly exercising its discretion.
62. The reasoning in our related decision in *Mark Robbins dba K&M Farms v. British Columbia Turkey Marketing Board* (BCFIRB, December 31, 2108) is equally applicable here:
 94. In coming to this conclusion, the panel confirms that market responsiveness is part of sound marketing policy and that a grower who is supplying farm differentiated product to consumers through a modified value chain in which the farm or farmer's market is the retail centre for consumers, is responding to the market. The grower is also providing a window, no matter how small, through which customers can directly view agriculture. Many consumers might not otherwise have this opportunity. The panel finds that K&M's business objectives are consistent with BCFIRB's objectives regarding niche production and reflect sound marketing policy.
63. Making decisions that achieve sound marketing policy is a challenge. Commodity boards need to consider the statutory authority for a decision, its own rules that may be relevant to any situation, and any BCFIRB or Ministry policy directions. In this case, the Chicken Board seems to suggest that it relied on an internal policy that required it to change the nature of a grower's production from farm-differentiated to "conventional" production. The panel has reviewed the General Orders in some detail as noted above. The Chicken Board has not enacted a policy rule that requires a grower's business plan be unilaterally changed from farm-differentiated product to conventional product even if the objective of doing so has merit (such as achieving period-by-period compliance). The Chicken Board provided no evidence that such a policy exists other than relying on this "policy" in argument. In the absence of any reliable evidence that such a policy exists and confirmation the policy has been formulated through an acceptable process, the panel does not accept this argument.
64. In considering the submissions of the Chicken Board regarding the administrative burden of "accounting for" annualized production and the need to offset this burden, the panel observes that there is also an additional administrative burden in tracking leasing arrangements between K&M and other growers to meet period-by-period compliance. There is an administrative burden either way. It is not necessary for the panel to make a finding in regard to this observation but considers it in the discussion below regarding principled decision-making.

65. The panel has considered the Chicken Board's submission that K&M has acted with disrespect and disregard for the Chicken Board's authority and for the supply management system by producing chicken as if its production was annualized, outside the sleeves of tolerance, while its decision remains under appeal. The panel has also considered K&M's response that it fully expected it could rely on annualization and was not disregarding the rules. In the alternative if found to be incorrect, K&M would pay for any penalties the Chicken Board determined necessary after receiving this decision.
66. The panel concludes that both parties have been blind to each other's objectives. First, we observe that K&M had a long history of annualizing its pasture-raised production and its belief that this would continue was not unreasonable especially given that the Chicken Board does not appear to have raised the issue of annualized production being a non-starter when issuing the incentive quota. However, K&M could certainly have been more clear as to its intentions. Similarly, had the Chicken Board raised the issue of incentive quota and its impact on the need for annualization when the Chicken Board first conceptualized the offer, there was certainly time and opportunity for both parties to have a meaningful discussion around expectations. Unfortunately once the barn was built, options for K&M, at least, became limited. Finally, the panel needs to acknowledge the role our delay in issuing these reasons has caused. The uncertainty around K&M's production could and should have been resolved months ago. The panel does not want to be seen as endorsing a grower acting in disregard of the industry regulator. However, in light of our conclusion above that the Chicken Board took too narrow an approach to exercising its discretion in addressing K&M's request, we are not prepared to penalize K&M for proceeding as it did.

SAFETI Analysis

67. BCFIRB in its supervisory capacity encourages marketing boards to adopt and reflect a principled approach to decision-making. The Chicken Board has demonstrated on many occasions and during appeal hearings that it has done so through the application and documentation of SAFETI⁹. A review of a board's SAFETI analysis is most helpful to BCFIRB in determining whether or not a decision of a board under appeal results in sound marketing policy. BCFIRB has determined that a distinct advantage of the SAFETI approach to decision-making is that it encourages the decision-maker to prioritize or rank the expected outcomes of a decision to assist its considering of competing objectives or outcomes.
68. The Chicken Board suggests that a principles-based regulatory system gives rise to sound marketing policy and policies and rules established to achieve this outcome should endeavour to be effective, strategic and accountable under all market conditions (barring exceptional circumstances). In this case however, there is sparse evidence that the Chicken Board fully applied its principled regulatory base or considered and applied decision-

⁹ The "SAFETI" principles have been developed by BCFIRB in consultation with the commodity boards it supervises to support a principles based approach to decision-making by commodity boards to carry out their responsibilities SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", "Transparent", and "Inclusive".

making principles. It set a priority on the need to meet period-by-period compliance and did not consider other circumstances related to self-marketing in niche markets.

69. The Chicken Board stated in its reasons for rejecting K&M’s application for annualization
- Your request is inconsistent with the BCCMB General Orders and the principles of orderly marketing and period-by-period compliance....
70. On this basis and without hearing any other evidence from the Chicken Board, the panel concludes that the Chicken Board did not appropriately consider and apply the SAFETI principles to its decision-making regarding K&M’s application for annualization. Had it done so, the Chicken Board would have been prompted to identify all interests relevant to its decision-making and to balance these interests before coming to a decision
71. The panel discusses and applies a SAFETI analysis in the following paragraphs.
72. **Strategic:** To determine if the Chicken Board had considered whether its March 5, 2018 decision meets with its strategic directions, the panel expects the board to have considered it in the context of any overall marketing board policy directions established by the *NPMA*, relevant government goals and directions, relevant supervisory directions of BCFIRB and its strategic plan, in order to assess and determine if the decision would support its strategic priorities.
73. As the Chicken Board has consistently indicated as part of this appeal, its decision is consistent with orderly marketing and supporting this fundamental pillar of supply management through encouraging a consistent and regular supply of chicken to the market, through the requirements of period-by-period production compliance.
74. On the other hand, as K&M suggests, the Chicken Board should have considered the Economic Policy for Regulated Marketing (2004) - which supports the need for diversity in production practices and farm differentiated practices to meet market demand, and the directions of the 2005 supervisory review which encouraged marketing boards to be responsive to growers meeting niche market demands. As recently as 2018, BCFIRB through another supervisory board review¹⁰ confirmed there is a continuing objective to be responsive to niche market demands. In the panel’s view, the Chicken Board’s decision is not supportive of these directions, as it operates to reduce or eliminate one of K&M’s farm differentiated products and forces K&M into “conventional” production practices.
75. The panel notes from the Chicken Board’s 2017 Annual Report¹¹ that of its five goals, three appear to have some relevance to the situation under appeal:
- a. Implement programs that provide the opportunity for a fair return to the producers, and allow processors to be competitive in the domestic market
 - b. Implement programs that result in industry sustainability and diversity
 - c. Implement programs to promote increased production and consumption of chicken in BC. [emphasis added]

¹⁰ February 2018

¹¹ The 2018 is not yet available on the internet.

76. The second goal noted above has particular relevance as K&M's production practices of raising chickens on pasture and free range in a barn, diversify products available to consumers. Some consumers are interested in supporting farmers whose practices are in line with their personal interests and values, for example achieving environmental objectives and animal care objectives. Reducing K&M's ability to be market responsive in this regard would not be consistent with this objective of the Chicken Board's strategic plan.
77. In summary, the decision would result in the Chicken Board achieving one high priority policy objective, while not meeting the strategic directions regarding producing differentiated product to meet consumer demands for niche products.
78. **Accountable:** By requiring period-by-period compliance at the risk of losing product diversity, the Chicken Board continues to be accountable and responsible to CFC, most producers, many processors and many consumers. The panel questions however, whether the Chicken Board considered its accountability to those consumers who seek out differentiated product or the grower interested in providing the product. The Chicken Board appears to have given no weight to this aspect of accountability when the relative risk of impacting the overall production for the province to be under or over the 102% target of the rules appears low, if annualization were to be allowed.
79. **Fair:** Fairness refers to the process followed, and is not limited to common law procedural fairness. A fair process would consider the appellant's historical contribution to this niche sector of the market and determine how best to recognize and/or accommodate that contribution. These discussions could have taken place earlier to avoid the misunderstandings that arose as a result of competing and poorly understood policy objectives.
80. Based on the history of the Chicken Board successfully annualizing K&M's production to date and the size of the production involved, it appears the period-by-period variation resulting from annualization has not resulted in over or under production. Admittedly when K&M first applied for annualization its seasonal production was very small. This has changed over the years to about 30,000 kg per year which is unlikely to increase. The Chicken Board did not give any weight to the fact that it had for several years previously applied its discretion to annualize K&M's seasonal production and what the impact of this decision would be on its business model.
81. This underscores the need for the Chicken Board to adopt and apply policy after consultation to ensure transparency and inclusivity to avoid surprises. It is clear that K&M did not appreciate that the Chicken Board was taking the position that as period-by-period compliance was possible with the issuance of incentive quota, annualization was off the table until close to the time it was preparing to submit its application. The panel expects the Chicken Board to include its constituents in a policy making process.

82. **Effective:** It is without question that the decision supports an objective of supply management for orderly production. The downside is that it will result in less farm differentiated product reaching the market and for this objective, the outcome was ineffective.
83. K&M argued that its seasonal production is sufficiently small (one one-thousandth of 1% of the total British Columbia chicken production), that any adjustments necessary to absorb this over the seven periods in a year would be minor and perhaps not require any coordination by the Chicken Board with other growers to achieve this outcome.
84. The panel agrees that the amount of production that is to be annualized is a relevant factor for consideration in determining the effectiveness of the decision and it appears without any evidence to the contrary, that this size of adjustment could be absorbed resulting in a penalty situation arising. There may be a point at which seasonal adjustments cannot be made because they are of a size that is not absorbable and there is no public interest related with the request for annualization, however, this is not the case with the 2018 request for annualization.
85. Another way to consider effectiveness is to consider the administrative or management burden the decision places on each of the parties. The decision would result in a shift in administrative burden on the Chicken Board from tracking the seasonal production variability in the context of BC's production status for each period to tracking any leases that K&M might enter into to achieve its outcomes.
86. K&M would be required to change its production practices in barn for at least four allotment periods which may have implications for the operation of the barn at lower levels of production density. This may raise biosecurity concerns.
87. **Transparent and Inclusive:** Had the Chicken Board undertaken this analysis during its deliberations, it could have revealed serious flaws in its decision-making. This may have caused the Chicken Board to fully evaluate how it planned to exercise its discretion regarding K&M's application for annualization and to seek better guidance on the full scope of relevant considerations to take into account before making its decision.
88. While elements of some principles (strategic, accountable, effective) can be met by adopting and implementing the Chicken Board's decision, the panel concludes that the other principles will not be met in any meaningful way. The Chicken Board needs to ask itself if meeting the strategic priority of avoiding penalties through period-by-period compliance alone outweighs the drawbacks associated with not meeting the strategic goals related to differentiated product and consumer demands for niche products, fairness principles associated with outcome or process, effectiveness, transparency and inclusivity.
89. On the basis of the foregoing analysis and discussion, the panel concludes that had the Chicken Board applied a similar analysis, its decision regarding K&M's 2018 application for annualization of its self-marketed seasonally produced chicken, could very well have been different.

ORDER

- 90. The panel orders that the Chicken Board annualize K&M’s seasonal production for the 2018 production year. The panel is mindful of the lengthy delay in releasing these reasons, which is in no way the fault of the parties, and as a consequence, the panel orders that annualization for K&M’s seasonal production extends to the 2019 production year.
- 91. In future years, the Chicken Board is to consider any request for annualization in the context of a full application of its orders, including a consideration of whether it is consistent with sound marketing policy to apply its discretion in accordance with section 22.9, Part 22, taking into account whether the applicant is a self-marketer of seasonally produced chicken.
- 92. The panel’s expectation is that any future Chicken Board decision made in response to a request for annualization under section 22.9 will be supported by a fulsome SAFETI analysis.
- 93. Having made the order that the appellant is entitled to annualization of its pasture-raised production for the years 2018 and 2019, K&M should not be subject to over or under production penalties for this period of time. The Chicken Board is directed to release any funds K&M may have paid in the nature of over and under production penalties due to its annualized production.
- 94. There is no order as to costs.

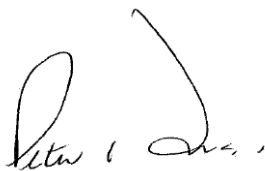
Dated at Victoria, British Columbia this day of May 17, 2019

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Daphne Stancil, Presiding Member



Peter Donkers, Chair



Al Sakalauskas, Vice Chair