

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL REGARDING A DECISION TO DENY A TURKEY LICENCE

**BETWEEN**

**STEVE IRELAND AND JASON IRELAND  
d.b.a. S&J IRELAND FARMS**

**APPELLANTS**

**AND:**

**BRITISH COLUMBIA TURKEY MARKETING BOARD**

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia Farm Industry  
Review Board

Garth Green, Member (Panel Chair)  
Wayne Wickens, Member  
Suzanne K. Wiltshire, Member

For the Appellants

Dan Ireland, Designate

For the Respondent

Michel Benoit, General Manager

Date of Hearing

June 11, 2007

Place of Hearing

Sidney, British Columbia

## INTRODUCTION

1. Steve Ireland applied to the British Columbia Turkey Marketing Board (TMB) in the Spring of 2004 to be licenced as a Grower-Vendor pursuant to the British Columbia Turkey Marketing Scheme (*Scheme*) and the TMB's General Order and Regulations in effect at the time.
2. Shortly after he applied the TMB advised Steve Ireland that his application would be held in abeyance pending the outcome of the British Columbia Farm Industry Review Board (BCFIRB) Specialty Review.
3. On August 26, 2006, following the completion of the Specialty Review, Steve Ireland and his nephew Jason Ireland<sup>1</sup> (S&J Ireland) applied to the TMB to be considered for the new entrant program pursuant to the *Scheme* and the TMB's General Order and Regulations.
4. In correspondence accompanying the August 26, 2006 application S&J Ireland supported their application with the following reasons:
  1. Our initial application for Grower Vendor was made on February 20, 2004. At that time, we were advised that we would be placed on the 'wait list' pending a Specialty Review.
  2. We have produced and marketed new, innovative specialty turkey products for many years. In addition to our fresh Thanksgiving and Christmas turkeys, our products also include turkey sausage (several varieties), fresh ground turkey, specialty turkey wings and legs, turkey hams, as well as bone & roll turkey-seafood gourmet meals. A new product we are developing is our specialty turkey pet food.
  3. Although not 'certified' organic at this time, we have traditionally produced 'Naturally-raised Organic Meats'. It is very difficult to be Certified Organic on Vancouver Island as the cost and conditions placed on shipping bulk feeds to the island is extremely restrictive. At times, one cannot depend on shipment arrivals with the obvious impact this would cause.
  4. Our turkeys are produced locally and sold at regional markets and farm gate all outside the Lower Fraser Valley region and specifically only on Vancouver Island.
5. Subsequently in a January 17, 2007 letter to the TMB, S&J Ireland noted that they had recently been advised by the TMB that their application had been placed on a "priority wait list" and that issuance of a licence was subject to the following four priorities:
  1. direct marketer of new, innovative specialty turkey products;

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<sup>1</sup> Who carry on business under the name S&J Ireland Farms.

2. certified organic production;
3. producer and marketer in regional markets outside the Lower Fraser Valley; and
4. commercial producers.

S&J Ireland also noted in the letter that they had been advised by the TMB that their application only qualified for priorities 3 and 4 and that several certified organic applicants might qualify ahead of their application.

6. In a March 8, 2007 letter, the TMB confirmed that S&J Ireland's January letter accurately described their application status and advised that the new entrants selected for the 2007/2008 quota year would be from a pool of applicants willing to grow certified organic turkey.
7. On March 26, 2007 S&J Ireland appealed the TMB decision denying them a new entrant grower licence. They contend that the TMB erred in not granting them a new entrant grower licence for the 2007/2008 year and is not "conducting licence issuance for New Entrant Growers in compliance with the intent of the Specialty Review."
8. The appeal was heard June 11, 2007 in Sidney, British Columbia. Dan Ireland represented S&J Ireland at the appeal.

## **ISSUE**

9. Did the TMB err in not granting S&J Ireland a new entrant grower licence for the 2007/2008 quota year?

## **SPECIALTY REVIEW**

10. The directions in the Specialty Review are central to certain of the arguments raised in this appeal. This section provides background on that review in order to provide context for the arguments that follow.
11. In October 2002 the BC Minister of Agriculture announced initiatives that the Cabinet had approved through the Core Review concerning the governance and policy framework for the regulated marketing sectors. This included a requirement for the supply managed commodities to proactively encourage the development of specialty markets.
12. In September 2003 BCFIRB responded to this directive and instructed all five supply managed boards to carry out a review of their policies and programs with respect to specialty production and marketing.
13. The Ministry of Agriculture, Food and Fisheries - now the Ministry of Agriculture and Lands (Ministry) released its *Regulated Marketing Economic Policy* in July 2004. This document included an objective that the regulated marketing system serve the growing demand for organic and other farm-differentiated products to facilitate overall industry growth and competitiveness. Boards were to ensure their policies and

decisions did not inhibit the economic viability of regional industries and the policy also called for the system to facilitate the entry of new producers to sustain and renew these sectors.

14. In August 2004, as part of the September 2003 review directive, BCFIRB developed draft *Specialty Production Review Principles* for future reference and then suspended its review of specialty production pending an upcoming Ministerial review. These principles are summarized as follows:

1. *Clarity in definition* – definitions of specialty production must be clear, specific and objective.
2. *National Systems* – production for specialty production should be within national allocations, and BC should seek increased allocation.
3. *Public Interest* – priority should be given to producers who have not previously produced commodities under quota.
4. *Affordability* – permits used to regulate specialty products must be cost effective.
5. *Transferability* – clear rules must be established for the transfer of specialty production permits.
6. *Administration* – procedures and management must be fair, transparent, effective, accountable, flexible and timely.
7. *Accountability* – producers and specialty products must be subject to compliance with regulations established for specialty production.
8. *Sustainability* – allocations for specialty production must be linked to demand for that production.

15. The Ministry commenced its review of all the work that had been completed by commodity boards and BCFIRB through its Specialty Review and began to further develop a general policy framework regarding the issue. A consultant was engaged to undertake this project in consultation with the Ministry and BCFIRB.

16. The Minister of Agriculture released the report, *Recommendations for Managing Specialty Agri-Food Products in BC's Supply Managed System* in January 2005. The stated goal was to facilitate the further growth and development of organic and other specialty production within the regulated marketing system. There were nine general recommendations made in this report

1. All producers of milk, eggs, chicken, turkey and broiler hatching eggs, regardless of size or class of product, should be registered with the Boards.
2. Specialty product definitions should reflect substantive farm level differentiation, third party certification, and identity preservation through to the consumer.

3. Specialty production and marketing should be managed using a distinct, separate, and restricted class of quota.
  4. Allocation procedures should ensure fair treatment of both specialty and mainstream producers, and allocation decisions should require prior approval of the FIRB.
  5. Small producer exemption levels should be increased.
  6. A phased permit system should be developed to foster innovation and to progressively advance specialty producers to become holders of specialty quota.
  7. Levies should reflect services provided. There should be no extra fees for specialty permits or quota, such as “quota lease fees”, that are not service-based.
  8. Specialty producers should have Board representation, and Specialty Markets Advisory Committees should be established for each Board.
  9. New entrant programs should be revised to include clear quota purchase permit issuance criteria, and incentive amounts issued should be non-transferable.
17. In January 2005 BCFIRB considered the Ministry report and resumed its own review. At that time BCFIRB directed boards and commissions to submit draft commodity-specific plans based on the policy framework and industry consultations within their respective sectors.
18. BCFIRB issued its *Policy, Analysis, Principles and Directions* to the boards in September 2005. Boards were instructed to implement changes through their board orders and regulations.
19. Following several more months of discussion with boards and industry regarding the specific content of each board’s orders and regulations, BCFIRB approved the revised orders and regulations of the boards. The TMB revisions were approved on June 27, 2006. By the Autumn of 2006 all boards had implemented their revised orders and regulations. Subject to a successful appeal, those orders and regulations are binding upon stakeholders in each commodity.
20. Since the Autumn of 2006, BCFIRB has advised the boards collectively respecting specialty implementation issues on three separate occasions. In January 2007 BCFIRB amended the September 2005 directions document to clarify rules dealing with quota transfers between siblings. In February 2007 BCFIRB responded to questions regarding eligibility of persons for new entrant programs and in May 2007 directions were issued regarding new entrant program eligibility criteria.
21. All the documents referred to in this section may be viewed in their entirety at: [http://www.firb.gov.bc.ca/specialty\\_review.htm](http://www.firb.gov.bc.ca/specialty_review.htm).

## **ARGUMENT OF THE APPELLANTS**

22. The Appellants submit that since Steve Ireland has been on the wait-list from early 2004, special circumstances should be considered to allow S&J Ireland to become licenced.
23. The Appellants also argue that the TMB has incorrectly interpreted the instructions from BCFIRB and implemented them in a way that was not intended. They do not believe the TMB is administering the September 2005 directions in the “spirit and intent of the Specialty Review”. Specifically they argue that the four-part criteria to become licenced under the new entrant program is being interpreted too narrowly by the TMB and flexibility is not being exercised by the TMB to accommodate the Appellants’ “extenuating” circumstances.
24. The Appellants presented the list of “New Entrant Applicants” obtained from the TMB website October 31, 2006 noting that of the nine individuals listed, only S&J Ireland (6<sup>th</sup> on the list) is located outside the Fraser Valley. The list is presented in alphabetical order and application dates are not included.
25. The Appellants argue that the priorities established by the TMB are being applied without regard to the Ministry’s objective of encouraging regionalization of agriculture. They contend that regionalization should carry a higher value in the determination of new entrants given that it will result in a lessening of intensive commercial agriculture in the Fraser Valley. They cite BCFIRB’s directions of September 2005 as supporting this position. In section 5.13.3 of those directions BCFIRB directed that “*Boards are encouraged to provide priority to specialty and regional market needs in issuing new entrant opportunities*”.
26. The Appellants also contend that they qualify for the first of the priorities on the TMB’s list and thus qualify under three of the four categories. They stated that they have produced, processed and marketed new, innovative specialty turkey products for many years. At the request of many clients, and in addition to their fresh Thanksgiving and Christmas turkeys, products they developed include; turkey sausage (several varieties), fresh ground turkey, specialty (smoked) turkey wings and legs, rolled hams (turkey rolls) as well as a turkey-seafood combination; a boned out bird combined with seafood neptune. A new product they are developing is specialty turkey pet food.

Based on this they believe they should have been given priority over other applicants intending to produce certified organic turkey in the Fraser Valley.

27. The Appellants referred to a letter from Ron Charles, TMB Chair, stating that it was the TMB’s opinion that the only identified product that would meet the Board’s understanding of the definition of new, innovative specialty turkey products is the

commercial production of “Wild Bronze Turkeys”. S&J Ireland maintains that this interpretation of “breed type” as the only acceptable qualifier for this category is too restrictive and is not in keeping with BCFIRB’s intent in the Specialty Review. The Appellants argue that this is particularly true in their situation because their specialty products are derived from a naturally-raised free range turkey.

28. The Appellants told the Panel that there are substantive reasons why animal agriculture is in decline on Vancouver Island. They argue that animal agriculture requires a steady flow of input ingredients and this is not guaranteed for Vancouver Island producers. Inputs are subject to the reliability of the ferry service transporting them from the mainland. Also, specifically related to their circumstances, there is no organic feed mill on Vancouver Island and therefore a local secure supply of reasonably priced organic feed is not available. This works against the production of certified organic turkey on Vancouver Island since organic feed is required for turkey production to be certified as organic.
29. The Appellants also argue that on Vancouver Island the “naturally-raised free-range” type of product they raise is in demand more than certified organic turkey which draws a very substantial price premium.
30. Dan Ireland drew the Panel’s attention to BCFIRB’s letter to all boards in the Province on February 16, 2007. This letter is entitled: REVIEW OF SPECIALTY PRODUCTION AND NEW ENTRANT PROGRAMS – IMPROVING ACCESS TO THE SUPPLY MANAGEMENT SYSTEM – ELIGIBILITY CRITERIA FOR NEW ENTRANT PROGRAMS. Dan Ireland highlighted three specific sections of this letter in support of the Appellants’ position.
  1. At the bottom of the first page BCFIRB drew attention to the language in its September 2005 supervisory directions concerning new entrant programs, referring to the second and third directions under “s.514 New Entrant Waiting Lists”<sup>2</sup> which state:
    2. Where Boards have existing waiting lists, they are to be reviewed and modified to reflect the new eligibility and invitation criteria developed by the Boards.
    3. Boards are encouraged to provide priority to specialty and market needs in issuing new entrant opportunities.

It is the Appellant’s contention that the TMB did not do this when it established its four priorities for granting new entrant grower licences.

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<sup>2</sup> The February 16, 2007 letter from the Provincial Board contains an error. The reference to “ s. 514 New Entrant Waiting Lists” should read “s. 5.13 “New Entrant Waiting Lists”. The error is referential and does not change the reasoning in the Appellant’s argument.

2. On page 4 of the letter BCFIRB addressed some of the difficulties boards were having in determining the criteria for new entrants. BCFIRB stated:

BCFIRB recognizes that no set of rules can address every eventuality, and there will undoubtedly be cases where commodity boards will be called upon to make decisions that are not specifically contemplated by the rules, where the rules are ambiguous, or where exceptional circumstances are asserted in favour of an exemption from their orders (which each of the schemes allows, based on power delegated from s. 11(1) (e) of the *NMPA*). When exercising these judgments, boards and commissions must have regards to the purpose or principles underlying the new entrant program.

The Appellants argue that the last sentence above makes it very clear that the TMB should have exercised more judgment with respect to their application and that the TMB was indeed empowered by BCFIRB to do just that.

3. BCFIRB followed the above quoted passage with a reiteration of the “principles” underlying the new entrant program. The four principles included were:
  - new entrant programs exist because they are desirable as a matter of sound marketing policy to encourage persons to enter into the supply management system;
  - these persons should be genuine new entrants to that system and not have personally profited from that system by having previously held quota either personally or through their financial interests in a corporation or partnership;
  - new entrant programs should recognize that diversification of the producer base is equitable and desirable having regard to the history and development of the quota system; and
  - making new entrant quota available to new producers encourages innovation, regional priorities and diversity, new ideas and new voices in the supply management system.

Dan Ireland submitted that the last bullet point above makes it abundantly clear that encouraging innovation, regional priorities and diversity are fundamental to the intent of the new entrant program.

31. Dan Ireland argued on behalf of the Appellants that the TMB has the authority to make exemptions to its General Order and Regulations and in light of his arguments they should have used that authority to grant S&J Ireland a new entrant grower licence.

## ARGUMENT OF THE RESPONDENT

32. The TMB argues that poultry quota is a finite resource and it is not the intention of the TMB to have quota issued that is not produced. In order to ensure that possible new entrants to the industry are going to produce the quota, a detailed system has been established to ensure the applicants are sound. Because the amount of quota is finite, applicants are wait-listed in order of application and selections are made based on the TMB's four priorities previously described. General Manager Michel Benoit, on behalf of the TMB, indicated that section 53 of the TMB's Quota Regulation directed the TMB to offer a place in the new entrant program to applicants meeting two or more priorities ahead of applicants meeting one of the priorities. In practice he indicated that if two applicants met criteria number 1 and number 2, then the TMB would award the licence to the applicant intending to farm outside the Lower Mainland, if one of them qualified.
33. Mr. Benoit explained that based on sections 52 and 53 the TMB decided that it would award the limited amount (30,000 kg.) of quota allotted to the new entrant program in 2007/2008 to the "two most senior organic certified entrant growers, as we did not have anybody that applied under the first criteria, which is specialty."
34. It is the Respondent's contention that defining specialty is a very difficult task. However Mr. Benoit directed the Panel to two documents that were utilized by the TMB in defining specialty. The first document was the report issued in December 2004 by the Minister of Agriculture entitled *Recommendations for Managing Specialty Agri-Food Products in BC's Supply Managed System*. Mr. Benoit drew the Panel's attention to section 2.3.10 in the report entitled *Specialty Products*:

For the purposes of this report, specialty products are defined as follows:

Specialty products have unique farm-based attributes which are identity preserved through processing, marketing and distribution to the final consumer. Differentiating attributes may include some or all of unique genetics, specialized nutrition programs, and unique facility and management requirements. The differentiating attributes are 3<sup>rd</sup> party certified to the final consumer.

One of the difficulties with the phrase "specialty products" is its diverse and temporal nature, which gives rise to a wide range of interpretations concerning what is "specialty."

Specialty products are conferred a range of definitions and interpretations by the Boards. With the exception of "certified" products (e.g. certified organic, SPCA, CFIA approved) or branded products, the consumer has little guarantee that they are getting a truly specialty product due to the looseness of definition and the lack of appropriate certification bodies (e.g. free range, free run, grain fed).

Mr. Benoit identified the second document used by the TMB in defining specialty as the September 2005 directions from BCFIRB. The Respondent quoted three sections of the report in support of their definition of specialty as follows:

1.2 11.c. Designation of specialty product/market classes is to be based on clearly defined criteria.

1.2 11.d. Certification is to be required as a condition of licensing for all designated specialty product classes. Certifiers are to be qualified by a skilled and reputable third party accreditation agency.

5.3 Certification is a key component in providing integrity to specialty programs. Without certification, the potential for cheating is increased... With respect to Certification, the following policy directions are given:

1. Designated specialty products are to be third party certified as such along the entire supply chain from farm to end consumer.
2. Approved certification standards are to be based on legitimate third party standards that meet provincial, national or international standards or approval...

The Respondent argues that S&J Ireland do not qualify as a specialty producer.

35. With respect to the determination of who would qualify to receive a new entrant grower licence, the Respondent submits that the manner in which the TMB proceeded is also in accordance with the September 2005 BCFIRB directions. The Respondent referred the Panel to s. 5.13 of the September 2005 report of BCFIRB which states:

Boards intend that the number of new entrants invited to enter the industry will be determined, for the most part, by the amount of quota raised from transfer assessments. Demand will likely exceed supply. Accordingly, the Boards intend to have procedures for putting applicants on waiting lists and priorities for offering invitations from the waiting list.

Some Boards are proposing to maintain existing lists with dozens of applicants, while others are proposing to have shorter lists and repopulate the lists using a lottery draw system. To provide invitations to waiting list applicants, Boards intend to rely on a combination of seniority (time on the list) and market needs. Market needs include those required to meet specialty market and regional demands. This leads to priorities in making invitations whereby the most senior person on the list may not be the first choice by virtue of the market needs priorities.

It is the contention of the TMB that the application of this section precisely captures the situation it was dealing with in determining successful applicants for the limited amount of new entrant quota available for the 2007/2008 quota year.

36. Mr. Benoit submits that in “brainstorming” what might actually qualify as *producing and direct marketing new, innovative specialty turkey products*, the TMB has only been able to identify farm production of wild turkeys as a possible candidate. The TMB submits that raising wild turkeys on a farm would be new and innovative in the

same way that silkie chicken production qualifies under the BC Chicken Marketing Board orders.

37. The Respondent told the Panel that there is a wide range of production that is commonly referred to as specialty in the province, but in the TMB's analysis this production is not specialty. Mr. Benoit stated it this way:

In the province there are at least three or more types of products that are currently being sold on the marketplace as specialty production. There are people selling free-range birds that could be medicated or non-medicated, there are people who sell free-range birds that are not medicated. There are people who sell indoor-raised birds that are not medicated, and all these people call themselves specialty... All turkeys are free-run. So, for someone to sell a specialty product that's free-run would be meaningless because there are no such things as a cage in a turkey barn.

The TMB says it had no new entrant program applicants that it considered to be a specialty producer under their understanding of specialty.

38. In addressing the market requirements aspect of new entrant eligibility the Respondents showed the Panel two documents from McLean Organic Foods Inc. ("McLean") with respect to the sourcing of organic turkey meat. In the documents McLean indicates that it is interested in finding turkey growers in the Fraser Valley to grow organic turkey to meet their short-term requirements of 150 birds or 1,200 kgs. per week and long-term requirements of 300+ birds per week, approximately 2,400 kgs. Mr. Benoit told the Panel that further discussion with McLean indicated that it was using approximately 100,000 kgs. of organic production grown outside BC.
39. The TMB maintains that in light of the BCFIRB directions cited above and the demonstrated market demand for certified organic turkey, the first two applicants on the wait-list intending to produce certified organic turkey had to be given priority irrespective of when S&J Ireland Farms applied for the new entrant program.

## **ANALYSIS**

40. S&J Ireland's arguments fall into two main categories. First, they submit they qualified for priority treatment under the TMB's new entrant program and that the TMB did not correctly assess their farm under the applicable sections of its General Order and Regulations. The second category is a broader, more general argument centered on the contention that the manner in which the TMB interpreted its orders with respect to new entrant program applicants is too narrow and inflexible, and is not carried out in the spirit and intent of the Specialty Review. They argue that this prevented them from getting new entrant quota and if the TMB continues to apply the same interpretation in future years they will continue to be excluded from qualifying for a licence under the new entrant program. We understand this submission to be an argument that, in the alternative, the TMB should have taken into account the spirit

and intent of the Specialty Review and granted S&J Ireland a grower licence utilizing the TMB's exemption power. We address the qualification argument first.

### **Qualification under Sections 50 through 53**

41. Sections 50 through 53 of the TMB Quota Regulation 2007/2008 (Quota Regulation) deal with the new entrant wait list and criteria for determining the priority for granting a grower licence to a new entrant. These sections provide as follows:

50. All applications will be placed on a waiting list in the order in which they are received.

51. Waiting lists will be published on the Board's website, and will be updated semi-annually at minimum.

52. Invitations to become a new entry grower will be offered annually by the Board in accordance with the following priorities:

- 1st. to persons indicating a plan to produce and direct market new, innovative specialty turkey products;
- 2nd. to persons indicating a plan to produce certified organic turkey, providing there is a market demand for increased production of certified organic turkey;
- 3rd. to persons planning to produce and market locally for regional markets outside the Lower Fraser Valley region; and
- 4th. to persons planning to produce commercial turkey anywhere in BC.

53. Invitation priorities pursuant to s. 52 will be considered additive insofar as an applicant fulfilling 2 or more of the priorities may be offered a new entrant opportunity ahead of applicants fulfilling only 1 of the priority criteria.

42. The Appellants make several arguments as to why they should qualify for a new entrant grower licence ahead of others on the wait list. One of these is "Time on the list". They submit that an "Ireland" farm, in some form, has been on the TMB new entrant wait-list since early 2004 and that this is much longer than those on the wait list who have already been granted grower licences. We have considered this argument and note that during the hearing the TMB advised that it recognized S&J Ireland's application as dating back to April 2004. The Quota Regulation specifies in section 50 that applicants will be *placed* on the wait list "in the order in which they are received." This does not mean that they will be selected on that basis, nor should they be, given the selection criteria set out in the following sections of the Quota Regulation, unless a consideration of all other factors is equal between two or more applicants. As noted in section 52, time on the wait list is not an express selection criterion for a licence grant. Consistent with this, the 2006 wait-list presented to the Panel as evidence does not show application dates. Applicants are listed alphabetically by name. We conclude that actual time on the wait list has no effect on priority for getting a licence as a new entrant under sections 50 through 53. We find

this to be consistent with the September 2005 directions and agree with this policy unless, as noted above, a weighing of other considerations between two applicants are equal.

43. The Appellants also argue that their production qualifies them for priority treatment as “specialty” producers under the first criterion specified in section 52 of the Quota Regulation. They submit that:
  1. Their “non-medicated free range” turkey husbandry practices produce a specialty product that is just as unique as a certified organic turkey and that an established market exists for this product.
  2. They have been producing “new innovative products” to meet market demand and will continue to do so. “Turkey Rolls”, “Specialty Ends” and “Pet Food” are examples of products they make that support this argument.
44. In considering this argument we found it instructive to revisit the discussion regarding specialty production that took place during the Specialty Review. Discussion regarding what is specialty production occurred right from the outset of the process. In BCFIRB’s August 2004 *Specialty Production Review Principles*, the first principle is entitled “*Clarity in definition*” and states – “**definitions of specialty production must be clear, specific and objective**” (emphasis added). In the Ministry January 2005 report entitled “*Recommendations for Managing Specialty Agri-Food Products in BC’s Supply Managed System*”, recommendation number 2 is more definitive and states “**Specialty product definitions should reflect substantive farm level differentiation, 3<sup>rd</sup> party certification, and identity preservation through to the consumer**” (emphasis added). Finally, BCFIRB’s directions to all commodity boards on September 1, 2005 say: “**Designated specialty products are to be third party certified as such along the entire supply chain from farm to end consumer**” (emphasis added). All of these statements are based on an underlying policy concern that without third party certification boards cannot ensure that a given product is indeed a specialty product. The direction that products require third party certification to be labeled specialty ensures that consumers are guaranteed product integrity on an objective basis.
45. In addition to farm level differentiation, third party certification and identity preservation through to the end consumer, the BCFIRB September 2005 directions also require boards to establish a separate class of quota for designated specialty production. This stipulation establishes a distinct, separate category of quota that is managed separately from mainstream quota. Mr. Benoit noted in his evidence that the TMB has established a separate class of quota for certified organic turkey production, but has not designated any other production as specialty production and therefore has not established any other separate classes of quota at this time.
46. As Mr. Benoit indicated to the Panel, there are many different turkey husbandry practices in the province that purport to produce specialty products. In many cases these claimants produce a product that has one or more of the characteristics claimed

by the Appellants. It would be difficult for the TMB to determine which of these producers qualified as specialty producers without clear and uniform criteria.

47. The Panel notes that in responding to a perceived market demand, and the desire to optimize the utilization of the entire bird, the Appellants have exercised initiative in producing various retail products. While this is a commendable entrepreneurial initiative we find it does not in itself qualify as “producing new, innovative **specialty** turkey products” as required under the first criterion. (emphasis added). Similarly, wild bronze turkeys would not automatically qualify as specialty.
48. The specific requirements for specialty designation included in BCFIRB’s directions of September 2005 are those that govern. The Appellants’ proposed production does not have the necessary attributes to qualify as specialty production, in particular it lacks third party certification as required under the September 2005 BCFIRB directions. Should S&J Ireland’s production acquire third party certification, a separate class of quota could be established to manage production of this nature. We note that the Appellants did not indicate any current initiatives or intention to seek third party certification at the time of the hearing.
49. We conclude that the TMB was correct when it determined that the Appellants’ free range turkey products were not specialty products and did not qualify under the first criterion set out in section 52 of the Quota Regulation.
50. With respect to the Appellants’ argument that they are a regional producer and therefore should be given a priority, the Panel does not dispute that they are indeed a regional producer of turkey. Nor does the TMB. The question is what priority, if any, this gives the Appellants with respect to the granting of a new entrant grower licence as compared with producers who meet the first two criteria.
51. BCFIRB’s directions to the commodity boards on September 1, 2005 address this issue under the New Entrant section and state: “**New entrant programs should provide priority to new producers seeking and/or willing to produce a designated specialty product or serve a regional market when there are identified specialty and/or regional market needs.** (emphasis added).
52. The TMB has recognized this requirement in its criteria for the granting of new entrant grower licences. We find sections 52 and 53 of the TMB’s Quota Regulation provide a matrix for the granting of grower licences according to certain criteria. Section 52 provides for priority according to the order in which the 4 criteria are listed in that section. The third criterion recognizes “**persons planning to produce and market locally for regional markets outside the Lower Fraser Valley region**” (emphasis added). There are, however, two criteria ahead of this on the list both of which deal with specialty production. Section 53 specifically instructs the TMB to view the criteria in section 52 not only in order, but as additive. An applicant fulfilling two or more of the priorities will be offered a new entrant opportunity over an applicant fulfilling only one of the priorities. The directions from BCFIRB in

September 2005 only state that a priority should be given to regional production. They do not specify what priority should be accorded regional production versus specialty production or how boards should interpret this requirement. That is a matter for each individual board to determine. The placement of a regional requirement in the number three spot on the priority list, in particular when combined with the provisions of section 53 which have the effect of giving a first priority to regional specialty production, we find to be consistent with the September 2005 directions. Given this, we cannot accept the Appellants' argument that he should be given a priority over all other new entrant applicants based on geographic location alone.

### **Consideration under Exemption Power**

53. The Appellants say that the decision to deny S&J Ireland a grower licence under the new entrant program was not carried out in the spirit and intent of the Specialty Review, and that the TMB should have considered the "extenuating and special circumstances" that apply to their production and granted them a grower licence. We understand the Appellants' argument to include the position that, even if they do not meet the technical requirements of the program, they should have been granted a grower licence under the TMB's power to exempt any person from any of its orders or regulations, which in this case would be the Quota Regulation, insofar as it has established the priorities discussed above.
54. The application made by the Appellants could qualify as potential new entrant production. While it was not specialty production, it was certainly what BCFIRB has understood as "niche market" and "regional" production.
55. The spirit and intent of the Specialty Review encompasses the integration into orderly marketing of producers who are producing a product that not only complies with the definition of "specialty" adopted by the TMB, but also includes niche and regional producers with a valid claim to these appellations. Indeed, it is our conclusion that one of the overarching objectives of the Specialty Review was to provide niche and/or regional producers with opportunity within the orderly marketing system.
56. As noted, niche and regional market producers may apply for new entrant production. They are recognized as being able to qualify for such quota. The problem, of course, is that in a system where the pool of available quota is necessarily finite, priorities must be established. The TMB's judgment, approved by BCFIRB, was that in the case of a conflict, specialty production ranks ahead of regional niche market production such as that of the Appellants. Where the "pie" is finite and there are two worthy candidates, hard decisions must sometimes be made between deserving candidates. To "exempt" a candidate that would otherwise rank lower is to effectively rewrite the ranking system itself. For that reason, the Appellants' exemption argument cannot, in this case, succeed.

## **POOL OF NEW ENTRANT QUOTA**

57. That said, we cannot leave this matter without giving serious consideration to the “size of the pie”, since that is really the underlying factor which has created the conflict which gave rise to this appeal. The real difficulty here arises from the size of the pool of available quota established by the TMB. We are struck by the Appellants’ assertion that under a strict interpretation of the existing sections 50 to 53 of the Quota Regulation, they and other regional producers will never be awarded a grower licence because the increasing demand for certified organic production in the Lower Fraser Valley will give an ongoing priority to certified organic producers located there.
58. We note that the TMB was only able to find 30,000 kg of quota for two new entrants at a time when a new national turkey allocation agreement resulted in BC being awarded a significant increase in overall turkey allocation. We also note Mr. Benoit’s evidence that the Specialty Markets Advisory Committee (SMAC) had only been consulted twice prior to the S&J Ireland decision.
59. The Panel does not think it is right to engage in an attempt to alter the “size of the pie” today, when allocations have been made for this year, and when the implications of altering those allocations have not been fully argued before us. That said, the Panel believes that, consistent with the spirit and intent of the Specialty Review, the TMB must in future pay much greater attention to the amount of quota allocated to meet new entrant program requirements for specialty, regional and other production. In particular, when making its decision on how to allocate BC production each quota year, it is our view that the TMB must consult with the SMAC and, with the benefit of its expertise and advice, form an assessment of the legitimate, differential market growth needs in all production categories, including new entrant. Further, in accordance with section 5.4 of the September 2005 Specialty Review directions of BCFIRB, and before finalizing its quota allocations, the TMB must submit its proposed allocations, with rationale in the form of supporting criteria and principles, to BCFIRB for prior approval. This will ensure the required supervisory oversight contemplated as part of the Specialty Review. To that end, the TMB can expect to receive further correspondence from BCFIRB in its supervisory capacity.

## **CONCLUSION**

60. In the result, the Panel concludes that the appeal must be dismissed. In all the circumstances, the TMB acted in accordance with its General Order and Regulations, in particular the Quota Regulation, in not granting S&J Ireland a new entrant grower licence for the 2007-2008 quota year.
61. However, for the reasons given above, the Panel does have concerns about the amount of new entrant quota the TMB has made available in order to address legitimate new entrant production. In accordance with section 5.4 of the September 2005 directions from BCFIRB, the TMB can expect to receive further correspondence

from BCFIRB addressed to that issue, so that an approach can be developed that will facilitate the integration of a more diverse, regional group of producers into the orderly production and marketing of BC turkey, thereby meeting one of the primary objectives of the Specialty Review.

**ORDER**

62. The appeal is dismissed.

63. There is no order as to costs.

Dated at **Victoria**, British Columbia this **2nd** day of **November, 2007**.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

*(original signed by:)*

Garth Green, Panel Chair  
Wayne Wickens, Member  
Suzanne K. Wiltshire, Member