

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION REGARDING PAYMENT FOR SPECIALTY PRODUCT
(#04-06)

BETWEEN:

FAIRLINE DEVELOPMENTS (1992) LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Christine J. Elsaesser, Vice Chair
Satwinder Bains, Member
Garth Green, Member

For the Appellant
Fairline Developments Ltd.

Alan Leung, Director
Roger Fuller, Consultant

For the Respondent

John J.L. Hunter, Q.C.
Bill Vanderspek, General Manager

Location of Hearing

Abbotsford, British Columbia

Date of Hearing

October 13, 2004

INTRODUCTION

1. On June 1, 2004, two specialty processors, Fairline Developments (1992) Ltd. (“Fairline”) and Wingtat Game Bird Packers (“Wingtat”), and one specialty producer, Bradner Farms Ltd. (“Bradner”), collectively appealed a decision of the British Columbia Chicken Marketing Board (the “Chicken Board”) to pay specialty producers the domestic live price for chickens rendered as a result of the Avian Influenza (“AI”) outbreak.
2. In the time between the filing of the appeal and this hearing, Bradner and Wingtat withdrew their appeals and Fairline alone proceeded to a hearing in front of the British Columbia Farm Industry Review Board (the “Provincial board”) on October 13, 2004.
3. Fairline operates a small chicken processing facility in Richmond. It has arrangements with a number of specialty chicken growers who operate under the Chicken Board’s specialty permit program. Under this program, specialty growers have a permit to produce up to 500 birds/week. These growers in turn supply Fairline with Taiwanese and Loong Kong chicken, selectively bred birds that are more labour intensive to grow. They require special vegetarian feed and more barn space than the traditional broiler chicken and take considerably longer to produce.

ISSUE

4. The issue on appeal was initially stated as whether the Chicken Board erred by not paying specialty growers full market value for specialty product rendered during the period March 29 to April 10, 2004? However, on appeal Fairline’s real issue was whether it should have received full market value for the specialty product it contracts with permit growers to produce?

FACTS

5. In February 2004, the Fraser Valley experienced an outbreak of AI. In order to control the spread of the disease throughout poultry operations in the valley, the Canadian Food Inspection Agency (“CFIA”) established a Control Zone encompassing the entire Fraser Valley. The CFIA placed stringent restrictions on the movement of fresh and frozen chicken out of the Control Area.
6. Approximately 90% of BC chicken production was grown within the Control Zone. However, as only about one-half to two-thirds of this chicken was sold within the Control Zone, the amount of chicken produced exceeded that which could be marketed in the Control Zone. The excess product was initially placed in cold storage until cold storage capacity was exceeded. Ultimately, the decision was made to send market ready chicken to a rendering plant.
7. The four major processors had come in desperation to the Chicken Board. There was chicken that needed to be picked up, no cold storage facilities and limited ability to market chicken. This was an unprecedented situation for the chicken industry. The Chicken Board

felt compelled to act in order to avert a serious animal welfare issue. On March 28, 2004, the Chicken Board entered into an agreement in principle with the major processors and the British Columbia Broiler Hatching Egg Commission whereby processors agreed to continue to take and process product while efforts were made to curtail chicken production in the longer term (this was before the AI spread and CFIA ordered a general depopulation), paying growers for any product actually marketed. However, the Chicken Board agreed to pay processors a \$0.40/bird cost recovery fee for any product sent to the rendering plant.

8. On March 29, 2004, the Chicken Board announced its program to compensate growers the “full live weight value for the flock processed, whether the birds were eviscerated or not.” Under this program, compensation was based on the type of production rendered according to the Chicken Board’s minimum price schedule. Under this program, specialty growers would receive the minimum price for broiler production, as no Chicken Board price existed for any class of specialty chicken. The Chicken Board was mindful of the concerns of specialty growers stating:

Specialty growers that were brought into supply management in the last few years have been hit very hard since many were exporting live and whole birds to the US. With this market now cut off as an export destination these growers and stakeholders have taken radical measures including eliminating flocks, destroying eggs and radically reducing their exposure. The Board intends to work with these producers to also assist them in this time of deep crisis.

9. In 2002, the Chicken Board had held exploratory discussions with specialty producers regarding establishing a minimum Chicken Board price. The intent of those discussions was to develop a pricing schedule for specialty birds that could be incorporated in Chicken Board pricing orders. On occasions since, Fairline and other specialty growers have provided the Chicken Board with documentation confirming the higher cost of production for specialty chicken as a result of longer cycles, higher feed costs and higher cull rates. However Chicken Board efforts to establish a set price for specialty chicken were unsuccessful.
10. On March 31, 2004 representatives of two specialty processor/growers (Fairline and Wingtat) met with Chicken Board Acting General Manager Bill Vanderspek to discuss their concerns respecting AI and its impact on the specialty business market. During this meeting, Mr. Vanderspek confirmed that the Chicken Board planned to assist growers until compensation was received from the federal and provincial governments and under the program all growers would receive Chicken Board price.
11. On April 6, 2004 Fairline faxed the Chicken Board a document confirming its sales of Loong Kong chicken and its associated costs of production. Fairline estimates the cost of production for specialty birds grown for them to be \$4.71/bird (\$2.45/kg).
12. On April 8, 2004 the Chicken Board notified all growers that it lacked the financial resources to continue with the live weight compensation program announced earlier. Growers were informed that the CFIA would carry a large part of the costs of compensating growers going forward.

13. On May 4, 2004, the Chicken Board sent Fairline a letter outlining the compensation program for their rendered product stating:

Although the specialty processors were not part of the discussions surrounding the original agreement, they were made aware of it. Therefore consistent with compensation given to other chicken growers, the Board has issued compensation to several of your growers. The names of the affected growers and payment information is attached as a separate document. Prices for compensation have been based on the regular price for chicken. Consistent with the March 28 agreement, no claims for compensation for rendered product or destroyed chicks will be considered if they occurred after April 2, 2004.

14. As a result, a Fairline grower, Johanna Van Ginkel was credited with \$6,182.12 in compensation against outstanding production penalties.
15. On May 6, 2004, a meeting was held between Alan Leung, David Leung, and Roger Fuller representing Fairline and Mr. Vanderspek and Christine Rickson of the Chicken Board staff to discuss compensation issues. The notes from this meeting indicate that the Chicken Board agreed to extend their compensation program for specialty growers to two weeks, starting March 29 and April 5, 2004, and that Fairline was satisfied with this (regular quota holders were to be compensated for the March 29 week only). Fairline was not happy with specialty growers only receiving the broiler price and wanted more compensation. Mr. Vanderspek asked Fairline to set out the compensation paid by CFIA for a flock of Fairline's ordered destroyed. The meeting notes indicate that no assurances were given on further compensation.
16. Mr. Vanderspek sent a further letter to Fairline on May 11, 2004 confirming that after review, the Chicken Board had decided not to amend its policy regarding payment to growers for rendered product and as such the regular broiler price in effect at the time birds were rendered would be paid.
17. On May 12, 2004, Fairline submitted further information to the Chicken Board. In this letter, David Leung, President of Fairline again asserts that specialty production should be compensated at higher rates. In addition, he asserts that as the Chicken Board was well aware that Fairline grows chicken under a "special farming method" and among other things "the property right of the product belongs exclusively to our company", it is only fair that any compensation paid by the Chicken Board should be paid to Fairline and not its growers. Mr. Leung calculated that the amount paid to Ms. Van Ginkel was too low and should in fact be \$17,343.60 if true market value is considered.
18. At the hearing, Fairline contended that at the May 6 meeting with the Chicken Board they were told that if they submitted proof of payment by the CFIA "with the actual bird value to market age" that the Chicken Board would reconsider compensation levels for specialty growers. Fairline submitted documentation on May 21, 2004 confirming that CFIA compensated Fairline at paid \$4.94/bird.
19. Michel Maurer, then Chair of the Chicken Board, replied to Mr. Leung on May 25, 2004 advising of the outcome of discussions at the May 19 Chicken Board meeting, stating in part:

1. ...The BCCMB paid you the 40 cent/bird for product rendered for the week of March 29 – April 3, 2004. Further the Board extended this payment to include the following week of April 4-10, 2004, which was after the agreement was no longer in force.
 2. Again Fairline must realize that any personal business arrangements made with permit holders is not recognized by the BCCMB. There are no property rights or contract growing fee rights between processor and grower that are recognized by the BCCMB. A permit is issued to an individual who must meet the requirements as stated in the Board's Regulations (now General Orders). A permit holder must own land in "fee simple" and is the "registered grower" assigned to the permit. As such all rights to compensation belong to the permit holder and not the processor. If a grower wishes to make alternate arrangements respecting compensation, they may approach the Board to change the arrangement. The only right the processor has respecting a permit holder is through the business plan, which contains a promise to ship product to the processor until the arrangement is changed by mutual agreement or order of the Board.
 3. The price for compensation is based on the regular Board price for chicken. Historically, price-setting discussions for TC and silkie chicken did occur. The former GM asked specialty processors to provide data and attempt to come up with a formula for discussion. In the interim, the Board received assurance that all growers were being paid as per the Board's orders the minimum live price for chicken...Discussions respecting a formula for pricing did not come to fruition, as the former GM did not receive much, if any, input from the processors...In absence of such an agreement, the Board is not comfortable with any settlement beyond the domestic live price...
 4. Fairline, the processor is not entitled to the payment of grower compensation. The Board compensates growers for rendered product, as they are the holder of the permit. To change this arrangement, the Board would have to receive in writing requests from individual growers asking to have their compensation sent to a third party.
20. In response to Mr. Maurer's letter, three of Fairline's growers, Bill Friesen/Lillian Fehr, Jim Hong and Casey Van Ginkel (on behalf of Johanna Van Ginkel) signed special declarations stating that all compensation payments in relation to their chicken growing service should be sent to Fairline.

DECISION

21. Fairline seeks to be compensated for the "true market costs" of specialty chicken grown for it by three permit growers, Mr. Friesen and Ms. Fehr, Mr. Hong and Ms. Van Ginkel. These three growers are permit holders under the Chicken Board's specialty program and as such have the right to produce up to 500 birds/week depending on the terms of their particular permit. Fairline is also a specialty chicken grower. However, it does not here seek to be compensated for any specialty chicken which it grew and which was subsequently rendered. Fairline's specialty chicken flock was ordered destroyed by CFIA and it has been properly compensated.
22. Fairline also does not seek compensation under the Chicken Board's program by which processors received \$0.40/bird for any birds which they picked up, did not process and sent for rendering.
23. Fairline here asserts that the Chicken Board must recognise its "special farming method" by which Fairline pays growers a husbandry fee of \$1.29/bird to raise specialty chicken and by which Fairline pays all costs and expenses related to medication, feeds, debeaking, sexing

and catching while retaining a property right in the birds. Fairline asserts an entitlement to compensation by virtue of this “property right”.

24. As to the amount of compensation, Fairline asserts that it is entitled to the true market value of the specialty birds. CFIA paid Fairline \$4.94/bird. In its May 12, 2004 letter to the Chicken Board, Fairline estimated the true market value of a specialty bird at \$8.99/bird. Alan Leung’s evidence was that the cost to raise a Loong Kong bird was slightly in excess of \$5.00/bird. When asked to estimate the compensation sought, Mr. Fuller calculated a differential between what CFIA paid and what the three growers were actually paid by the Chicken Board. According to Mr. Fuller, the three growers received \$1.24/kg or \$2.48 /bird. Given that the three growers produced 20,000 birds ($20,000 \times \$2.50 = \$50,000$), he estimates that approximately \$50,000 remains outstanding.
25. The Chicken Board maintains that they do not recognise contract-growing arrangements. By virtue of its General Orders, the Chicken Board must deal directly with the registered growers who are in this instance, the permit holders. The permit holders have not taken issue with the compensation received. In this case, this is not a surprise as the compensation they received was considerably more than the husbandry fee paid by Fairline. The three growers have subsequently signed declarations to the effect that if this Panel determines that anything remains owing by way of compensation, payment is to be directed to Fairline.
26. The Chicken Board argues that Fairline must fit within the rules of orderly marketing. There is no basis to confer compensation on Fairline. A person cannot choose the aspects of orderly marketing that he will conform to and those that he will not. Contract growing is not allowed under Chicken Board General Orders. It is a practice that has been frowned on in the past and the Chicken Board has attempted to clarify for Fairline the relationship between grower, processor and the Chicken Board Orders and the responsibilities of each of the parties.
27. The Panel notes that there has been ongoing discussion in the BC chicken industry regarding specialty production and how to properly fit that part of the business into the supply management system. We heard considerable evidence of discussions and submissions to the board from specialty growers and processors regarding the unique aspects of their business. The nature of this evidence satisfies the Panel that the Chicken Board and its staff were and are aware of issues unique to the specialty sector. There is an awareness on the part of the Chicken Board and its staff that establishing specialty pricing is an important issue. The Serecon report was in fact commissioned to provide concrete information that could be used as a basis for the Chicken Board policy pertaining to the specialty sector.
28. Mr. Vanderspek testified that developing general orders for specialty production was a priority for the Chicken Board before the AI crisis derailed the process. On the basis of the evidence at this hearing, it would appear that the Chicken Board was well on its way to developing a specialty policy. This work has continued as part of the ongoing specialty review in which all commodity boards are participating. We recognise however, that it is the failure of the Chicken Board to develop a comprehensive specialty policy has directly led to this appeal. We understand how circumstances intervened and derailed this consideration,

but we also want to emphasise that the Chicken Board must continue its work to develop a specialty policy without any further delay.

29. As for the issues on appeal, the Panel is not satisfied that the Chicken Board erred in not paying Fairline compensation for the full market value for specialty product rendered the weeks of March 29 and April 5, 2004. Fairline has shown no basis in law to make such a claim. Further the Panel is not satisfied that the Chicken Board erred in not paying specialty growers the full market value for specialty product rendered during this period. Several factors have influenced our decision:
- a. The outbreak of avian influenza was a catastrophe for the chicken industry in the Fraser Valley in BC. The repercussions were immense and no aspect of the business was untouched. Hatcheries, growers, processors, feed companies, and retailers were all affected. The effects of the outbreak impacted the industry nationally and internationally. Governments at both levels were deeply involved. The Chicken Board found itself at the centre of that storm. Events developed rapidly and decisions with potentially long-term ramifications were made hourly. Board members and staff were in a response mode only, for several months after AI was discovered. In these circumstances, the Chicken Board decided to make an *ex gratia* payment to assist growers. In looking at the adequacy of payment, the Panel finds that the Chicken Board's actions were fair and reasonable in all the circumstances.
 - b. While Chicken Board pricing orders acknowledge six classes of chicken, virtually all chicken is grown under the Broiler category. The Chicken Board does not have a category, or categories, for specialty pricing in its orders. The reason that no minimum pricing category exists for specialty chicken is at least in part due to a reluctance on the part of specialty processors to supply the necessary data to the Chicken Board. While the Chicken Board could have opted for some other basis for paying growers, the Panel is not prepared to interfere with the method ultimately chosen by the Chicken Board.
 - c. The Chicken Board retained Serecon Consulting in 2003 to assist in the development of a comprehensive policy with respect to specialty production. The Serecon Report has provided valuable input into the ongoing specialty review. Had AI not occurred, the Serecon Report would have provided a basis for a comprehensive specialty production policy incorporating a pricing schedule that recognises the additional costs associated with specialty production.
 - d. There was no obligation on the Chicken Board to provide any compensation for growers or processors affected by AI. (This would especially apply to specialty growers if their exemption from regulation had not been rescinded in 2000.) However, the Chicken Board moved quickly to try to mitigate the negative impacts caused by AI. The impetus for the program was provided out of a heartfelt concern for the welfare of the industry and its individual participants. There was no legal requirement to act.

- e. The compensation program was not intended to be a cost of production program. It was designed to provide some financial relief to affected growers who would not be able to market their product in the normal manner.
- f. The current absence of a specialty pricing order puts the Chicken Board in a difficult situation. To provide compensation at a higher rate than the live broiler price in the orders would be to essentially create specialty policy on an *ad hoc* basis. Policy created under such circumstances is not likely to be either sufficiently thorough or well considered and is likely to be the subject of criticism and appeal. In the past, the Chicken Board has been criticised by the Provincial board in circumstances where it chose to act in an *ad hoc* manner instead of taking a considered approach, involving industry participants in a consultation process before creating new policies.

ORDER

30. The appeal is dismissed.

31. There will be no order as to costs.

Dated at Victoria, British Columbia, this 15th day of June, 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Satwinder Bains, Member

Garth Green, Member