

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

**BETWEEN:**

PONICH POULTRY FARM LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD

**RESPONDENT**

**DECISION**

**APPEARANCES BY:**

For the British Columbia Marketing Board

Ms. Christine Elsaesser, Vice Chair  
Ms. Karen Webster, Member  
Mr. Richard Bullock, Member

For the Appellant

Mr. Murray Ponich  
Mrs. Pat Ponich

For the Respondent

Mr. Jim Beattie, General Manager

Place of Hearing

Salmon Arm, British Columbia

Dates of Hearing

November 1, 2001

## **INTRODUCTION**

1. The Appellant, Ponich Poultry Farm Ltd., is a registered broiler producer in British Columbia.
2. In December 2000, the Appellant sought to renew its 2 specialty permits to produce specialty chicken.
3. In a decision of May 8, 2001, and communicated by letter dated May 14, 2001, the British Columbia Chicken Marketing Board (the “Chicken Board”) denied the Appellant’s request to renew its specialty permits.

## **ISSUE**

4. Should the Chicken Board issue two specialty permits for 1,000-birds each to the Appellant?

## **FACTS**

5. In January 1993, Mr. Murray Ponich, a principal of the Appellant, received a permit (P011) to produce 1,000 birds/week of specialty chicken. No birds were ever produced under this permit. In 1995, when Mr. Ponich sold this operation (barns and quota), the Chicken Board cancelled the permit.
6. In 1995, the Appellant acquired broiler quota to produce chicken in the interior of British Columbia near Salmon Arm. Currently, the Appellant holds 53,048 kg of primary quota, 9,644 kg of secondary quota and 20,062 kg of transitional quota. Its total quota holdings are 82,754 kg.
7. In February 2000, Mr. Ponich applied for another specialty chicken permit. Effective March 1, 2000, Mr. Ponich received specialty permit No. 44 allowing him to produce 1,000-birds/week of specialty chicken.
8. In March 2000, Mr. Ponich alleges he had a telephone conversation with then Chicken Board Production Manager, Mr. Jim Beattie, in which he requested a further permit for his wife. Although Mr. Beattie does not recall this conversation, on March 23, 2000 permit No. 51 for 1,000-birds/week was issued to Mr. Ponich. Both permit No. 44 and permit No. 51 expired December 31, 2000.
9. In the spring of 2000, the Chicken Board held a specialty producer meeting to discuss the future of specialty chicken production as well as the proposed new regulations. Mr. Ponich did not receive notice of this meeting.

10. Over the spring and summer 2000, Mr. Ponich demolished his old barn, prepared the land and began construction of a direct marketing facility. His evidence was that by July 2000, he had expended approximately \$75,000 on this project. Mr. Ponich's plan is to construct a new barn 50' x 150' in 2002. He hopes to create a "down home country atmosphere" from which to market his free range chicken products.
11. On August 15, 2000, the Chicken Board released its new Regulations. In its new Regulations, 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, 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 a maximum of 500-birds/week or 4000-birds/cycle would be granted as permit production to allow producers to test the viability of their product. In addition, the Chicken Board determined that those producers who had been producing specialty chicken in the year prior to the enactment of the new Regulations would be "grandfathered" at their proven level of production.
12. On December 11, 2000, Mr. Ponich sent the Chicken Board a \$30 cheque for his 2001 license fees. This included \$10.00 for his broiler operation and \$10.00 each for his two specialty permits. The Chicken Board cashed Mr. Ponich's cheque on December 14, 2000. However, by letter postmarked December 20, 2000, the Chicken Board refunded Mr. Ponich's payment for his permit license fees. Mr. Ponich did not accept this refund and returned it to the Chicken Board.
13. In December 2000, Mr. Ponich had available barn space as the allocation of secondary quota was only 61% and there was no allocation to produce transitional quota. He placed 17,680 birds of specialty production in his barn. These birds were fed vegetarian feed and ultimately slaughtered and marketed by Colonial Farms in 2001. As the Chicken Board took the position that the Appellant's year 2000 specialty permits had expired prior to slaughter, it treated this specialty production as quota production. As a result, in period A-37, Mr. Ponich over-produced his quota by 16,152 kg of chicken.
14. By letter dated January 2001, Mr. Ponich requested that the Chicken Board either renew the permits and allow a reasonable time for him to get into production or, amongst other things, to reimburse him for his estimated losses (which he calculated to be in excess of \$432,000). At a meeting on February 6 and 7, 2001, the Chicken Board considered Mr. Ponich's request for renewal of his specialty permits. Following its meeting, the Chicken Board invited Mr. Ponich to attend a future meeting and clarify the circumstances set out in his letter.

15. On March 13, 2001, Mr. Ponich attended a Chicken Board meeting. Although the March 13, 2001 Minutes set out that Mr. Ponich agreed that the second permit had been issued through administrative error, at the hearing of this appeal Mr. Ponich denied that this was his position. In any event, the Chicken Board agreed to send its Inspector, Mr. Greg Campbell, to check the state of construction of the Appellant's operations.
16. On April 18, 2001, Mr. Campbell visited the Appellant's operation. He presented his findings to the Chicken Board at its May 8, 2001 meeting. He observed that the direct marketing building had been largely completed but no barn had been constructed. In addition, he made the following three recommendations:
  - (1) That Mr. Ponich not be granted a Permit for 2001 on the basis that he does not intend to grow chicken during 2001 nor does he have the facilities to grow the chicken according to the Regulations, Section 143 and 150. (emphasis in original)
  - (2) That Mr. Ponich receive approval for a Permit for the year 2002, provided that an application is received before the end of 2001, to produce 1000 birds per week (based upon earlier Permits issued by the BCCMB from 1993 to 2000).
  - (3) That all future Permits, from 2003 onwards, be based upon evidence that Permit birds were actually produced and there was full compliance in all other respects with the Regulations.
17. At the same meeting, the Chicken Board passed a motion denying "a grandfathered permit for M. Ponich as there is no product to grandfather". Mr. Ponich was notified of this decision by letter dated May 14, 2001.
18. On June 12, 2001, Mr. Ponich filed his appeal of the Chicken Board's decision. His grounds of the appeal were as follows:

I made a business plan to produce a niche bird and direct market the product utilizing my 2 permits.  
I made substantial financial commitments (store, building with freezers & coolers, infrastructure to the above, etc.).  
The Board can't pull a permit after a few months when the permit holder is in the mid stream developing for its use.  
Secondary & transitional quota holders are given a reasonable period of 2-4 years to build before it is taken away (with notice I might add).
19. On July 23, 2001, the Chicken Board and the Appellant participated in a pre-hearing conference. The parties agreed to exchange information on the understanding that the Chicken Board would then reconsider the issue. On August 28, 2001, the Chicken Board and the Appellant participated in a second pre-hearing conference. Mr. Beattie, on behalf of the Chicken Board, agreed to take a settlement proposal from the Appellant to the Chicken Board. As no settlement was reached in this matter, it proceeded to hearing on November 1, 2001 in Salmon Arm.

## **DECISION**

20. Although it appears that before the Chicken Board, the Appellant agreed that the second permit was issued as a result of an administrative error, the Appellant asserts entitlement to both permits in this appeal.
21. The first issue to be considered is whether the Appellant is entitled to be issued one or both specialty permits under the terms of the new Regulations. In considering this issue, the Chicken Board found that the Appellant did not qualify for a specialty permit and as such, its request was denied.
22. The Panel agrees with this decision of the Chicken Board. There is no issue as to whether the Appellant qualifies for permit under the terms of the new Regulations. Clearly, it does not. The Appellant does not fall within the transitional rules set forth in Schedule 14 which provide as follows:

### **Permit Issuance Guidelines**

- 1) 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 the 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 Board's satisfaction that the person was producing chicken as of July 1, 2000 at a level greater than the 500 bird permit 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.
23. Although the Appellant held a specialty permit in 2000, it was not growing chicken under the former specialty program as of July 1, 2000.
  24. The real issue on this appeal is whether the fact that the Appellant held 2 specialty permits and had begun to develop a marketing facility justifies the issuance of one or both specialty permits.
  25. The Chicken Board argues that it thoroughly considered the Appellant's request in the context of the new Regulations and has ruled that it does not qualify for a specialty permit. The business that the Appellant wishes to establish, selling a unique product from its farm, is not jeopardised by the Chicken Board's refusal to issue a specialty permit. The Appellant has adequate quota to supply its specialty production requirements.

26. The Appellant argues that its permits were issued under the old specialty program, and as such it is not governed by the Chicken Board's new Regulations. In 2000, in anticipation of developing a specialty chicken production facility, the Appellant embarked on a 4 to 5 year plan. First it obtained specialty permits. Then it began the demolition of the old barn and the construction of a new facility. The Appellant argues that in this case, the specialty permit is analogous to a building permit. As long as it is kept current, the Appellant should be entitled to use it. The development of a specialty chicken operation takes many years. It is not fair to take this permit away mid-stream. The Appellant argues that as the Chicken Board gave regulated producers several years to build for secondary and transitional quota, so it should allow time for construction of a facility to use the two specialty permits. In the Appellant's case, this amounts to another two years.
27. Looking to the circumstances of this case, when the Appellant acquired its two permits in 2000, it was not in a position to produce any specialty chicken under permit. In fact, it had no intention of producing specialty chicken for at least 2-3 years. In order to use the permits, the Appellant first had to build barns. However, as a regulated producer, the Appellant had a prior obligation to build additional barn space to house the secondary and transitional quota that had been allocated by the Chicken Board. Any failure on the part of the Appellant to build for this quota would result in it reverting to the Chicken Board. Thus, the Appellant did not realistically expect to be producing specialty chicken under permit until 2003 at the earliest.
28. The Appellant did not approach the Chicken Board and advise of its plans. It did not seek or receive any assurance from the Chicken Board that it would continue to renew the specialty permits until such time as the Appellant was in a position to produce specialty chicken. Even under the old Program, the Chicken Board was under no obligation to renew a permit that had not even been used by the producer.
29. Further, the Appellant was aware that a new Chicken Board had been appointed to replace the prior elected Board. As a regulated producer, it should also have been well aware that the new Board was put in place to restore order to the regulated chicken industry. Although the Appellant denies any notice of a specialty producers meeting to discuss changes to the Program, the Appellant was notified by letter dated February 29, 2000 that the Specialty Program was under review. It ought to have been aware that significant industry changes were likely and should have contacted the Chicken Board to confirm the status of its permits and plans.

30. Against this backdrop of significant change within the industry, the Appellant went ahead with its long-term plans and began constructing a marketing facility in the spring of 2000. The Appellant chose not to build barns in order to get into specialty production as quickly as possible. Rather it began construction of a marketing facility. This is significant because the Appellant can use this marketing facility to sell chicken, specialty or otherwise, produced under quota. The building of a direct marketing facility is not dependent on acquiring specialty permit production.
31. The Appellant appears to be arguing that the acquisition of a specialty permit gives the permit holder more rights than acquisition of quota. A producer who acquires quota must produce that quota on a period by period basis throughout the year. Failure to use quota results in penalties and/or reductions in quota holdings. The Appellant's argument is that a permit acquired by purchasing a \$10 licence grants an unrestricted right to produce specialty chicken whenever it chooses in the future. The Panel finds that this is completely contrary to operating within a regulated marketing system and inconsistent with the Chicken Board's legitimate goal of effectively regulating the chicken industry.
32. Accordingly, the Panel finds that the Appellant's construction of a direct marketing facility is not a special circumstance warranting the granting of a specialty permit to the Appellant.
33. Based on the Chicken Board's argument at the hearing, it is unclear whether it considered the issue of special circumstances or simply found that the Appellant did not fall within the transitional rules and as such denied its request for specialty permits. However, the Chicken Board sent Mr. Campbell to inspect the Appellant's operation and reviewed his expenditures. Implicit in this conduct is a consideration of whether the actions of the Appellant were sufficient to warrant the issuance of one or both specialty permits.
34. Given that this Panel exercising its independent discretion finds that no special circumstances exist, any failure on the part of the Chicken Board to consider special circumstances is not determinative of this appeal in any event.

## **ORDER**

35. The appeal is dismissed.
36. There will be no order as to costs.

Dated at Victoria, British Columbia, this 17<sup>th</sup> day of December, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

Christine J. Elsaesser, Vice Chair

Karen Webster, Member

Richard Bullock, Member