

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION CONCERNING A SLAUGHTER SCHEDULE
FOR PERIOD A-49

BETWEEN:

ROSSDOWN FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

SUNRISE POULTRY PROCESSORS LTD.
HALLMARK POULTRY PROCESSORS LTD.
LILYDALE CO-OPERATIVE LTD.
ROYAL COLUMBIAN POULTRY

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Mr. Hamish Bruce, Member
Ms. Satwinder Bains, Member

For the Appellant

Mr. Delwen Stander, Counsel

For the Respondent

Ms. Sarah P. Pike, Counsel

For the Intervenors

Sunrise Poultry Processors Ltd.
Hallmark Poultry Processors Ltd.
Lilydale Co-operative Ltd.

Mr. Christopher Harvey, Q.C.
Counsel

Royal Columbian Poultry

Mr. Allan Cross, self-represented

Date of Hearing

September 3 and 9, 2002

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. In 1999, the Appellant in these proceedings, Rosstown Farms Ltd. (“Rosstown”) began developing plans for its own hatchery to hatch the eggs from its broiler hatching egg operation to produce the chicks for its broiler operation. In so doing, it sought to integrate its broiler hatching egg and broiler operations. Historically, the Appellant purchased its chicks from a hatchery affiliated with its processor, Lilydale Co-operative Ltd. (“Lilydale”). From the outset, Lilydale has not been supportive of the Appellant’s plan to build a hatchery and expressed an unwillingness to process chicken not grown from chicks from Lilydale’s hatchery.
2. In an attempt to resolve this issue prior to the start-up date of its new hatchery, the Appellant sought the assistance of the British Columbia Chicken Marketing Board (the “Chicken Board”). Specifically, the Appellant asked the Chicken Board to direct its product to a processor in accordance with its “eight home week” schedule. Chicken is allocated and produced in eight-week cycles. The home week is the week in which a producer has its chicken processed; most producers have one home week. The Appellant, which is a large chicken producer, has for the last two years had its chicken slaughtered in each week of the eight-week cycle, and thus enjoyed an eight home week schedule.
3. The Chicken Board, in a letter dated November 23, 2001, refused to offer the Appellant any assurance that it would direct a processor to purchase its product according to a particular schedule. By letter dated April 17, 2002, the Chicken Board confirmed its November 23, 2001 position and advised that it would not direct product “when it is being absorbed by the processor community in a manner consistent with the Board Regulations and practice” (albeit not in accordance with the Appellant’s eight home week schedule). The Chicken Board encouraged the Appellant to seek processor co-operation in co-ordinating the weekly production from its hatching egg operation with the capacity of its hatchery. The Chicken Board was of the view that imposing a particular schedule on a processor “would be disruptive and inappropriate”.
4. On April 26, 2002, the Appellant sought the supervisory intervention of the British Columbia Marketing Board (the “BCMB”) in order “to aid in the orderly and efficient production and processing or (sic) our client’s broiler quota”.
5. On June 5, 2002, a supervisory Panel of the BCMB issued a decision with respect to these matters. Although this supervisory decision is not binding on this Panel, it does provide useful background to the issues on appeal. It states in part:

On April 26, 2002, legal counsel for Rosstown Farms Ltd. (Rosstown) wrote to the British Columbia Marketing Board (BCMB) requesting that the BCMB exercise its supervisory role over the British Columbia Chicken Marketing Board (Chicken Board). Rosstown’s complaint is that the Chicken Board has failed to act to protect it from

retaliatory actions – which its May 29, 2002 letter describes as “squeeze play” tactics – by British Columbia’s three major processors, which actions began following the disclosure of Rosstown’s plans to build a broiler chick hatchery. Rosstown seeks the BCMB’s supervisory intervention to ensure that the Chicken Board protects it from these actions...

Rosstown’s complaint can only be understood in light of the reality that in the British Columbia chicken industry, there are three major chicken processors: Lilydale Co-operative Ltd. (Lilydale), Hallmark Poultry Processing (sic) and Sunrise Poultry Processors Ltd. Under BC’s national supply management agreement in chicken, the market requirements of these processors has become critical to the production management system. Simply speaking, each processor advises the Chicken Board of its future market requirements on a period by period basis, and the Chicken Board in turn allocates production to chicken producers based on their quota holdings and these total requirements. For their part, the processors assume an obligation to purchase the volume of chicken they have requested, at a price set by the Chicken Board.

The complications that arise here have to do with the fact that British Columbia’s processors do not merely process (kill and market) chicken. They are “vertically integrated operations”. In other words, they also hold and grow their own quota as producers, and importantly, they also operate hatcheries, which are regulated by the British Columbia Broiler Hatching Egg Commission. The hatcheries are a significant part of the processors’ businesses, because it is these hatcheries that sell chicks to the vast majority of British Columbia’s chicken producers. For many years then, British Columbia’s chicken industry has operated on the basis that the vast majority of growers merely grow chicken, and the same people who bought and processed their chickens also supplied them with their chicks.

Rosstown’s application for a hatchery licence in the fall of 2001 had the potential to alter this *status quo*. Rosstown, which is one of the largest chicken producers in British Columbia apart from the three processors, used to have all its production purchased by Lilydale. Rosstown itself does not have the means to process its production and so will not be a fully vertically integrated operation.

Upon learning that Rosstown does not intend to buy chicks from Lilydale or the two other processors, Lilydale has ceased to take 100% of its production...

...

The Chicken Board’s response to the merits of Rosstown’s letter is in fact directed extensively to “how the chicken industry in British Columbia works”. The key points made by the Chicken Board are these:

- Rosstown undertook its plan to build a hatchery with the knowledge that the Chicken Board had refused to direct Rosstown’s production to a specific processor;
- Rosstown’s production “must be purchased by the processors”; they have an “obligation to purchase all such production”; “the product must and does find

a home”;

- What the Chicken Board is not prepared to do is to direct one or more processors to schedule the purchase of Rosstown’s product “in a manner consistent with the schedule of Rosstown’s hatching egg production”. If Rosstown wishes this sort of special treatment, it will need to negotiate that with a processor.

In the BCMB’s view, it is a fundamental governance obligation of the Chicken Board to ensure that processors live up to their commitments to take the production of all growers in a given period. As admitted by all parties, all of Rosstown’s production has been processed to date.

Rosstown seeks to have the Chicken Board go further in this instance, and dictate that one or more of the processors collect Rosstown’s chickens in such fashion from day to day and week to week over the course of a given 8 week period as best suits Rosstown’s hatchery business interests. In our view, this would not be an appropriate exercise of authority by the Chicken Board. As the Chicken Board points out, processors face a very complex task in scheduling the slaughter of BC chicken production on a period-by-period basis. The slaughter schedule requires the processors to take into account size, age, plant, farm location, transportation and market demands. For the Chicken Board to dictate that the schedule of one grower shall be “locked in” simply to suit other business needs of that grower – which needs are not part of what the Chicken Scheme is about – would in our view unnecessarily interfere with the business of the processors, and would also result in inconvenience and disruption to other chicken producers.

As the Chicken Board points out, Rosstown proceeded with its hatchery business with a specific caution by the Chicken Board that it would do well to obtain a commitment from a processor regarding the purchase of its production. In the absence of such a negotiated commitment, someone will inevitably be inconvenienced – either Rosstown on the one hand, or the processors and other producers on the other.

The mere fact that Lilydale has declined to take 100% of Rosstown’s production is in our view not a cause for intervention when the processors have, collectively, lived up to their obligation to take all Rosstown’s production. If there were evidence that the processors had failed to accept 100% of Rosstown’s production, or have acted with concerted intention to harm Rosstown, our decision might well have been different.

Rosstown has advised that it intends to place eggs in its hatchery, for the period A-49, in September, 2002. Should evidence arise that the processors are refusing to take all Rosstown’s production and should there be evidence that the Chicken Board is not fulfilling its obligation to ensure that the product “must and does find a home”, the BCMB is prepared to examine this matter again. In the interim, Rosstown would do well to follow the Chicken Board’s earlier advice and seek to negotiate a resolution to this matter with one or more processors.

6. On July 30, 2002, the Appellant forwarded unsigned contracts for period A-49 to the Chicken Board in an attempt to have the Chicken Board obtain the signatures of the processors regarding the processing of its production in accordance with an

eight home week schedule.

7. By letter dated August 8, 2002, the Chicken Board advised as follows:

The Board wishes to reiterate that it would be prudent for Rosstown Farms to obtain a commitment from one or more processors for the purchase of its production in a manner all parties are willing to accept.

As indicated in the letter dated May 28, 2002 from the Board's legal counsel of Davis and Co to the BCMB, the BCCMB will not direct one processor, or some number of processors to schedule the purchase of product in a manner consistent with the schedule of Rosstown's hatching egg production. The BCMB, in its letter of June 5, 2002, agreed that this would not be an appropriate exercise of the authority of the Chicken Board.

8. By letter dated August 12, 2002, the Appellant appealed the August 8 decision of the Chicken Board wherein it refused to direct product to a processor in accordance with Rosstown's established procedure (an eight home week schedule).
9. Given the Appellant's assertion that a decision in this matter needed to be made prior to egg sets for period A-49, this appeal was heard over two long days of hearing on September 3 and 9, 2002. Intervenor status was granted to Sunrise Poultry Processors Ltd., Hallmark Poultry Processors Ltd. and Lilydale (the "Processors") who collectively opposed the appeal. In addition, intervenor status was granted to Royal Columbian Poultry, a broiler hatching egg producer who supported the Appellant in the appeal.
10. The Panel agreed to provide its reasons as soon as possible after the conclusion of the hearing. The Panel has had the opportunity to hear from the various parties to this dispute and review the documentary evidence filed. However, due to time constraints resulting from the need for eggs to start being set by September 15 for period A-49, our reasons for decision must of necessity be somewhat abbreviated.

ISSUES

11. The Appellant maintains that the Chicken Board under the *British Columbia Chicken Marketing Scheme, 1961* (the "Scheme") has the power to "regulate and control" in "any and all respects" the production of chicken in the Province.
12. The Appellant describes the issues on appeal thus:
 - a) Did the Chicken Board err in not assisting the Appellant in maintaining its choice of an eight home week schedule for the slaughter of its chickens and in

particular, in not upholding this producer's choice of home weeks as set out in s. 67 of the Chicken Board's Regulations?

- b) Was it appropriate, in light of the evidence of improper, illegal and anti-competitive activities on the part of the Processors, for the Chicken Board to decline to exercise its authority to assist the Appellant in the direction of its product on an eight home week schedule?

DECISION

13. The Appellant argues that the BCMB should direct the Chicken Board to intervene on its behalf and direct a processor to process the Appellant's chicken in accordance with its July 30 schedule. The Appellant also asks for a direction that the Chicken Board take steps to ensure that the Processors no longer interfere with the Appellant's eight home week schedule, the processing of its product, or with its hatchery operations. It also asks for any further relief or remedy that the BCMB, in its discretion, deems appropriate in the circumstances.

Eight Home Week Schedule

14. The Appellant argues that the broad empowering provisions in s. 2 and s. 11 of the *Natural Products Marketing (BC) Act* (the "Act") and s. 4.01 the *Scheme*, give the Chicken Board the power and the authority to control all aspects of chicken production in the Province. In the circumstances of this case, the Appellant argues that the Chicken Board should be required to use its regulatory powers to assist a grower in becoming economically viable and to prevent that grower from suffering at the hands of the economically powerful Processors.
15. The Appellant argues that the Chicken Board's own Regulations recognise that it is the producer who chooses its home week(s): Part 1 Definitions, s. 67. The home week is the producer's choice and not that of the processors or the Chicken Board. Further, the Regulations recognise that the processor must buy the chicken from the producer in accordance with the contract and the Regulations: s. 25.
16. The Appellant argues further that the Chicken Board ought to exercise its discretion and use its power of regulation to prevent the Processors from subverting Rosstown's eight home week schedule. In support of this argument, the Appellant points to the following factors:
- The Appellant is one of the largest independent producers in the province with combined quota holdings between Rosstown Farms Ltd. and Wiebe Holdings Ltd. of 290,000 birds per cycle
 - The Appellant has been attempting to develop an integrated operation (feedmill, broiler hatching egg operation, hatchery, broiler operation)

- The Appellant has shipped to its processor Lilydale on an eight home week schedule without complaint from the processor and with tacit approval from the Chicken Board for approximately two years
- The Appellant constructed its hatchery in the spring of 2002 at a cost of approximately \$1.5 million
- The eight home week schedule only became a problem for Lilydale once the new hatchery was constructed
- Lilydale has aggressively opposed the Appellant's plans to develop a hatchery and has refused to process its chicken on the eight home week schedule or to process chicken grown from chicks other than those purchased from Lilydale's hatchery
- Since period A-46, although the Appellant's chicken has been processed, it has not been in accordance with its contracts – its chicken has been processed by different processors and on varying schedules
- This disruption of scheduling has created hardship and inefficiencies for the Appellant which has resulted in financial losses
- Poor chick quality has resulted in bird health issues and higher than normal mortality and condemnments
- The Appellant requires an eight home week schedule to co-ordinate the production from its broiler hatching egg operation with the capacity of its hatchery
- If the Appellant is pushed into fewer home weeks, its hatchery cannot be run efficiently or at all
- The Processors are refusing to process chicken on an eight home week schedule when that chicken is produced from chicks other than those purchased from a processor's affiliated hatchery – this conduct is illegal as it constitutes "locked in or tied selling"
- A previous investigation by the Competition Bureau in 1996-7 resulted in the Processors giving certain assurances that they would not restrict competition in the supply of chicks and in the purchase of broilers
- The Chicken Board is well aware of the earlier Competition Bureau investigation and is equally aware of the Processors' alleged anti-competitive behaviour towards the Appellant

17. Given the foregoing circumstances, the Appellant argues that the Chicken Board should have exercised its authority and stepped in to protect the Appellant and its eight home week schedule.
18. Mr. Frank Flokstra, another chicken producer, supports the Appellant in this appeal. He believes more competition among the hatcheries would benefit the producers. Currently, producers are at the mercy of integrated processors; unless

- a producer has a home for his chicken, there is little ability to change hatcheries. Further, because each processor has its market share, there is little ability for a producer to move to another processor unless a corresponding producer also wants to move.
19. Mr. Allan Cross of Royal Columbian Poultry, a broiler hatching egg producer also supports the Appellant in its request to have its product processed in accordance with the eight home week schedule. He argues in favour of increased choice and competition. He is interested in the outcome of this appeal as he too has experienced oppressive conduct on the part of hatcheries and as such would like the ability to set up his own hatchery.
 20. The Chicken Board maintains that the real issue on this appeal is not whether the Chicken Board has the power to direct product but rather whether in these circumstances it is appropriate for it to do so. It answers this latter question in the negative. After considering this issue on several different occasions, the Chicken Board has determined that it is inappropriate for it to dictate to a processor when it should take certain product. As long as a processor takes up a producer's product during a cycle, the Chicken Board will not and should not intervene.
 21. Further, the Chicken Board argues that while it may direct product, the circumstances of this appeal are not an appropriate instance to exercise such authority. The relief that the Appellant seeks is primarily to benefit the Appellant Rosstown as a hatchery or broiler hatching egg producer, not as a chicken producer. The requirement of an eight home week schedule is to accommodate the needs of the staged incubators in its hatchery and the weekly production of broiler hatching eggs from its broiler hatching egg farm. The eight home week schedule is not necessary to accommodate the broiler farm production, which the Appellant concedes could be grown in one placement. No other producer operates with an eight home week schedule; 98% of growers in the Province have their product slaughtered in one home week.
 22. The Chicken Board argues that there is no reason, consistent with its responsibility and authority to effectively manage the supply of chicken in British Columbia, why the Appellant's schedule ought to be imposed on one or more processors. The Chicken Board disagrees with the Appellant that the definition of "home week" when read with s. 67 of the Chicken Board's Regulations allows a producer to impose his home week(s) on a processor. Chicken Board practice and policy is for this decision to be made by both the producer and the processor and is in turn reflected in the producer contract.
 23. The Processors obviously agree with the Chicken Board's position with respect to the imposition of the Appellant's eight home week schedule. However, they go further and argue that not only is it inappropriate for the Chicken Board to impose

- the Appellant's eight home week schedule but that the Chicken Board lacks the authority to direct product in any event. The Processors assert that the fact that the Chicken Board has not designated processors as agencies of the Chicken Board limits or prevents them from exercising the power in s. 4.01(a) of the *Scheme* to direct product. More will be said on this issue later.
24. This appeal turns on the issue of whether, in these circumstances, it is appropriate for the Chicken Board to direct product to a processor on a particular schedule. This begs the question of what is the appropriate level of management to be exercised by the Chicken Board? A determination of the appropriate level of management involves consideration of the regulated system created by the *Act* and the *Scheme*, and which operates both in British Columbia and nationally.
 25. The chicken industry in Canada is supply managed on a national allocation system. The national supply management agreement dictates a "bottom up approach" whereby processors' market requirements form the basis for each province's allocation. Each processor advises the Chicken Board of its market requirements for domestic and export production, on a period by period basis. The Chicken Board submits these numbers to the Chicken Farmers of Canada following which BC receives its provincial allocation, which may be less than what the processors sought in the first instance. Processor representatives then meet in a "huddle" at the Chicken Board offices to distribute the allocation in accordance with each processor's needs. Once production numbers have been agreed to, the Chicken Board allocates production to registered producers in accordance with their quota holdings. In circumstances where a processor is short of its market requirements, the Chicken Board can direct a producer to ship its product to a particular processor despite a pre-existing contractual relationship with another processor. Chicken producers place chicks and then produce their quota allocation within certain tolerances on a period by period basis. Processors are obligated to purchase the volume of chicken requested for a particular cycle, at the price set by the Chicken Board. Apart from the volume of chicken to be produced and the price to be paid, processors and producers are free to negotiate other contractual terms between themselves.
 26. The Processors are the three major chicken processors in British Columbia; all are vertically integrated. They do not just process chicken; they own their own hatcheries, and in some cases broiler farms, as well. Hatcheries form a significant part of their business and are considered to be fairly lucrative. Their margins are set as the price of the hatching egg and chick are both fixed. Historically in British Columbia, producers purchase their chicks from the hatchery operated by (or affiliated with) the processor who slaughters their chicken.
 27. The Appellant seeks to manage its own destiny by controlling more of its input costs. Rosstown wants to hatch its own broiler hatching eggs and use those

- chicks in its broiler operation. In order to maximise the efficiency of the hatchery, it is necessary to have a steady supply of eggs, staged to allow chicks to be hatched, placed on the broiler operation, grown and then shipped in a eight-week production cycle. However, as the Appellant is not totally vertically integrated, it still requires a processor to take its chicken on an eight home week schedule. The Processors who now view the Appellant as a competitor in the hatchery business are less than willing to accommodate Rosstown's special shipment needs.
28. Leaving aside that the Appellant is a major chicken producer and looking at the Appellant solely as a hatchery, there would be no basis upon which the Chicken Board would or should step in to assist a hatchery with its business plan. An independent hatchery, if it is going to be able to sell its product, should have a working relationship with a processor. When a producer purchases chicks from a hatchery, he must have an assurance that the chicken produced will be processed. The Chicken Board does not have the ability or the authority to dictate a business relationship between the hatchery and a processor.
 29. Does the situation change any then when one considers that the Appellant is a major chicken producer as well as a hatchery? The Panel does not think so. The Chicken Board is responsible for regulating the chicken industry. The Chicken Board has the authority to control the amount of chicken grown in British Columbia and the price paid for that chicken. Chicken producers hold quota, which gives them the privilege of producing the allocated volume of chicken at a price set by the Chicken Board. The processors, in turn, obtain that volume of chicken when during the production cycle they require it, at the price fixed by the Chicken Board. The supply-managed system ensures that producers are paid for the product they produce and processors receive the product when they require it to meet their market demands. The Chicken Board's task is to balance the needs of the producers with those of the processors in order to ensure stability in the marketplace.
 30. What then is the role of the Chicken Board in this case? The Appellant, a chicken producer, in a move to be more profitable made a business decision to control its input costs by hatching its own eggs. Presumably this move is to maximise profitability for the Appellant over time. The Processors are further along this path than the Appellant. In a move to be more profitable, some years ago they also made business decisions to control input costs by having their own farms, hatcheries and processing plants. The motive is the same, to maximise profitability over time.
 31. The Appellant points to the definition of "home week" and s. 67 of the Chicken Board Regulations and argues that it is Rosstown's decision alone as to when it ships its chicken. The Panel disagrees with the Appellant's interpretation of home week and the unilateral nature of the decision of when to ship. Section 67

qualifies the Part 1 definition of home week by providing that a producer “after consultation with the processor, shall complete and file with the Board the prescribed form...indicating the length of cycle ...and the home week(s) for the registered premises”. The producer, the hatchery and the processor must sign the contract confirming their agreement with the production and marketing specifications set out. Thus, the parties to the contract have the choice as to whether they accept the terms or not and as such the decision of when to ship chicken is not unilateral. The Panel agrees with the Chicken Board that the decision of when to ship forms part of the contractual relationship between producer, hatchery and processor.

32. The Appellant is asking the Chicken Board to impose an arrangement that dictates the conduct of others in order to accommodate its larger business objectives. Those business objectives relate primarily to the profitability of a hatchery and not to the broiler operation. The Panel agrees with the actions of the Chicken Board in this instance. Anticipating the difficulty of getting Rosstown’s chicken processed, the Chicken Board initially cautioned the Appellant against proceeding with its plans for a hatchery without obtaining a commitment from a processor regarding the purchase of that production. In the absence of a commitment from a processor and without any assurance from the Chicken Board that its product would be taken up, the Appellant nonetheless proceeded with its plans. The Appellant now seeks to have its eight-week schedule imposed on a processor. To do so will not only impact the Processors but other producers as well.
33. The Panel is not satisfied that the injustice to the Appellant in not enforcing an eight home week schedule is so profound as to require regulatory intervention by the Chicken Board at this point. The Chicken Board is committed to meeting its regulatory objectives of ensuring that all the regulated product is purchased by the processors on a cycle by cycle basis. To date, 100% of the Appellant’s production has been processed. The Chicken Board has confirmed its intention to ensure that all the Appellant’s production is taken up by the Processors in A-49.
34. Very clearly there is a power struggle taking place between the Processors on one hand and the Appellant on the other. The Chicken Board is attempting to walk a fine line and balance competing interests. The Panel is not satisfied that the Chicken Board has erred in failing to impose the Appellant’s eight home week schedule on any of the Processors. The Chicken Board has exercised sound judgement and acted properly

Directing of Product

35. As mentioned earlier, in opposing an order directing an eight home week schedule the Processors argue that the Chicken Board lacks the power to direct product. Section 4.01(a) of the *Scheme* gives the Chicken Board authority to “regulate the time and place at which, and to designate the agency through which, any regulated

- product shall be packed, stored or marketed”. As the Processors are not designated agencies of the Chicken Board, they argue that the Chicken Board cannot direct product to them.
36. The Appellant and the Chicken Board both agree that the Chicken Board has the power to direct product. The Chicken Board argues that the broad powers enunciated in s. 4.01 of the *Scheme* “to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and marketing, or any of them, of the regulated product” are not limited by the enumerated powers. By necessary implication the power to regulate must include the power to direct product. The designation of an agency is not integral to the power to direct product.
 37. The Appellant points to the decision of Mr. Justice Clancy in *British Columbia Broiler Hatching Egg Commission v. Horizon Hatchery Ltd.* (December 20, 1991, Vancouver Registry, No. A914406), a case where the Supreme Court had the opportunity to consider the Broiler Hatching Egg Commission’s similarly worded power to direct product. The Appellant argues that the decision does not make a distinction that a board or commission can only direct product to a designated agency. Agency designation is not a determining factor in the power to direct product.
 38. The Panel has considered the foregoing submissions. However, having decided that the circumstances are such that it is inappropriate for the Chicken Board to direct a processor to take the Appellant’s chicken on its eight home week schedule, it is not necessary to deal conclusively with this issue in the context of this appeal. Further as the issue of directing product was not central to the issues between the Appellant and the Chicken Board, the arguments before the Panel were not fully developed. As mentioned above, it was the Intervenors who raised the issue of the Chicken Board’s authority to direct product to a processor that is not a designated agency. If this is a strongly held view by the Processors, it will no doubt be the subject of a future dispute should circumstances require the Chicken Board to direct product.
 39. Subject to hearing full argument should the occasion ever arise, the Panel would be surprised if it was found, in the face of the broad prefatory powers to regulate the chicken industry in the *Scheme*, that the Chicken Board did not have the power to direct product. A pillar of supply management is the right of a quota holder to produce and ship a certain amount of product at a certain price. Without the power to direct product for purchase by a processor, the production rights associated with quota would be severely undermined.

Illegal, Improper and Anti-Competitive Conduct

40. One of the justifications relied upon by the Appellant to support its request for the Chicken Board to direct a processor to take its product on an eight home week schedule is the alleged illegal, improper and anti-competitive conduct of the Processors. For many years, the Appellant enjoyed a good working relationship with Lilydale. Once it began plans to develop a hatchery, circumstances changed. Lilydale expressed an unwillingness to accept product not grown from chicks purchased from its hatchery. Various statements were attributed to employees of Lilydale to the effect that if the Appellant developed its own hatchery it better make sure it had a home for its product. Mr. Al Fauchon, a consultant working for the Appellant in the design and development of its hatchery, had a conversation with Mr. Peter Shoore, President of Sunrise Poultry Ltd. (also a member of the Chicken Board). Mr. Shoore indicated the Processors were not very excited about the Appellant's plan to build a hatchery and if the Chicken Board directed the Appellant's product to their plants, the Appellant better have an injunction for every truckload of product.
41. With the exception of the evidence of Mr. Frank Burdzy, Chief Executive Officer of Lilydale, the Processors chose not to respond to the allegations of the Appellant. Mr. Burdzy appeared at the hearing by way of telephone conference; his evidence was less than clear due to poor transmission. However, he stated that Lilydale had nothing against the Appellant and its principal Mr. Dan Wiebe personally. The decision to not take the Appellant's product if grown from Rosstown's own chicks was a business decision. A hatchery is a revenue centre for a processor. The price a processor agrees to pay a producer is derived from an assessment of various revenue streams. If the Appellant does not purchase its chicks from Lilydale, Lilydale loses the benefit of that revenue. Given that Lilydale is a producer co-operative, it operates on principles of fairness and equity. A producer who is not a fully participating member (i.e. not purchasing chicks from Lilydale's hatchery) cannot expect the same privileges. Mr. Burdzy stated that even if the Appellant agreed to forego dividends from that part of the business in which he was no longer participating, Lilydale still loses revenue.
42. The Appellant points to this linkage of inputs (chicks) with processing and argues that the Processors are acting in an anti-competitive manner. In January 1997, after an investigation by the Criminal Matters Branch of the Competition Bureau, the three major processors who are Intervenors in this appeal agreed *inter alia*, to not enter into agreements or arrangements among themselves to restrict competition in the supply of chicks to and in the purchase of broilers from specific producers in British Columbia. The Appellant argues that the Processors, in refusing to take the Appellant's chicken if produced from its own chicks, are violating their agreement with the Competition Bureau. In light of the foregoing,

the Appellant argues that the Chicken Board should act to protect its producer from this anti-competitive behaviour.

43. The BCMB has not been assigned the statutory function of making determinations about what constitutes anti-competitive conduct under the *Competition Act*, R.S.C. 1985 c. C-34. It is unclear to this Panel whether the conduct complained of by the Appellant constitutes “tied selling” or “lock in”. These determinations would need to be the subject of a complaint and investigation under the *Competition Act*.
44. What is clear to the Panel is that the Chicken Board has the statutory authority to regulate the chicken industry. The Appellant has made the Chicken Board aware of its complaints regarding the Processors’ conduct. For the reasons given above, the Panel endorses the Chicken Board’s approach to this matter to date.
45. We note as well in closing that on September 2, 2002, the Chicken Board passed the following motion:

When contracting for the purchase of a grower’s chicken that has been allotted to the grower through the Board’s allocation process, a processor may not set as a condition of purchase that the grower purchase chicks from any particular hatchery.
46. The motion is evidence of the Chicken Board’s commitment to ensure that all the chicken produced – which chicken is produced at the request of processors – “will find a home”. This is the proper regulatory role of the Chicken Board.

ORDER

47. The appeal is dismissed.
48. There will be no order as to costs.

Dated at Victoria, British Columbia, this 12th day of September, 2002.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Hamish Bruce, Member
Satwinder Bains, Member