

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION TO SEIZE A FLOCK

BETWEEN:

VIRGINIA AND JENS-HUGO JACOBSEN
(DBA POLDERSIDE FARMS INC.)

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine J. Elsaesser, Vice Chair Joseph Truscott, Member
For the Appellants	Virginia and Jens-Hugo Jacobsen
For the Respondent	Julie Owen, Counsel
Place of Hearing	Abbotsford and Langley, British Columbia
Dates of Hearing	February 15, and March 10, 2005

INTRODUCTION

1. This appeal raises issues relating to the application of certain British Columbia Chicken Marketing Board (“Chicken Board”) policy rules to the Appellants’ specialty chicken operation as well as the appropriateness of certain decisions made in enforcing these rules.
2. The Appellants, Virginia and Jens-Hugo Jacobsen, are specialty chicken producers. They currently reside in Yarrow, BC and operate under the name Polderside Farms Inc. (“Polderside Farms”). However, at the material time, the Appellants owned and operated a small hobby farm operating under the name Southin Farms Ltd. (“Southin Farms”) near Ladysmith, BC.
3. In approximately February 2003, the Appellants met with Chicken Board inspectors to gather information about the New Entrant, Niche Market and Specialty Program (the “New Entrant Program”). At that time, they had been producing large roasters on their farm and direct marketing them within their community. The Appellants produced their chicken without a permit or quota and as such operated outside the regulated marketing system.
4. Subsequently, the Appellants prepared a permit application, which was received by the Chicken Board on August 27, 2003. The Appellants did not receive a permit for the Ladysmith operation before moving to their current farm in Yarrow in November 2003. Although they do not have fee simple ownership of the Yarrow property, a pre-requisite for a permit, the Appellants produced chicken without a permit from August 2004 until December 8, 2004 when the Chicken Board seized their flock.¹
5. The Appellants are appealing to the British Columbia Farm Industry Review Board (the “Provincial board”) the decisions of the Chicken Board to not issue a permit and to seize their flock. This matter proceeded to hearing on February 15 and March 10, 2005.

ISSUES

6. Did the Chicken Board err in not issuing the Appellants a permit to grow chicken?
7. Did the Chicken Board treat the Appellants unfairly or not act in accordance with sound marketing policy when it seized their flock on December 8, 2004?

¹ The Appellants have entered into an agreement for sale with the farm’s owner, Riverside Poultry Ltd.

FACTS

8. Until November 2003, the Appellants operated a small hobby farm in Ladysmith as Southin Farms. They produced grain-fed, free-run, non-medicated roasters that were direct marketed to local customers.²
9. As a result of conversations with Keith Fuller and Ron Harris, local chicken producers, the Appellants were aware that the Chicken Board was interested in getting unregulated producers on Vancouver Island like themselves to come forward voluntarily to sign up for the New Entrant Program.³ Mr. Harris also processed the Appellants' chickens.
10. The Appellants met with Chicken Board inspectors, Brian Hoven and Kathy Erickson, in Duncan in approximately February 2003. The content of this conversation is in dispute. The Appellants maintain that they told the inspectors about their specialty chicken operation. The inspectors maintain that they were never told that the Appellants were in fact producing chicken but rather thought that the Appellants were interested in growing chicken. In any event, both parties agree that the Appellants were given copies of the necessary application forms and the *British Columbia Chicken Marketing Scheme, 1961* (the "Scheme") and General Orders. Nor is there a dispute that had the Appellants qualified, they could have received a permit.
11. Subsequently, while waiting for further information from the Chicken Board, the Appellants prepared an application for a permit to produce the maximum allowed under the New Entrant Program, 500 birds/week. As they grew roasters, a heavier bird, this actually amounted to a permit for 220 roasters/week. The permit application confirms that the Appellants were currently producing but does not disclose an amount. As part of the application, the Appellants agreed to obey the regulations of the Chicken Board and pay permit charges of \$0.18 per 1.929 kg live weight and a levy of \$0.0125/kg live weight and meet production requirements on a cycle by cycle basis. Although the application was dated March 14, 2003, the Chicken Board did not receive it until August 27, 2003; telephone discussions between the Appellants and the Chicken Board in early August confirmed no application had been received.
12. Mr. Jacobsen sent the application under cover of an August 22, 2003, letter advising that they were in discussion with an owner of a broiler farm in Yarrow and were seeking to transfer the permit to that location.
13. Earlier, in July 2003, as a result of conversations with now Chicken Board member Mr. Fuller, Inspector Erickson had discovered that the Appellants were in fact unregulated producers growing according to Mr. Fuller "maybe 2000 kgs per year".

² In 2002, they produced 4262 roasters amounting to 14529.55 kgs.

³ On April 10, 2003, Mr. Fuller was appointed as a member of the Chicken Board.

14. On August 26, 2003, the Chicken Board revised its New Entrant Program to allow amongst other things, the one time only transfer of a permit from one location to another after 6 years of production. Other amendments allowed for permits to be issued once per year in March, allocation calculations and for permits to be issued on a first come first served basis. In September 2003, all permit applications under the New Entrant Program were put on hold. No reason was offered in the hearing for the suspension and Chicken Board minutes for the time period are unhelpful. Presumably the decision was in part related to the decreasing amount of growth available to BC following reductions in the national allocation being experienced at the time.
15. On October 23, 2003, Inspector Erickson contacted the Appellants to advise that as new permit applications were on hold, the only permit available to them was in the amount of their proven production prior to July 1, 2000.
16. On October 24, 2003, Mr. Jacobsen faxed Inspector Erickson requesting a reconsideration of a 220 roasters/week permit. He again indicated the Appellants' intention to move to Yarrow and to transfer the permit. His letter indicated that Southin Farms had been producing roasters for two years and that as of the February 2003 meeting he was under the impression that Southin Farms could apply for and receive a permit for up to 50,154 kg live weight production (220 roasters/week).
17. On November 27, 2003, the Chicken Board met and discussed the Appellants' application for a 220 roasters/week permit. As a result of this meeting, the Appellants were advised by then Chicken Board General Manager Jim Beattie in a November 28, 2003 letter that no new permits were being issued. If they wished to apply under the grandfather clause based on past production, they must provide proof with auditable documentation to establish the size of the permit and pay past fees as outlined in the regulations. Unfortunately, this letter was faxed to the Appellants' Ladysmith address and the Appellants deny receiving it.
18. Despite maintaining that they did not receive this letter, on December 5, 2003, Mr. Jacobsen wrote to the Chicken Board enclosing a record of farm gate cash sale roaster production figures.⁴ He confirmed their move to Yarrow and production requirements for 2004 of 35,000 kg eviscerated weight (50,000 kg live weight).
19. On January 22, 2004, Inspector Hoven received a telephone inquiry from Ms. Jacobsen about the status of their permit application. He advised that a letter had been sent out two months previously asking for documentation substantiating levels of production prior to July 1, 2000. Mr. Hoven faxed this letter to Ms. Jacobsen and then followed up by phone call to confirm she was aware of the information required. At and after the hearing Ms. Jacobsen denied ever receiving

⁴ This letter may have perpetuated confusion on the part of the Chicken Board as it is written on Southin Farms letterhead with the Ladysmith address and contact information but is signed on behalf of Polderside Farms Inc. and references the Yarrow address.

this letter originally or by fax on January 23, 2004, and denied receiving a follow up phone call. However, in a written submission dated December 15, 2004, referring to historical production, the Appellants noted “[t]he details of this requirement was (sic) faxed to us on January 23, 2004.”

20. On January 30, 2004, Mr. Beattie wrote to the Appellants at the Yarrow address advising that the five year roaster production history provided was insufficient and requested original records be forwarded to Chicken Board staff.
21. On February 9, 2004, Mr. Jacobsen wrote to Mr. Beattie advising that between February 21, 1999 and May 28, 2000, they produced 908 roasters (3095.45 kg). As these birds were sold for cash at the farm gate there were no records other than a cheque to Mr. Fuller to buy broilers, a cheque for processing one flock and a cash receipt for feed. He indicates that their production grew from 60 birds/month in 1999/2000 to 600 birds/month in 2003. The move to Yarrow was in order to meet Canadian Food Inspection Agency requirements for marketable poultry to be processed by a federally inspected facility and to maintain their current cost of production and selling price. He confirmed his intention to accept the Chicken Board’s invitation to grow for and develop niche chicken markets and agreed to make payment of fees and levies for past production.
22. By letter of February 16, 2004, Mr. Beattie advised the Appellants that the Chicken Board could not issue permits based on unsubstantiated claims of past production. If they chose to apply for a new permit of 500 birds/week, their name would be placed on the waiting list.
23. On February 25, 2004, the Appellants met with the Chicken Board regarding their permit application. The Chicken Board re-iterated its position that documentation proving production was required to receive a grandfathered permit in an amount over 500 birds/week. The Appellants indicated that all their business dealings were via underground markets dealing in cash sales with no receipts. However, they agreed to provide a certified copy of the production data and the Chicken Board indicated it would revisit the matter once it had received that information.
24. On March 2, 2004, Mr. Jacobsen provided an affidavit swearing to the veracity of the production numbers he had sent on December 5, 2003. The Chicken Board in its meeting of March 10, 2004 considered this affidavit, and as a result sent a letter to the Appellants on March 22, 2004 outlining two options. The Chicken Board required confirmation of land ownership as well as a written response indicating the preferred option:
 - a. Apply under s. 220 and Schedule 14 for a grandfathered permit based on proved production in the year prior to July 2000. According to the certified records provided, this permit amounted to 47 birds/week. To be eligible for this permit, Southin Farms had to pay \$1706.34 for permit fees and \$933.40 for marketing levies on production. The Chicken Board indicated that it

might also choose to collect over-marketing levies for production beyond the amount permitted.

- b. Apply for a permit up to 500 birds/week to be issued as per section 220.7(b). Their name would be placed on a waiting list with no guarantee that a permit would be issued in 2004 or 2005 depending on industry growth.
25. The use of “Southin Farms” is perhaps indicative of the Chicken Board’s mindset and not surprisingly this letter was faxed to the wrong number and location (Vancouver Island once again). This is despite the fact that the Appellants had already indicated previously that they had moved to Yarrow and that they were operating under the name Polderside Farms. The Appellants maintain that they did not receive this correspondence until July 2004 when it was forwarded by mail from Vancouver Island. In a note to file dated December 10, 2004, Inspector Hoven indicates that the Chicken Board did not receive a response to this letter and as a result no permit was issued.
26. On April 15, 2004, the Chicken Board informed all permit applicants that no new permits would be issued until further notice as a result of Avian Influenza (“AI”). It is unclear whether this notice was received by the Appellants at the time; however, the Appellants acknowledge receiving the notice in the same July 2004 mailing in which they received the March 22, 2004 letter.
27. In response to a tip of unregulated chicken production, Inspector Hoven went out to investigate a farm in Yarrow on October 22, 2004. He spoke to Ms. Jacobsen; she did not recognise him from their visit in February 2003 and indicated that Polderside grew chicken to 9 weeks of age under a special permit. Mr. Hoven did not disclose that he was a Chicken Board inspector. On that same day, the Chicken Board initiated an investigation of possible violations of the *Natural Products Marketing (BC) Act* (the “Act”), the *Scheme* and General Orders.
28. The investigation revealed a feed delivery on July 23, 2004 and a delivery of 3120 chicks on July 30, 2004. On September 24, and 29, 2004 respectively, flocks of 1620 and 1435 roasters were slaughtered. On October 12, 2004, a further 3060 chicks were delivered to Polderside Farms. In addition, it was confirmed that Clancy’s Meats was selling Polderside Farms product, some of which was kept frozen, thawed and then sold as fresh, a few birds at a time. On November 25, 2004, the Chicken Board notified the processors that it had received information that Polderside Farms may be growing chicken without a permit and requested that any placement of chicks or slaughter of birds be reported to the Chicken Board. The continuing investigation revealed a November 17, 2004 feed delivery, product still being sold at Clancy’s and another flock due for slaughter December 8, 2004.
29. On December 7, 2004 the Chicken Board notified poultry processor K&R Poultry Ltd. (“Farm Fed”) that it intended to seize the Polderside Farms flock and that the Jacobsens would be advised of the seizure in writing prior to the chickens being

processed. Farm Fed was advised that it would be allowed to process the seized chickens and purchase them from the Chicken Board at the applicable posted price for the weight class of chicken.

30. On December 8, 2004 at 12:15 AM, Chicken Board inspectors served a seizure notice on the Farm Fed transport driver after he left the Appellants' farm. Inspectors followed the truck to the processing plant where the seized product was unloaded and marked. At 12:20 AM, Inspector Hoven advised Mr. Jacobsen that his flock had been seized and gave him a copy of the relevant legislation and the seizure notice.
31. On December 8, 2004 at 9 AM, Inspector Hoven met with the Appellants and obtained the following information:
 - a) a flock of 2920 birds was shipped;
 - b) since receiving the March 22 letter at the end July, the Jacobsen's had been waiting for a permit to be issued once the suspension due to AI was lifted;
 - c) two flocks had been produced at the Yarrow location on the assumption that a permit would be issued;
 - d) they have an agreement for sale with Riverside Poultry Ltd. for the purchase of the Yarrow property and took up residence at that location in November 2003; and
 - e) they wanted a permit to grow chicken and are prepared to pay any outstanding fees and agreed not to grow any further chicken until they got a permit.
32. On December 8, 2004 at 3 PM, the Jacobsens met with the Chicken Board to discuss the seizure. They indicated that 2000 of the 2920 birds seized had been pre-sold and they required the proceeds of sale to pay their bills, otherwise they would be bankrupt.
33. The Chicken Board upheld the seizure, as the product had been grown in direct contravention of the *Act*, *Scheme*, and General Orders. The flock was sold to Farm Fed at the Chicken Board's roaster price and the levies and GST from the two flocks plus other costs related to the seizure were deducted. The remainder of the money went to the Jacobsens, on the condition that they refrain from growing chicken without a permit in the future.
34. On December 15, 2004, the Jacobsen's filed their appeal with the Provincial board.

DECISION

35. There are two issues on this appeal. The first issue requires the Panel to determine whether the Chicken Board erred in failing to issue a permit to the Appellants. The second issue requires the Panel to determine whether the Chicken Board treated the

Appellants unfairly or failed to act in accordance with sound marketing policy when it seized their flock on December 8, 2004.

36. By way of remedy, the Appellants seek a permit to produce 220 birds/week and a reversal of the flock seizure. By this they mean that they want to be placed in the position that they would have been in had the Chicken Board not seized their flock. They ask for an order that the Chicken Board reimburse the amount they would have received from their presale contract (\$34,432.30) less appropriate deductions rather than the balance remaining after selling the chicken for the lower roaster price set by the Chicken Board for A-61.

Are the Appellants Entitled to a Permit?

37. The Appellants argue that the Chicken Board knew in February 2003 that they were growing roasters at their Vancouver Island location. The Chicken Board allowed them to continue growing chicken and in fact encouraged them to “go and grow”. However, the Chicken Board failed to issue a permit. At the time the Appellants say they initially sent in their application (March 2003), there was no wait list. By the time the Chicken Board did receive the application on August 27, 2003 there was, unbeknownst to the Appellants, a wait list.
38. The Appellants argue that they have kept the Chicken Board informed of their operation and their intentions. When they sent their application, they requested a transfer of permit to the property they intended to purchase in Yarrow. The Chicken Board did not respond to their request and remained silent on their application. The Appellants moved to Yarrow, assuming that they would get a permit but a permit was never issued.
39. The Appellants argue that despite the fact that they did not apply to be “grandfathered” under the specialty program, the Chicken Board proceeded to lump them in with other specialty program applications. They argue that they do not fit within the wording of Schedule 14, as they were not persons growing chicken under the former specialty program:
 - 1) *Persons growing chicken as of July 1, 2000 under the former specialty program may apply for a permit under Part 43.* The (Chicken) 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. In this instance growers who have quota will be eligible for the issuance of a permit.
 - 2) *A person applying for a permit under Part 43 who is able to establish to the (Chicken) Board's satisfaction that the person was producing chicken as of July 1, 2000 at a level greater than the 500 bird per week maximum permit may, at the discretion of the Board, receive a permit in an amount up to the applicant's proven level of production,* provided that the grower is in good standing on fees and levies for the production above 500 birds per week for the last twelve months. This amount will be determined in discussions between the Board and the applicant.
[emphasis added]

40. As such, they maintain that their historical production is of no significance. Rather they seek the permit they were assured that they could have, that is in the amount of the weight equivalent of 500 birds/week (220 roasters/week). On this point, it is worth noting that there is no issue that had the Appellants' application for a permit been received in March 2003, subject to the Appellants meeting Chicken Board requirements, a permit in some amount would have been issued.
41. The Appellants argue that the Chicken Board has not been transparent in its decision-making and has not been accessible. They do not understand why the Chicken Board allowed them to grow roasters on Vancouver Island without a permit and yet did not allow the same thing in Yarrow. They have an agreement for sale and are prepared to satisfy the Chicken Board's requirements in terms of land ownership, even if they have to convert the land to fee simple ownership.
42. In response, the Chicken Board maintains that it consulted extensively with the Appellants regarding their permit application between February 2003 and March 2004. The Appellants should have understood the Chicken Board's position regarding their permit application. The correspondence and in particular, the March 22, 2004 letter is very clear on the Chicken Board's requirements. There are only two available options, the immediate issuance of a permit grandfathering pre-July 2000 production or apply and wait for a permit to produce up to 50,154 kgs of production.
43. The Chicken Board acknowledges that there may not have been much communication after its March 22, 2004 letter to the Appellants. However, the AI outbreak in the spring of 2004 diverted the Chicken Board's attention from permit applications to the crisis at hand. The Chicken Board points out that even after the crisis was over, it still had no response from the Appellants to the March 22, 2004 letter. On the Appellants' evidence, they received this letter by July 2004 yet continued to produce until the seizure.
44. The Panel has considered the submissions of the parties and their evidence. As for the initial meeting between Chicken Board inspectors and the Appellants, the Panel does not accept that experienced inspectors such as Mr. Hoven and Ms. Erickson would have offered any guarantee that the Appellants would receive a permit. We also do not accept that the inspectors knew that the Appellants were growing chicken. Had they known this fact, they would have attended at the farm to inspect the operation. The Panel cannot reconcile the diametrically opposed versions of this meeting. Perhaps the inspectors were overly enthusiastic about the permit program; perhaps the Jacobsen's were overly circumspect about their production given that it was illegal. In any event, it appears that at the conclusion of the meeting, the Appellants did not see any barriers to receiving a permit, which seems true at the time. They also understood that they could continue to grow without a permit until they received one. This may have been overly optimistic but given the Chicken Board's position (after it was known they were already producing) that if

levies and permit fees were paid on illegal production they could bring themselves into good standing, this belief is not that far fetched.

45. Having been illegal producers and having found out that they could still produce chicken under the Chicken Board's New Entrant Program, it is difficult to see why the Appellants would not have proceeded with a permit application.
46. However, the question then arises whether if the application was received in March 2003, what amount of permit would have been issued? The Panel cannot answer this question as the Chicken Board's August 15, 2000 policy rules contemplate a process whereby a business plan is submitted and evaluated before a permit is issued. The business plan submitted by the Appellants is inadequate to demonstrate that they in fact had a market for the level of production sought. However, given that the Appellants' application was received after the program was officially suspended it does not appear that the Chicken Board undertook any analysis of the Appellants' business plan nor did it seek any clarification regarding their markets. Their application for a permit was placed on the waiting list.
47. The Panel cannot predict what the outcome of any evaluation would have been had the application for Southin Farms been received by the Chicken Board in March 2003. By that time it was already Chicken Board practice to be cautious about issuing permits in larger amounts; although permits for smaller operations were still being processed. It is likely, however, that any permit issued for the Appellants' Vancouver Island operation would have been rescinded on the move to Yarrow pending confirmation of property ownership and receipt of a business plan for the new operation.
48. In November 2003, the Appellants moved their operation to Yarrow. They did this knowing full well that they did not have a permit let alone whether that the permit could be transferred to a new location. No business plan was provided to the Chicken Board for this new venture, no markets were demonstrated. Clearly as the Appellants were moving into a different region, one would have contemplated significant changes to the business plan including new direct market customers and a new processor. One would also have anticipated that the development of a business in Yarrow would likely have taken some time to ramp up to the production levels sought under the permit. Further, despite having acknowledged in their August 22, 2003 letter to the Chicken Board that their "application is to grow on our present farm on Vancouver Island as ownership of the property where the birds will be grown is a requirement", the Appellants did not acquire fee simple ownership of the Yarrow property. Their August 22, 2003 letter also states that "[o]n completion of the purchase (of the Yarrow property) we will request a transfer of the permit from our present farm". Clearly, the Appellants were aware that land ownership was a pre-requisite for permit.
49. After considering the entirety of the evidence, the Panel is not satisfied that the Chicken Board erred by not issuing a permit. As such we cannot give the

Appellants the remedy they seek. Given that the Chicken Board did not receive the permit application until August 27, 2003, it is reasonable that this application was suspended and placed on the wait list. However, it is appropriate for the Chicken Board to undertake an evaluation of the Appellants application in light of the change in their circumstances including the move to Yarrow and in the context of the directions that will be forthcoming from the Specialty Review.

50. The Appellants should be given an opportunity to provide a revised business plan for their Yarrow operation and to meet any other Chicken Board requirements. However, in the end it is for the Chicken Board to decide whether the Appellants are entitled to a permit, in what amount and effective what date. Further, should the Chicken Board decide to issue a permit to the Appellants, the Chicken Board is entitled to insist that the Appellants' bring themselves into good standing by paying outstanding levies, permit fees and production penalties on all production grown by Southin Farms and Polderside Farms since August 15, 2000.

Did the Chicken Board Err in Seizing the Appellants Flock?

51. The Appellants argue that the Chicken Board acted in a heavy-handed manner when it seized their flock denying them the opportunity to meet contractual commitments. They maintain that there should have been a face-to-face discussion prior to the seizure where alternatives could have been discussed. Instead the Chicken Board acted to punish the Appellants. If the Chicken Board's purpose was to stop illegal production, they could have nominally seized the product yet still allowed the Appellants to fulfil their contracts. By so doing, the Chicken Board could have stopped further illegal production without forcing unusually harsh consequences on the Appellants. They argue that they face bankruptcy and financial insolvency.
52. On the point of financial hardship, the Panel does not accept that all the Appellants' current financial hardship can be blamed on the seizure. Perhaps they were over extended by the move or their operation was under capitalised. Prior to the seizure, the Appellants had outstanding accounts for processing and for feed. However, the fact that the Appellants did not realise the intended income from the seized flock no doubt made their already precarious financial situation much worse.
53. The Chicken Board argues that the Appellants operating as Polderside Farms have marketed at least two flocks of chickens without a permit or licence. They never reported their production or the marketing of that chicken to the Chicken Board, nor have they paid levies, all in violation of Parts 3 and 4 of the General Orders. There was never any agreement by the Chicken Board to issue a permit. There is no error or unfairness in disposing of the seized birds at the Chicken Board's minimum live price. The Appellants should not profit from their wrongdoing.
54. The Panel agrees with the Chicken Board that the *Scheme* gives it the authority to seize and dispose of any of the regulated product produced, kept, transported, packed, stored or marketed in violation of any of its orders. In this case, the

Appellants produced and marketed regulated product in violation of the General Orders and the Chicken Board exercised its powers to seize the flock and deduct the costs associated with the seizure. It is clear that the Appellants were producing chicken without permit or quota and as such the Chicken Board was acting within its legal authority when it seized the product. However, there are also several mitigating factors that lead us to the conclusion that the decision to seize the Appellants flock was administratively unfair.

55. We take as significant that the Appellants did not attempt to conceal their Vancouver Island activities from the Chicken Board. They presented themselves to the Chicken Board voluntarily and sought to bring themselves within regulation. Unfortunately from the outset the communication between the Chicken Board and the Appellants has been fraught with difficulties. Some factors we have considered are:
 - **The first meeting:** As mentioned above, we have difficulty understanding what transpired at the first meeting between the Appellants and the inspectors. Both parties left this meeting with a mistaken impression. The inspectors thought the Appellants were new growers otherwise they would have inspected the Appellants' operation. The Appellants understood (perhaps over optimistically) that they would receive a permit and they could grow up to 50,154 kgs per year.
 - **The initial application:** Had the Appellants' original application been received in March 2003, a permit in some amount would have likely been issued to Southin Farms.
 - **The source of the Appellants' birds:** Given that at least some of the broilers grown out into roasters by the Appellants were purchased from Mr. Fuller who very shortly after the February 2003 meeting became a member of the Chicken Board, it is difficult to believe that the Appellants were trying to hide their operation. Indeed it was at Mr. Fuller's suggestion that the Appellants initially contacted the Chicken Board.
 - **The pattern of correspondence:** While the Chicken Board may have been clear in setting out the options available to the Appellants, there is a pattern of correspondence being sent to the wrong mailing address or fax despite attempts by the Appellants to keep the Chicken Board apprised of their contact information and their plans.
 - **The lack of knowledge and inexperience of the Appellants:** The letters from the Appellants portray confusion as to why it is that they do not qualify for the permit they thought they were getting in February 2003. The Panel appreciates that this confusion may be seen by some as wilful blindness or perhaps stubborn bullheadedness in an attempt to get something they are not entitled to. However the correspondence from the Chicken Board does not

address the issue of the initial application in terms of its late receipt and the impact that may have had on their considerations.

- **AI outbreak:** During the spring of 2004, any difficulties the Appellants may have had getting answers from the Chicken Board are understandable as the Chicken Board's attention was focussed on crisis management until at least August 2004.
 - **The March 22, 2004 letter:** The Chicken Board's letter set out two options either a grandfathered permit for 47 birds/week or wait for a 500 birds/week permit to be issued, subject to industry growth, in 2004 or 2005. The Appellants were also to provide confirmation of land ownership of the Yarrow property. This letter was sent to Vancouver Island and was not received by the Appellants until July 2004. Not surprisingly, the Chicken Board did not receive a response and no permit was issued.
 - **The April 15, 2004 notice to industry:** The Chicken Board informed all permit applicants that due to AI, no new permits would be issued until further notice. There is no evidence that the Appellants received this notice before July 2004.
56. Against these many factors, the Chicken Board discovered in the fall of 2004 that someone was growing unregulated chicken in Yarrow. Inspectors confirmed that the Appellants were the culprits. This should have come as no surprise to the Chicken Board as the Appellants' own correspondence confirmed that this was their intention. Unfortunately, from the Chicken Board's perspective the Appellants were thumbing their noses at the March 22 proposal and queue jumping in a time when all permits were suspended. It is understandable that the Chicken Board's perception was that the Appellants were wilfully disregarding regulation and a stern response was warranted. However, the Panel is not convinced that the response taken was appropriate this case.
57. The Panel finds fault lies with both parties. However, given the history between the Chicken Board and the Appellants, prudence and fairness dictated that something more be done. Having made the decision to seize and in light of the circumstances, there was some obligation on the Chicken Board to consider how to best achieve the goals of orderly marketing. While enforcement is a necessary component of industry management, in this case the Chicken Board pursued enforcement in a heavy-handed manner with the end result being maximum financial impact of the Appellants. The Panel finds that the Chicken Board did not treat the Appellants fairly and failed to act in accordance with sound marketing policy when it did not consider how best to deal with the seized flock.
58. In coming to this decision, the Panel is not prepared to find that the Chicken Board erred in actually carrying out its seizure. Rather its error comes in the implementation of the seizure notice without consideration of appropriate

progressive discipline and without considering options to maximise payment realised from a seized flock. After seizure, the Appellants were paid the Chicken Board price for their roasters (\$1.3165/kg live weight) despite the fact that the Appellants' say there was a contract with a distributor(s) to pay much more than that (\$4.54/kg eviscerated weight). Although the Panel appreciates that processing costs would have accounted for a portion of this difference in price, and that the processed chicken did go to fill the original contracts, it is not clear what the total difference in price may have been or whether (as suggested by the Appellants) someone benefited from this transaction at their expense.

ORDER

59. Having found that the Chicken Board erred in seizing the Appellants' flock in the manner that it did, the Panel makes the following orders:
 - a) the seizure of the Polderside flock is upheld;
 - b) the amount owing to the Appellants as a result of the seizure be reassessed;
 - c) subject to an assessment and deduction of processing costs by the Chicken Board, the price payable on the seized flock should be the proven contract price received for that portion of the flock covered by a contract and;
 - d) the posted Chicken Board price for light roasters in A-62, namely \$1.3625/kg on the balance of the flock;
 - e) from the above calculated figure representing the deemed proceeds from the sale of the flock, the Chicken Board is entitled to deduct all outstanding levies, permit fees and production penalties owed by both Southin Farms and Polderside Farms from August 15, 2000; and
 - f) the Chicken Board is entitled to deduct the reasonable costs associated with the seizure of the flock.
60. Once the Chicken Board makes the foregoing re-assessment, the balance of any monies remaining is to be paid to the Appellants.
61. Finally, and in accordance with paragraphs 49 and 50 above, the Chicken Board is directed to consider the Appellants application for a permit for the Yarrow operation, in an amount and as of a date to be determined by the Chicken Board.
62. It should be noted that the Chicken Board, along with the other supply managed commodity boards, has been participating in the Specialty Review for the last two years. The mandate of the Specialty Review is to allow for the inclusion of specialty production within the regulated marketing system under a cohesive set of principles. These principles will include fair and progressive rules for enforcement of commodity board orders.
63. The Specialty Review is nearing the end and directions will soon be published. These directions may have a significant impact on the Appellants and their desire to produce specialty product. The parties are encouraged to discuss this matter in an

attempt to ensure that going forward the Appellants can produce a specialty product in compliance with the new rules as they develop.

Dated at Victoria, British Columbia, this 29^h day of July 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Joseph Truscott, Member