

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL FROM A DECISION CONCERNING THE ALLOTMENT  
OF SPECIALTY PERMIT

**BETWEEN:**

JIM HONG d.b.a. HONG LEE FARMS

**APPELLANT**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD

**RESPONDENT**

**DECISION**

**APPEARANCES BY:**

For the British Columbia Marketing Board

Ms. Christine Elsaesser, Vice Chair  
Ms. Satwinder Bains, Member  
Mr. Richard Bullock, Member

For the Appellant

Mr. John Durham, Agent

For the Respondent

Mr. Jim Beattie, General Manager

Place of Hearing

Abbotsford, British Columbia

Dates of Hearing

July 26, 2001

## **INTRODUCTION**

1. The Appellant, Jim Hong, is a specialty chicken producer in British Columbia.
2. On April 3, 2001, the Appellant applied for a permit to grow 1500 specialty birds per week. On April 4, 2001, the British Columbia Chicken Marketing Board (the “Chicken Board”) denied the Appellant’s request stating:

The Board reviewed your presentation and the Board’s historical records in considering your request to have your permit grandfathered at 1,5000 birds/week.  
The Board has concluded that there is no basis to grandfather a permit larger than the 500 bird/week permit issued under the August 15, 2000 regulations.

3. On April 26, 2001, the Appellant appealed the Chicken Board’s decision to deny him a specialty permit.

## **ISSUE**

4. Should a specialty chicken production permit in the amount of 1500-birds/week be issued to Hong Lee Farms?

## **FACTS**

5. Effective August 3, 1993, the Appellant was granted a specialty permit for 1000 birds/week under the Chicken Board’s then Niche Market Specialty Supply Program. These chickens were marketed through Wingtat Game Bird Packers (“Wingtat”).
6. In January 1997, the Appellant approached the then Chicken Board for assistance in dealing with another specialty chicken producer who in an attempt to dominate the specialty chicken market had dropped the price of his specialty chicken to Wingtat by \$0.20/lb.
7. The Chicken Board told the Appellant that his options were to either custom kill his own birds and market them himself and thereby pay a lower permit fee or match the other producer’s price to Wingtat. As neither of these options was satisfactory, the Appellant stopped producing specialty chicken. The Appellant ceased specialty production and failed to pay \$5,958.73 in levies on his final shipments.
8. During the period after 1997, the Appellant produced squab in his barns. Squab production is not supply-managed and thus does not require quota or permit to produce.
9. Effective March 30, 1999, the Chicken Board suspended new applications to the Specialty Niche Market Program. Those producers who held specialty permits were allowed to continue to produce specialty chicken under their permits. However, new applications were no longer being accepted.

10. On January 18, 2000, an appointed Chicken Board replaced the elected Chicken Board. The appointed Chicken Board was given a series of tasks to restore credibility to the supply-managed chicken industry. One task was to bring order to specialty chicken production.
11. In approximately May 2000, Mr. Alan Leung of Fairline Developments Canada (1992) Ltd. (“Fairline”) approached the Appellant. Fairline had built a small chicken processing facility in Richmond and was looking for a producer to grow a specialty “Buddhist” chicken for the Asian market. Growing “Buddhist” chicken is fairly labour intensive. The birds are selectively bred and require a special vegetarian feed. They require more barn space than the traditional broiler chicken and take considerably longer to produce.
12. In June 2000, prior to the new Regulations being enacted, the Appellant approached the Chicken Board and requested a specialty permit to grow “Buddhist” chicken. He was advised that no permits were being issued, as the Specialty Niche Market Program had been suspended effective March 30, 1999.
13. On August 15, 2000, the Chicken Board released its new Regulations. At the time of implementation of the new Regulations, there was approximately 600,000 kgs eviscerated weight of specialty production every 8 weeks. The Chicken Board felt that this production should be regulated but that existing specialty producers should not suffer undue hardship as they were brought into the system.
14. In its new Regulations, the Chicken Board created a New Entrant, Niche Market and Specialty Program, the purpose of which is to formalise specialty production under permit by turning it into quota production after a 12 year period (Part 43, Regulations). In addition, the Chicken Board determined that the industry needed flexibility in addressing the requirements of the market place for different types of regulated product. To accommodate this demand, the Chicken Board decided that 500-birds/week or 4000-birds/cycle would be granted as permit production to allow producers to test the viability of their product.
15. On November 27, 2000, the Appellant applied for a permit of 500-birds/week. This permit was granted and Fairline has processed the birds. Prior to the permit being granted, the Appellant had also agreed to pay his outstanding levies from 1997 over a period of time.
16. On April 3, 2001, the Appellant met with the Chicken Board to request that he be “grandfathered” for specialty production permit of 1500-birds/week. This was his level of production in 1997. On April 4, 2001, the Chicken Board denied this request, finding no basis for grandfathering any permit for the Appellant.

## DECISION

17. The Appellant seeks an order from this Panel granting him a permit to produce 1500-birds/week rather than the 500-birds/week allowed under the Chicken Board's New Entrant, Niche Market and Specialty Program. There is a proven market for this production.
18. The Appellant argues that he is entitled to this increased production, as he is a bona fide stakeholder in the poultry industry. If it had not been for some very fierce competition by another producer in 1997, he would still be producing specialty chicken. As such, he would have been entitled to have his prior production levels grandfathered. Given that the Appellant's desire to grow "Buddhist" chicken to meet an emerging market typifies the BCMB's recommendations in its Review of Regulated Marketing in February 1999, he argues that the Panel should support this request and grant the Appellant the increased production to make this a viable opportunity.
19. The Chicken Board argues that while Mr. Hong was a specialty chicken producer in the past, he was not producing specialty chicken at the time the new Regulations came into force, and as such he does not fit within the grandfathering provisions of the new Regulations. He still has the opportunity to get back into the chicken industry. He has applied for and received a permit for 500-birds/week. If he wants further production, then he must buy quota.
20. The Chicken Board argues that the Panel should respect its Regulations. While hindsight may be 20/20, and there may have been a lot of errors and difficulties with the specialty program in the past, the Chicken Board urges this Panel to respect the Chicken Board's attempts to take the industry forward and maintain order in the industry.
21. Based on the evidence heard in this hearing, it is clear that in the past there were many problems with specialty chicken production in the Province. Given that "specialty" production was not covered by quota, there were advantages to producers to attempt to create their own type of "specialty" chicken in order to escape from the regulation. The old system appears to have encouraged large producers to sell off quota and grow "specialty" product. Not only did the producer not have to pay for quota, in some cases permit or levy was not required either. Clearly, this was not a desirable result. It placed the Chicken Board in the difficult position of policing specialty vs. regulated product. Ambiguity in determining what was "specialty" chicken may have lead to illegal production.

22. The appointed Chicken Board inherited this state of affairs in January 2000. One of their tasks after taking office was to bring some rigour to the specialty chicken sector. In August 2000, after consultation with the various industry stakeholders, the Chicken Board issued new Regulations dealing with the entire chicken industry. The Panel does not take issue with the Chicken Board's Regulations enacted with respect to specialty chicken production. The New Entrant, Niche Market and Specialty Program appears to deal with many of the problems within the specialty chicken sector. It brings current specialty production into regulation over a twelve-year period but preserves the ability of producers, either independently or in conjunction with a processor, to obtain small amounts of permit to test new markets. The new program is not intended to create or support commercial specialty chicken operations. If a producer wants to enter the specialty market on a large scale, he must buy quota.
23. The Chicken Board's Regulations operate from the starting point that if a person is going to produce chicken, a regulated commodity, he should do so within regulation. Excluding certain types of chicken production from regulation undermines the regulatory system and is therefore counter-productive.
24. Based on its new Regulations, the Chicken Board considered the Appellant's request for a 1500-bird/week permit. As the Appellant at July 1, 2000 was not growing chicken under a specialty permit, and as the Regulation only permitted new applicants to receive a maximum 500-bird /week permit, the Chicken Board denied his request.
25. The question for this Panel is whether the Chicken Board properly exercised its discretion in turning down the Appellant's request. Had the Appellant been a new producer, the Panel would not have hesitated in dismissing this appeal. The Chicken Board's program is clear as to what level of production is available for new applicants. Even if these applicants can demonstrate that markets exist for their product, they are only entitled to receive the 500-bird/week permit. If they wish to produce more chicken, they must purchase quota.
26. However, during the hearing, both the Appellant and Mr. Jim Beattie, General Manager of the Chicken Board, recounted historical problems with the specialty chicken program. The Appellant maintains that the historical inequities justify his application for a 1500-bird/week permit. Mr. Beattie, while conceding that there were problems in the way the specialty program was administered in the past, urges this Panel to not look too deeply into the past but rather respect the new Regulations and the decision of the Chicken Board.

27. The Panel does not agree with Mr. Beattie that a decision regarding Mr. Hong's entitlement to grandfathering must only be determined based on the circumstances as they stood at July 1, 2000. The Chicken Board cannot isolate itself from decisions of previous Chicken Boards. Those decisions must be recognised and considered if this Chicken Board is going to be fair in its decision making.
28. The Chicken Board acknowledges that some producers abused the specialty chicken program in the past. Mr. Hong alleges that another producer drove him out of the specialty chicken business and the Chicken Board of the day did nothing to help him despite that he was paying levies and was in good standing. Mr. Beattie, who was not General Manager at the time, in response to questions by the Panel explained that there was abuse of the past specialty program. Some producers had "warm bodies" apply for permits. The indication being that some of the permits were issued to persons who had no intention of producing specialty chicken but rather they held the permit in name only. Some other chicken producer actually grew the chicken. With respect to the allegation by Mr. Hong that another producer had driven him out of production, Mr. Beattie suggested that in the past, there was inconsistent application of the regulations. Not all producers of the same product necessarily paid the same levies. Some production should have been accountable under previous programs but was not. Certain production, such as the silky, was not regulated at all. Mr. Beattie agreed with the suggestion by a Panel member that the whole situation surrounding the undercutting of the price of specialty production for Wingtat "smelled funny".
29. It appears on the evidence that Mr. Hong attempted to play by the rules and in doing so was forced out of business by a producer who was not. Mr. Beattie acknowledged this concern but maintains that the Chicken Board in developing its new Regulations tried to come up with the best rules possible. It recognised the problems with the way the specialty program was administered in the past but felt that regardless of their past indiscretions, producers who were still producing specialty chicken at the time the new Regulations came into effect should be grandfathered at their proven level of production.
30. The level of production grandfathered to these producers is significant. Of the approximately 53,876-birds/week of specialty production, all but 4000-birds/week are grandfathered production. The Panel does not fault this approach as grandfathered producers have been allowed to operate in a particular fashion with the tacit approval of the previous Chicken Board. It would be difficult now to take away their production. Having granted this amnesty to producers, some of whom were engaged in illegal production, it is however difficult to understand the Chicken Board's hard line with respect to Mr. Hong.

31. Up until his last shipments in 1997, Mr. Hong was a specialty chicken producer in good standing. He appears to have been driven out of the market when he could not match another producer's price. That producer appears at least in part to have been able to offer his product at a lower price as a direct result of the Chicken Board's failure to enforce its regulations. The Chicken Board's response to this apparent inequity is that they should not be apologists for the old Chicken Board. However, the Panel does not seek apologies for old actions. Rather, the question remains whether these past circumstances justify granting Mr. Hong a permit to grow 1500-birds/week.
32. Under s. 8(9) of the *Natural Products Marketing (BC) Act* ("the Act"), the BCMB has the power on appeal not to just confirm, reverse or vary an order but also to make another order in considers appropriate in the circumstances. For the purposes of this appeal, it is unnecessary to fully define the scope of appellate and remedial authority given to the BCMB in light of the language and purpose of s. 8 and the Act as a whole. Whether the proper characterisation of the BCMB's appeal function is that of "de novo appeal" or "appeal by way of rehearing" (see Evans, et al *Administrative Law* (1995), 4th ed., at p. 609), and whether or not the BCMB can simply substitute its discretion for that of a commodity board (see *Fraser Valley Credit Union v. Superintendent of Financial Institutions* (1999) BCCA 0048), the legislation clearly confers authority on the BCMB to rectify the situation where the BCMB finds that the commodity board has committed an error in the exercise of its discretion: *Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 76. We find that this test is met here.
33. In the circumstances of this appeal, the Panel finds that the Chicken Board failed to take into account the conduct of the prior Chicken Board in coming to its decision to grandfather any production to Mr. Hong. Fairness dictates that Mr. Hong be grandfathered at the 1500-birds/week level. In comparison to the amounts of specialty chicken production grandfathered by the Chicken Board with its new Regulations (approximately 49,000-birds/week), this amount is insignificant. Further, according to the evidence of the Chicken Board, there are no other producers in a similar position to Mr. Hong who would qualify for a similar order.
34. One further point bears mention. Mr. Hong approached the Chicken Board in June 2000 seeking a specialty permit. At that point in time he was advised that no new applications under the former specialty chicken program were being granted. However, the Chicken Board did not advise Mr. Hong that if he wished to re-enter the specialty market, he could grow an unregulated product such as a silky as it was not covered by the old program and did not require permit. Under the terms of the Chicken Board's new Regulations, Mr. Hong could then have applied under Part 43 for a permit greater than 500-birds/week based on his proven level of unregulated production. However, the Chicken Board did not give Mr. Hong this option and the Panel does not know whether had he been given this option, Mr. Hong would have taken advantage of this method to re-enter the specialty market.

**ORDER**

- 35. The appeal is granted.
- 36. The Chicken Board is directed to grant a specialty permit in the amount of 1500-birds/week to the Appellant forthwith.
- 37. The Appellant is directed to pay any outstanding levies to the Chicken Board within 45 days of this order or such further time as agreed to by the Chicken Board.
- 38. There will be no order as to costs.

Dated at Victoria, British Columbia, this 2<sup>nd</sup> day of October, 2001.

**BRITISH COLUMBIA MARKETING BOARD**  
Per

*(Original signed by):*

Christine J. Elsaesser, Vice Chair  
Satwinder Bains, Member  
Richard Bullock, Member