

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT

AND

IN THE MATTER OF AN APPEAL CONCERNING A DECISION TO
ENTER INTO A NATIONAL ALLOCATION AGREEMENT AND/OR A
WESTERN PROVINCES MEMORANDUM OF AGREEMENT

BETWEEN:

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

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES :

For the British Columbia Marketing Board	Mr. Ross Husdon, Chair Ms. Christine Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Dedar Sihota, Member Mr. Hamish Bruce, Member
For the Appellant	Mr. Christopher Harvey, Q.C., Counsel
For the Respondent	Mr. John Hunter, Q.C., Counsel Mr. Doug Scullion, Counsel

DATE AND PLACE OF HEARING: January 6 and 7, 1998
Richmond, British Columbia

INTRODUCTION

1. On November 6, 1997, the British Columbia Chicken Marketing Board ("Chicken Board") decided to enter into the 'National Allocation Agreement for Chicken' ("NAA") and the 'Memorandum of Agreement between the British Columbia Chicken Marketing Board, the Alberta Chicken Producers, the Saskatchewan Chicken Marketing Board and the Manitoba Chicken Producers Board concerning the Delineation of Responsibilities and Accountabilities specific to the National Allocation and Production System's Market Responsive Pool' ("MOA"). For reference, the term NAA refers to the November 14, 1997 draft, the term MOA refers to the December 29, 1997 draft.
2. On November 10, 1997, the British Columbia Marketing Board ("BCMB") received a facsimile letter from counsel for certain chicken processors appealing the Chicken Board's decision to enter into these agreements and seeking a direction that implementation of these decisions be "stayed" pending appeal.
3. On November 12, 1997, in the exercise of its supervisory authority under the *Natural Products Marketing (BC) Act* ("Act") and taking into consideration the issue of consultation, the BCMB directed the Chicken Board to not enter, pending further review by the BCMB, into the MOA. The BCMB did not at that time restrain the Chicken Board from entering into the NAA.
4. The Appeal was heard on January 6 and 7, 1998, with written closing arguments submitted as follows:
 - from the Appellants on January 9, 1998;
from the Respondent on January 13, 1998; and
from the Appellants on January 14, 1998.

ISSUES ON APPEAL

5. A. Did the consultation process followed by the Chicken Board satisfy the requirements imposed by the Chicken Scheme? ("Process issue")
 - B. Are the proposed agreements destructive and detrimental to the chicken industry in British Columbia? ("Merits issue")
 - C. Does the Chicken Board have the authority to enter into national agreements to regulate production of chicken within British Columbia? ("Jurisdiction")

FINDINGS

Process Issue

6. The BCMB finds, with respect to the Process issue, that although the consultation process was flawed at the time the Appeal was filed, it has been remedied by the ongoing consultation both prior to and during the hearing. In addition, the agreements have continued to evolve and there have been opportunities for consultation since the hearing of this Appeal.
7. Had prior consultation been the only issue on appeal, the Appeal would have been denied.

Merits Issue

8. The BCMB finds, with respect to the Merits issue, that there is merit in having a national agreement which provides stability to chicken production in Canada and in British Columbia. Without such an agreement, there is a serious risk of widespread overproduction, which history has demonstrated would likely result in lower industry returns and increased storage stocks. However, the BCMB does have serious concerns about some of the terms in the agreements.
9. After two days of hearing evidence and on review of the written arguments, we have not been convinced that the Chicken Board has adequately addressed the long-term implications of the NAA and MOA. The Appellants raised some compelling concerns about deficiencies in the agreements, including the lack of an exit clause in the NAA and the inadequacy of the proposed allocations to protect British Columbia's existing and future production requirements.
10. As a minimum, the NAA must have an exit clause (i.e. a clause to allow British Columbia to unilaterally withdraw from the agreement). While we wish to leave some flexibility, we believe the two-period notice requirement in the 'Liquidated Damages Agreement' is appropriate and minimizes the concerns about fettering outlined below.
11. The conditions in sections 6(a) and 6(b) of the NAA, dealing with the reconciliation of provincial market requirements, must be met by the Chicken Board prior to entering into the NAA.

Jurisdiction

12. With respect to the constitutional issue, the Act gives the BCMB the mandate of hearing appeals from marketing boards, which are appealable to the Supreme Court on questions of law.
13. One duty of the BCMB in the course of an appeal is to consider whether a subordinate board has exercised its authority within the constitutional limits contemplated in section 21(1) of the Act.
14. Given the foregoing, the BCMB finds it has the authority to consider the constitutional issue raised in this Appeal.
15. The BCMB further finds that the constitutional challenge raised by the Appellants to the NAA and MOA is premature, as there is no legislative action which has been taken by the Chicken Board. No constitutional (division of powers) issue will arise until there is a person aggrieved or dissatisfied by a Chicken Board production order tied to the NAA or MOA.
16. With respect to the "delegation/fettering" issue, we have significant concerns, based on paragraphs 9 and 10 above, that the net effect of entry into the NAA may result in the improper fettering of the Chicken Board's ability to set sufficient production to satisfy British Columbia's requirements.

DECISION

17. With respect to the Process issue, the Appeal is denied.
18. With respect to the Merits issue, the Appeal is allowed.
19. With respect to Jurisdiction, the Appeal is allowed to the extent set out in paragraph 16.
20. As neither party has requested costs, none shall be awarded.

DIRECTION

21. The Chicken Board is directed to comply with paragraph 10 and paragraph 11 prior to entering into the NAA or MOA.
22. As part of its supervisory role, the BCMB directs the Chicken Board to keep the BCMB fully informed on developments arising out of the direction in paragraph 21.
23. In the interests of time, the BCMB has issued this decision with written reasons to follow.

Dated at Abbotsford, British Columbia this 22nd day of January, 1998.

(Original signed by):

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