IN THE MATTER OF THE
*NATURAL PRODUCTS MARKETING (BC) ACT*
AND
APPEALS FROM DECISIONS CONCERNING THE ALLOTMENT
OF SPECIALTY PERMIT

**BETWEEN:**

FARMCREST FOODS LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD

**RESPONDENT**

**AND:**

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

**INTERVENOR**

# DECISION

**APPEARANCES BY:**

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| For the British Columbia Marketing Board | Mr. Ross Husdon, Chair<br>Ms. Satwinder Bains, Member<br>Mr. Richard Bullock, Member |
| For the Appellant | Mr. Christopher Harvey, QC, Counsel |
| For the Respondent | Ms. Sarah P. Pike, Counsel |
| For the Intervenor | Mr. Rick Thiessen, President |
| Place of Hearing | Richmond, British Columbia |
| Dates of Hearing | December 10-11, 2002 |

## INTRODUCTION

1. On August 15, 2000, the British Columbia Chicken Marketing Board (the "Chicken Board") enacted new policy rules that it termed "Regulations". As part of these new policy rules, the Chicken Board created a New Entrant, Niche Market and Specialty Program to replace the former Niche Market – Specialty & Organic Chicken Supply Program.

2. The Appellant, Farmcrest Foods Ltd. ("Farmcrest") is a registered broiler producer operating in Salmon Arm, British Columbia. Farmcrest also has an integrated hatchery and processing operation. Since March 2000, it has produced chicken under a specialty permit, as opposed to quota, authorizing it to produce 5000 chickens per week. This production was fully grandfathered under the Chicken Board's August 2000 policy rules.[1]

3. In its capacity as a processor, Farmcrest saw a market for significantly more birds than it had permission to produce, and so sought increases in its permit levels in 2001 and 2002.

4. By letter dated February 21, 2002, the Appellant applied through counsel to the Chicken Board for an increase in its specialty permit to 10,000 birds per week. However, in its letter dated March 18, 2002, the Chicken Board confirmed its earlier positions and denied the request for an increased specialty permit. By letter dated April 8, 2002, Farmcrest appealed the Chicken Board's March 18, 2002 decision refusing to increase its specialty permit (the First Appeal).

5. By letter dated June 28, 2002, the Appellant applied through counsel to the Chicken Board to increase the percentage of quota that it could purchase under the new Specialty Program without reducing its existing permit level and to request a waiver of over production penalties due to special circumstances.

6. By letter dated July 9, 2002, the Chicken Board advised the Appellant that while it would not approve its request to purchase up to 30% of its permitted production each year without reduction, it would allow the purchase of 10% of its permitted production as quota each year without reduction in permit levels. The Chicken Board advised that it was not prepared to waive over-production penalties owed by Farmcrest.

7. By letter dated July 30, 2002, Farmcrest appealed the Chicken Board's July 9, 2002 decisions to restrict its annual purchase of quota to 10% and to enforce over-production penalties (the Second Appeal).

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[1] These grandfathering provisions were discussed in our earlier appeal *Ponich Poultry Farm Ltd. v. British Columbia Chicken Marketing Board* (December 17, 2001), appeal dismissed *Ponich Poultry Farm Ltd. v. British Columbia Marketing Board*, [2002] BCSC 1369.

## ISSUES

8. At the pre-hearing conference, the Appellant maintained that the Chicken Board's August 15, 2000 policy rules were *ultra vires* and invalid for lack of authority in the *Natural Products Marketing (BC) Act* ("the "*Act*") and the *British Columbia Chicken Marketing Scheme, 1961* (the "*Scheme*"). However, as the Chicken Board conceded that it still had discretion under the new policy rules to raise permit levels; the Appellant did not pursue this issue on appeal.

9. The remaining issues on appeal are as follows:

**First Appeal**

a) Should the Chicken Board increase the base allotment of specialty permit production to the Appellant from 5000 to 10,000 birds/week to maintain its processing viability in terms of overall production and to ensure the Appellant has a sufficient supply of local production?

**Second Appeal**

b) Was it unfair and unreasonable for the Chicken Board to refuse the Appellant the right to acquire up to 30% of its permit production as quota each year without reduction of its permit?[2]

c) Was it unfair and unreasonable to refuse to waive the Appellant's overproduction penalties for period A-45 forward?

## FACTS

10. In January 1998, Mr. Richard Bell, a principal of Farmcrest, received a permit to grow 1000 birds per week under the former (pre-2000) Specialty Program. In addition, four family members received 1000 birds/week permits. A permit fee of 15 cents for each 1.929 kgs live weight marketed was paid. This chicken was grown in Chilliwack.

11. In 1999, the Appellant acquired a broiler production farm in the interior of British Columbia near Salmon Arm with the intention of establishing an integrated hatchery, production and processing operation. In November 1999, Farmcrest began placing birds in its facilities.

[2] The Appellant did not press this issue on appeal. Instead, its position appeared to be that acquiring any quota was prohibitive and not in keeping with its business model. This issue will be discussed in more detail later in this decision.

12. By letter dated November 24, 1999, the Chicken Board advised all specialty permit holders that "effective December 19, 1999 all permits issued for specialty production will be at a cost of $0.30 per 1.929 kgs. live weight".

13. In January 2000, the Chicken Board issued hatchery and processor licences to Farmcrest. Following meetings with Mr. Bell in Salmon Arm on February 18 and February 19, 2000, then Production Manager of the Chicken Board, Mr. Jim Beattie, sent copies of the *Act*, the *Act's Regulations* and the *Scheme*, as well as the existing guidelines for the Specialty Program, to Mr. Bell. Included with this information was an application for a specialty permit. Mr. Bell was advised that the specialty program was under review and subject to change.

14. In March 2000, the Chicken Board issued a 5000 birds/week specialty permit to the Appellant. After the issuance of the specialty permit, the Appellant and the Chicken Board had a number of disputes concerning the amount of the permit fee and the fee payable on over-production of the permit amount. The dispute over the fee arose when the Chicken Board began to assess the Appellant the new permit fee of $0.30/bird (1.929 kgs) rather than the $0.15 fee charged under the former program. The Chicken Board sent letters to the Appellant on April 12, April 26 and May 4, 2000 requesting slaughter information so that the permit fees could be assessed.

15. On May 11, 2000, the Chicken Board invited Mr. Bell to a meeting with other speciality growers to discuss specialty production in BC. Mr. Bell attended that meeting but in his opinion no meaningful discussions took place. The then Chair of the Chicken Board suggested that individual meetings could be conducted to obtain grower input, however to Mr. Bell's knowledge, no subsequent meetings were held.

16. Effective August 15, 2000, the Chicken Board introduced its new policy rules providing for comprehensive regulation of the chicken industry. The Chicken Board created a New Entrant, Niche Market and Specialty Program, the purpose of which was to formalise specialty production under permit by turning it into quota production after a 12 year period (Part 43). In addition, the new Program allowed for flexibility in addressing market place requirements for different types of regulated product by allowing permit production in the amount of 500 birds/week to allow producers to test the viability of their product. The Appellant's production was fully grandfathered under the August 15, 2000 policy rules at its 5000 birds/week permit level, 10 times above the new permit levels.

17. On September 26, 2000, counsel for the Chicken Board wrote to the Appellant advising of the total outstanding permit fees and demanding payment by October 3, 2000. Failing payment, the Chicken Board advised that it would suspend the specialty permit and order the Appellant to cease production. A copy of this letter was also sent to the Appellant's bank.

18. On November 10, 2000, as no resolution had been reached on the outstanding permit fees and over production, the Chicken Board commenced an action in the Supreme Court of British Columbia. This dispute was ultimately resolved by way of a settlement agreement entered into between the Chicken Board, Farmcrest, Mr. Bell and Mr. Alan Bird (another principal of Farmcrest) on April 5, 2001. The Chicken Board agreed to accept a lower permit fee of between 18 and 20 cents/bird (depending on the time frame), and Farmcrest agreed to pay outstanding fees in the amount of $49,145.82 by April 30, 2001 or at such time it received its GST refund from Canada Customs and Revenue Agency, whichever came first.[3]

19. The Appellant failed to live up to the terms of the settlement agreement and did not pay its outstanding permit fees by April 30, 2001. It also failed to provide chick placement or shipment reports. On June 11, 2001, the Chicken Board again wrote to the Appellant advising of the breaches of the settlement agreement and to advise that it was considering revoking its processor, hatchery and grower licences.

20. In response, on July 5, 2001, counsel for the Appellant confirmed that all outstanding placement and shipment reports had been provided and that Farmcrest was in receipt of the outstanding GST monies from CCRA. Farmcrest requested that upon payment of the outstanding fees, the Chicken Board increase its permit to 9000 birds/week.

21. On July 11, 2001, the Chicken Board wrote to Farmcrest and advised that based on its reported production up to June 28, 2001, $70,139.16 was due and owing. The Chicken Board also advised that Farmcrest was significantly over-produced and that "production beyond the issued permit must be made up and is subject to penalties as per the August 15, 200 (sic) Regulations".

22. On July 20, 2001, counsel for the Chicken Board wrote to counsel for the Appellant advising that the Chicken Board was "extremely dismayed" that Farmcrest was attempting to connect the payment of outstanding settlement funds and invoices to the issuance of a new permit. The Chicken Board rejected the request for an increased permit and advised that if additional production was required, there were other options including:

    1. the purchase of quota;
    2. establishing a business relationship with a new permit grower; or
    3. requesting product through the allocation process which exists for large and small processors.

23. On July 29, 2001, Farmcrest formally applied under the new policy rules for a specialty permit for 9000 birds/week. On July 31, 2001, the Chicken Board issued a permit for 5000 birds/week effective August 15, 2000. Farmcrest did not appeal

[3] It should be noted that under the former Specialty Program, the Chicken Board had been inconsistent in the fees charged to growers - some were charged 15 cents/bird others 30 cents/bird. In coming to this agreement, the Chicken Board also resolved the amounts owed by these other growers.

the level of the permit at the time it was issued, intending to work with the Chicken Board to obtain the added production required. However, this process proved unsatisfactory.

24. On September 11, 2001, the Chicken Board again discussed Farmcrest's request for additional permit production. The minutes of the meeting reflect the following comments from the Chicken Board's General Manager, Mr. Beattie:

- the farm could receive production from the allotment process;
- the location of the farm in the Interior presents issues around supply particularly since Colonial Farms Ltd., a large Interior processor, has in the past requested more production from growers in the Interior than the amount of quota available;
- Farmcrest's request creates an additional burden on Interior supply; and
- some product could be procured from new permit growers in the region.

25. On September 25, 2001, the Chicken Board wrote to Farmcrest advising it of its September 11, 2001 decision set out in the following motion:

> Farmcrest may only grow up to the level of the 5000 bird permit the Board has issued and Farmcrest is liable for all applicable over production penalties prescribed in the Regulations. Additional production required to meet current needs and growth in the future is to come from other registered growers through the allotment process.

26. The Chicken Board also advised that it did not view the transport of product from the Fraser Valley to Salmon Arm any differently than transport from Vancouver Island to processing plants on the Lower Mainland. However, the Chicken Board did recognise that "the issue of the safety of birds in the depth of winter is a matter which must be addressed". Farmcrest did not appeal this decision within 30 days.

27. Farmcrest remained behind in the payment of its permit fees. According to the Chicken Board's letter dated February 14, 2002, the amount of outstanding levies to the end of January 2002, based on $0.18/kg, was $34,410.12.[4]

28. On January 31, 2002, the processors had their "huddle" to allocate production for period A-45. Due to bad weather, Mr. Bell did not attend this meeting to give input about his processing requirements. However, Mr. Bell did contact the Chicken Board, and his requirements were conveyed to the other processors by Chicken Board staff. By fax dated February 1, 2002, the Chicken Board advised Farmcrest that Lilydale Foods Ltd. had 96,046 kgs of product available from four growers, one of which was from Vancouver Island. As Mr. Bell felt it was unreasonable for the Chicken Board to require Farmcrest to pick up birds from the Lower Mainland

[4] The Chicken Board later acknowledged that this amount is incorrect as the fee charged should have been based on $0.18/bird not $0.18/kg. However, this did not change the fact that Farmcrest was still behind in its payment of fees.

and even more unreasonable to require it to pick up birds from Vancouver Island, he refused to pick up any of the offered product.

29. On February 21, 2001, counsel for the Appellant wrote to the Chicken Board advising of Farmcrest's difficulties in obtaining enough production to meet its processing and marketing requirements and pointing out the impracticality of an allotment from the Lower Mainland as transport could jeopardise Farmcrest's SPCA humane designation.[5] To remedy this situation, Farmcrest requested a further permit of 5000 birds/week.

30. On March 18, 2002 the Chicken Board responded as follows:

> Farmcrest Foods Inc. chose its' (sic) location and type of operation aware that chicken is a fully regulated product. Farmcrest has been supported and treated equitably by the BCCMB.
>
> Farmcrest, without discussion or permission, in a period when the Board was forced to repeatedly request placement and slaughter data from Farmcrest, began producing twice as much chicken as its' (sic) permit allowed. This additional production has given Farmcrest unfair advantage over other growers and processors in British Columbia. Despite this unilateral increase in production, the Board recognized Farmcrest's growth and decided to allow this level of production to continue until the end of A-44. In A-45 Farmcrest was to produce the regulated product within the limits of its' (sic) permit and to participate with other processors in the Board's product distribution process designed to permit processors to acquire additional product. Farmcrest, as a result of its' (sic) failure to fully participate in the process by attending the meeting of the processors was unable to put its' (sic) specific needs on the table. Wendy Baker, Richard Bell and Board staff discussed these matters and once again the Board indicated a willingness to assist. Following that meeting there were no attempts by Farmcrest to speak to staff, the Board or the other processors in order to obtain product in a manner consistent with Board policy.
>
> Farmcrest refuses to purchase the product it requested, primarily because it does not wish to transport product from the lower Mainland. It must be noted that Processors in British Columbia and across the western provinces transport birds significant distances on a year round basis in a safe and humane manner. The Board, in deference to your client, gave Farmcrest the summer season to begin its' (sic) participation in the process.

31. The letter reaffirmed the Chicken Board's position that it would not increase Farmcrest's permit and that it expected Farmcrest to obtain increased production for processing through the allotment process. Farmcrest was referred to Part 43 of the August 15, 2000 policy rules dealing with the purchase of quota where s. 218, at the time, stated:

> If a grower wishes to exceed the production stipulated in the permit, the grower must acquire quota on the market. Any purchase of quota beyond industry growth will result in the reduction of the level of the permit in an equal amount.

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[5] As for the special designation, Farmcrest has received BC SPCA Labelling and Certification for approximately 7-800 birds/week (that portion which was free range). Farmcrest anticipates that the entire production facility would receive SPCA certification (even the non-free range birds) early in 2003. To obtain the SPCA Certified labelling the hatchery, production unit and processing facility must meet approved standards.

32. Farmcrest was also advised that the Chicken Board was carrying out a review of the policy rules and that it may wish to make oral or written submissions.

33. On March 21, 2002, counsel for the Appellant wrote to the Chicken Board requesting confirmation that the Chicken Board's March 18, 2002 letter denied the Appellant's February 21, 2002 request for an in increase in Farmcrest's permit. The Chicken Board confirmed this by way of its March 27, 2002 letter.

34. By letter dated April 8, 2002, Farmcrest appealed the Chicken Board's March 18, 2002 decision refusing to increase its specialty permit to the BCMB (the First Appeal).

35. On May 14, 2002, the Chicken Board applied to the Supreme Court of British Columbia for an order restraining and enjoining Farmcrest from producing chicken in excess of 40,000 birds in an 8-week cycle. To resolve the issue, the Chicken Board proposed that Farmcrest consent to the restraining order on the condition that it be given permission to purchase quota annually up to 10% of its permit levels.

36. On June 28, 2002, counsel for the Appellant wrote to counsel for the Chicken Board proposing that Farmcrest be given permission to purchase up to 30% of permit levels but enclosing the signed order consenting to the restraining order on the following terms:

    a) That Farmcrest be restrained and enjoined from growing greater than 5000 birds/week, calculated on an 8-week cycle.
    b) In period A-46 only, any eggs that Farmcrest has set or chickens it is growing as of June 27, 2002 will not be included in the assessment of the weekly average of chickens grown, which instead will be calculated based only on the chickens grown from eggs set on June 28, 2002 or after.

37. On July 2, 2002, the Chicken Board considered the request for permission to purchase up to 30% of permit levels and passed the following motion:

> That Farmcrest adhere to its permit production level of 5,000 birds per week and that the Board not waive the over production penalties for Farmcrest and in addition any overproduction will be cutback in subsequent periods and that additionally Farmcrest be allowed to purchase up to 10% of additional quota on an annual basis without reduction to the permit.

The Chicken Board, on July 31, 2002, amended its policy rules to allow all permit holders to purchase up to 10% of additional quota.

38. On July 9, 2002, counsel for the Chicken Board wrote to counsel for the Appellant advising of the Chicken Board's decision not to waive over-production penalties for Period A-45 forward. Farmcrest was subject to the monetary penalties and the reduction in its allowable production in accordance with s. 102 and 103 of the August 15, 2000 policy rules.

39. By letter dated July 30, 2002, Farmcrest appealed the Chicken Board's decision refusing its request for a 30% margin for quota purchases, and its decision refusing to waive over-production penalties for Period A-45 forward (the Second Appeal).

40. On September 17, 2002, the Supreme Court petition was adjourned generally. The Chicken Board and the Appellant agreed to allow the constitutionality of the new policy rules to be determined by the decision of the Supreme Court in *B.C. Chicken Marketing Board v. Brad Reid*, Vancouver Registry No. L021509, except where any distinction can be made out with respect to Farmcrest's different situation.

**DECISION**

**First Appeal – Request for Additional Permit**

41. The Appellant seeks an additional permit of 5000 birds/week to meet its processing demand. As Farmcrest is an integrated operation, it argues that its processing needs cannot be viewed independently of its other operations. It says that the decision to invest in this operation was made under the former Specialty Program, a program that was not rigidly enforced and which did not have any limits, and argues that it is unfair and wrong for the Chicken Board to enforce changed policies on its operation when investment decisions have already been made. The Appellant argues that it should be grandfathered in a similar fashion to the fishing industry where the regulatory authority looks at the investment made as the basis of any grandfathering.

42. The Appellant disagrees with the Chicken Board's position that to grow, Farmcrest should buy quota. It is too late for Farmcrest to buy quota. Had it known of the imminent changes to the Specialty Program, it would have opted to become a quota holder and not incurred the expense of purchasing a processing and hatchery facility. Now that the Appellant is committed to specialty production, it is unfair for it to purchase quota.

43. The Appellant also argues that it is unfair to require Farmcrest to go out and find permit growers to supply its operation. If new permit growers were to start up in the Okanagan, that could go some way to assist Farmcrest. However, those growers do not yet exist. Farmcrest cannot wait until some future date; it needs the production now. It is no answer to require Farmcrest to "poach" growers from Colonial Foods Ltd.; it is unethical and does nothing to promote orderly marketing.

44. The Chicken Board argues that there is simply no justification for increasing Farmcrest's permit from 5000 to 10,000 birds/week. Farmcrest commenced production in December 1999. The rules at that time were for a permit fee of $0.30/bird with a cap of 1000 birds. Industry was aware that these rules were under review. Despite that, Farmcrest received a permit for 5000 birds and paid a $0.15/bird fee.

45. When the new policy rules came into force in August 2000, growers were grandfathered on the following basis (Schedule 14):

> Persons growing chicken as of July 1, 2000 under the former specialty program may apply for a permit under Part 43. The Board may, at its discretion, issue a permit to the applicant in an amount equal to the average production of the applicant in the 12 months preceding July 1, 2000.

46. Despite the fact that Farmcrest had not been operating for a full year, the Chicken Board fully grandfathered its production. The Chicken Board also points to Farmcrest's history of non-compliance. Farmcrest is seeking a benevolent exercise of discretion despite being significantly over-produced. The Chicken Board has exercised discretion and allowed a lengthy period for Farmcrest to come into compliance (to April 7, 2002, the beginning of A-45), during which time Farmcrest was allowed to over produce without penalty.

47. Farmcrest has made little effort to find other growers or to obtain product through the allocation process. Instead, it has opted to appeal.

48. The Panel concludes that the Chicken Board was correct in its decision to not grant a further permit of 5000 birds/week to Farmcrest. First of all, it should be noted that 5000 birds/week is not an insignificant amount of chicken. It represents 40,000 birds per eight-week cycle, the size of an average commercial poultry operation in this province. Thus, the Appellant's grandfathered production is already equivalent to an average size broiler operation in BC. This appeal is not about the lack of viability of a grower due to small farm size. It is about a grower seeking what is essentially "free" production in order to achieve a farm double the average size, which production would, under a Chicken Board policy rule that the Appellant does not challenge, convert to full quota in 12 years, with the regulatory and other benefits that come with quota.

49. As noted above, chicken is a regulated commodity. Only growers with quota or a permit are entitled to grow chicken in BC. Mr. Bell entered the chicken industry in BC in 1998 at a time when the Chicken Board loosely administered the Specialty Program. He obtained a 1000 bird permit in his name. In addition, four family members obtained permits in their names. After a brief stint in the Lower Mainland, Mr. Bell moved to Salmon Arm and set up the Farmcrest business with Mr. Bird. No permits were held for 1999.

50. The Specialty Program at this point in time was limited to 1000 bird permits per person. Despite this, Mr. Bell had been growing 5000 birds of permit production (his permit combined with the permits of four family members who should have been growing their own production), and he was issued a 5000 bird permit for the

Farmcrest operation.[6] He was advised that the whole Specialty Program was under review and subject to change.

51. The Panel is not satisfied that, even under the former Specialty Program, the Appellant had a reasonable expectation of unlimited growth at the time it commenced operation. The former program had a 1000 bird limit and Farmcrest was successful in obtaining a significantly larger permit. Mr. Bell and his partner knew or ought to have known that the entire program was under review and that part of the reason for that review was the fact that the Specialty Program had been abused for many years. There was a real need to restore stability and bring about orderly marketing in specialty production.

52. The Chicken Board exercised its discretion to grandfather Farmcrest under the new policy rules at its full level of production, despite the fact it had not been operating for a full year. This benefited Farmcrest significantly.

53. If it was not reasonable for Farmcrest to expect unlimited growth at the outset of its investment, is there any change in circumstances justifying a further permit? The Panel does not think so. It is as a processor that Farmcrest requires more production. This is a common complaint to most, if not all, processors in this province, most of which have vertically integrated operations to a greater or lesser degree. The real issue is whether Farmcrest's desire as a processor to sell SPCA certified product is sufficient to warrant Farmcrest as a grower receiving a further permit.

54. The Panel agrees with the Chicken Board that it would be wrong, as a matter of policy, for it to use Farmcrest's processor needs as justification for granting Farmcrest, the grower, a further 5000 bird permit. Farmcrest as a grower conceded that it did not have an issue with the new Specialty Program.

55. Like other processors, Farmcrest must work within the system, from which it obtains many benefits. It should advise the Chicken Board of its market requirements on a period by period basis. It should participate with the other processors in the "huddle" to distribute the allocation in accordance with their needs. In circumstances where a processor is short of its market requirements, the Chicken Board can direct a grower to ship its product to a particular processor despite a pre-existing contractual relationship with another processor. Apart from the volume of chicken to be produced and the price to be paid, processors are free to negotiate other terms with growers. In Farmcrest's case, it could work out terms of delivery to meet its SPCA designation.

56. As part of its argument, the Appellant referred to a number of provincial government policy papers recognizing the need for specialty production to be accommodated within the regulated marketing system. In the Panel's opinion, the

[6] This was a common practice under the former program and was a least one of the reasons why the program needed revision.

evidence tendered on this appeal demonstrates that the Chicken Board has made considerable effort to accommodate specialty production. Mr. Bell concedes that as a grower, he does not have any difficulty with the new Specialty Program. Indeed how could he? Farmcrest the grower operates a poultry operation, average in size for the province of BC, without ever purchasing quota. The major part of that production is conventional broilers, albeit a portion does have SPCA certification.

57. As a processor, Farmcrest has a market for more product than its grower operation can satisfy. Its stated preference is to grow that production itself rather than accept it from another grower. However, the Panel is of the view that Farmcrest as a processor should acquire the production it needs in the same fashion as other processors. It can acquire quota; it can encourage other producers to grow production, including SPCA certified product, for its markets; it can encourage new producers to obtain 500 bird/week permits to supply its operation. In fact, Farmcrest has already obtained one such grower.

58. The Panel is aware of at least one grower in BC who has had considerable difficulty in getting processors to take his production. This grower is now looking at arrangements with smaller processing operations. Thus, there are opportunities out there for Farmcrest, the processor, to work toward meeting its market demands for SPCA chicken. Despite the Appellant's reluctance to transport birds, it is possible for Farmcrest to work within the SPCA guidelines and still transport chicken from the Lower Mainland. There may be some issues around logistics but these are not insurmountable barriers. The Chicken Board may also have a role to play in facilitating regional market needs for production particularly in times when weather makes transport of product from the Lower Mainland difficult.

59. Accordingly, the Panel dismisses the Appellant's request for a further 5000 bird permit.

**Second Appeal – Acquisition of Quota**

60. As noted above, the Appellant initially appealed the Chicken Board's July 2, 2002 decision restricting it to acquiring only 10% of its permit in quota each year instead of 30% as requested. However, its position at the hearing was that, having made the decision to pursue its investment opportunities in the Specialty Program, it was too late to purchase quota and thus it was no longer challenging this decision. Rather, Farmcrest argued, pursuant to the issue addressed above, that its processor market needs should be addressed by doubling its grower permit.

61. Although the Appellant is no longer advancing this ground of appeal, the reason it is not doing so relates to the First Appeal, and therefore we discuss it briefly here. In summary, less than six months before the hearing of this appeal, the Appellant, which was aware of its market needs, wanted to be able to purchase 30% of its permit in quota without reduction in permit levels. After being granted a right to

purchase 10% of its permit amount as quota without suffering a reduction in its permit levels, Farmcrest then concluded that it does not want to purchase quota at all – that it should receive all its production increases without purchasing quota.

62. For the reasons given above, we reject the view that the Appellant's grower permit should be increased. The Panel is of the opinion that, as a matter of sound marketing policy, Farmcrest's present position is unreasonable and seeks effectively to turn the privilege associated with past grandfathering into a right to produce only under permit. This is contrary to both the language and sound principle of the Chicken Board's policy rules. For the reasons given above, the Chicken Board was correct in refusing Farmcrest's request for additional permit birds. We find that the Chicken Board was being responsive, fair and balanced when, in early July 2002, it decided that Farmcrest could purchase 10% of its permit amount as quota without any permit reduction – which decision the Chicken Board later decided to extend to the entire industry. Farmcrest has since decided not to purchase any quota, and to take an "all or nothing" approach. This, of course, is a matter for Farmcrest. However, based on the evidence led at this hearing, the Chicken Board's decision to allow Farmcrest to purchase 10% of its permit as quota annually and without impacting on its permit production was very fair.

**Second Appeal – Outstanding Over-Production Penalties**

63. The final issue is whether the Chicken Board erred in refusing to waive the Appellant's over-production penalties for period A-45 forward. The Appellant argued that these penalties should have been waived. The Appellant argues that had the Chicken Board made the correct decision and increased its permit production when requested, the Appellant would not have been placed in the penalty situation, and would have had the economy of scale to make the levy payments.

64. We disagree with the premise of this argument. For the reasons given above, the Chicken Board did not err in refusing to increase the Appellant's permit. The Appellant is subject to the over-production penalties, the amount and schedule for payment of which we leave to the Chicken Board to address.

**Comment**

65. An issue arose on this appeal which did not have a bearing on the outcome, but which we feel warrants brief comment here. Evidence was led that when the Chicken Board first began having difficulty with Farmcrest paying its over-production penalties, its response was to send a demand letter from counsel copied to Farmcrest's bank. Farmcrest said that its first knowledge of the letter occurred when a banker called making inquiries and that as a result of this letter, its relationship with its bank became strained.

66. This issue was not examined extensively at the hearing, and so we limit ourselves in this decision to the observation that it is unusual to send a letter of this sort to a grower's banker, given its potential impact on a grower's financial arrangements. While we do not say that it is never appropriate to send such a letter to a banker, we do think it would benefit the industry as a whole for the Chicken Board to give thoughtful consideration to the policy question as to when regulatory letters should be copied to a grower's financial institution. As this is a question of relevance to all commodity boards, the Panel intends to refer this question to the BCMB in its supervisory capacity to take up as a policy question for response from all the commodity boards.

**ORDER**

67. The appeals are dismissed.

68. Each party will bear its own costs.

Dated at Victoria, British Columbia, this 25th day of June, 2003.

BRITISH COLUMBIA MARKETING BOARD
Per

*(Original signed by):*

Ross Husdon, Chair
Satwinder Bains, Member
Richard Bullock, Member