

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL FROM A DECISION CONCERNING CHICKEN PRICING

**BETWEEN:**

PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA

**APPELLANT**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD

**RESPONDENT**

BC CHICKEN GROWERS' ASSOCIATION

**INTERVENER**

**DECISION**

**APPEARANCES:**

For the British Columbia Farm Industry  
Review Board:

Sandi Ulmi, Vice Chair  
Garth Green, Member  
Dave Merz, Member

For the Appellant:  
Primary Poultry Processors  
Association of British Columbia

Wendy A. Baker, Counsel  
Scott Cummings, President, PPPABC  
Bruce Arabsky, Vice President, PPPABC  
Peter Shoore, Owner, Sunrise Farms  
Ed Rodenburg, CEO, Lilydale  
Ken Huttema, Director, FarmFed

For the Respondent:  
BC Chicken Marketing Board

John J. L. Hunter, Q.C., Counsel  
Ron Kilmury, Chair  
Bill Vanderspek, General Manager

For the Intervener:  
BC Chicken Growers' Association

Kerry Froese, President

Date of Hearing:

September 24, 2008

Place of Hearing:

Langley, British Columbia

## **INTRODUCTION**

1. The Appellant, the Primary Poultry Processors Association of British Columbia (PPPABC) is appealing Pricing Orders #077 and #078 of the British Columbia Chicken Marketing Board (Chicken Board) dated July 18, 2008 and September 12, 2008. These orders set the price BC chicken processors must pay for live chicken for periods A-86 and A-87 (July 20, 2008 to November 8, 2008).
2. The British Columbia Chicken Growers' Association (Growers' Association) applied for and was granted full intervener status in this appeal.
3. On July 31, 2008, the PPPABC made an application to the British Columbia Farm Industry Review Board (BCFIRB) for a stay of the Chicken Board's Order #077 pending the hearing of the appeal. The Chicken Board opposed the application. By a decision dated August 8, 2008, BCFIRB dismissed the application for the stay.
4. The matter proceeded to hearing on September 24, 2008. As a second hearing to deal with the issue of remedies is scheduled for October 22, 2008, the panel agreed to provide its decision as soon as possible. For this reason, the panel wishes to expressly note that it has carefully considered all of the evidence and submissions referred to by the parties, even though we do not intend to refer to all of it in the course of this decision.

## **ISSUE**

5. Did the Chicken Marketing Board err in setting Pricing Orders #077 and #078 rather than allowing the process as mandated in the General Orders to be followed?

## **BACKGROUND**

6. Chicken is produced under the national supply management system. Under this system, a national allocation is set by the Chicken Farmers of Canada for the total amount of chicken to be produced in Canada for every eight-week cycle. Each province then receives a provincial allocation for the amount of chicken to be produced in the province for that eight-week cycle based on a prescribed formula.
7. As the largest producer and processor of chicken in Canada, Ontario is the price setter for the entire country. Ontario uses a formula based on cost of production and reviews its price every eight-week cycle. Across Canada, provinces set the live chicken price as either equal to the Ontario price or as a differential increase over the Ontario live price. British Columbia has traditionally set a differential over the Ontario price.
8. Over the past number of years, there has been much conflict in the BC chicken industry over price negotiations. There is tension between the growers, who are in a supply-managed system and are attempting to cover their costs and make a profit and

the processors who must buy chicken provincially at a set price and sell it into the competitive national market.

9. The Chicken Board's General Orders set out a mandatory process to establish the price for live chicken on a period-by-period basis. This process, set out in Schedule 3, requires the establishment of a Pricing and Production Advisory Committee (Pricing Committee) comprised of three chicken growers, three chicken processors, one broiler hatching egg producer and an independent chair. The Pricing Committee meets prior to the commencement of each Broiler Quota Period to discuss price and production levels for the upcoming eight week quota period. If the Pricing Committee reaches consensus on price, it informs the Chicken Board and the Chicken Board embodies this consensus in a board order. If a consensus cannot be reached, an independent arbitrator is consulted on a final offer selection process. In this process, the arbitrator must choose either the grower or processor price and is not free to choose a price somewhere in between the two. The arbitrator then submits an opinion to the Chicken Board who have the final authority to accept, or in exceptional circumstances, not accept the arbitrator's price.
10. From November 2004 (A-62) to June 2007 (A-78), the live price for chicken was set at 4.35 cents over the live price of chicken in Ontario. In A-79, the arbitrator accepted the processors' price differential of 4.35 cents. In A-80, the arbitrator accepted the grower differential of 5.35 cents. This was the highest differential ever awarded. Prior to the commencement of period A-81, the PPPABC and the Growers' Association agreed to a multi-period pricing agreement of approximately one year, setting the live price for chicken at the Ontario live price plus 5 cents. However, after two periods the Growers' Association opted out of this agreement and the process went back to arbitration. In periods A-84 and A-85, arbitrations resulted in a price differential of 4.35 cents.
11. Because of the contentious issues and the increasingly acrimonious nature of the negotiations between the growers and the processors, the industry agreed that there must be a better way. In an attempt to find one, the Chicken Board engaged the consulting firm of Ference Weicker & Company to prepare a report entitled *Economic Analysis to Develop a Pricing Model for Live BC Grown Chicken*. As of the hearing date this report has not been completed. The Chicken Board is to be commended for having made that effort to seek a constructive solution to these matters in a productive and timely fashion.
12. An information session with Don Ference, the project leader, was held on May 22, 2008 with representatives from the processors, hatcheries, the Growers' Association and the BC Broiler Hatching Egg Commission. At this meeting, a "cooling off" period in the form of a pricing agreement for one or two periods (A-86 and A-87) was suggested to allow all parties to prepare their responses to the Ference Weicker report in an environment free of the animosity surrounding pricing negotiations and arbitration. Participants at this meeting stated that they would be

amenable to a moratorium on arbitration, but there was no discussion about how price would be set in the interim.

13. By way of a letter dated May 30, 2008, the Chicken Board advised the PPPABC and the Growers' Association that it would hold a meeting on June 4, 2008 to fix the live price for periods A-86 and A-87 and that it was suspending the Pricing Committee's process for those two quota periods. The letter stated that if the Pricing Committee reached consensus with respect to the pricing agreement prior to June 4, 2008, the Chicken Board would confirm that consensus.
14. On June 5, 2008, the Chicken Board sent a letter to the chair of the Pricing Committee informing it of the motion passed on June 4, 2008:

That unless the PPAC comes to a unanimous agreement on the live price prior to the start of quota period A-86, the Board will set the price for quota period A-86 (July 20-September 13, 2008 [sic] at Ontario posted price plus 5.35 cents/kg live weight. Further, unless the unless [sic] the PPAC comes to a unanimous agreement on the live price prior to the start of quota period A 87, the Board will set the price for quota period A-87 (September 1-November 8, 2008 [sic] at Ontario posted price plus 5.35 cents/kg live weight.

The letter went on to state:

The Board would ask you to convene a meeting of the PPAC to discuss this matter and to provide the Board with the positions of the PPAC members and any further advice as it related to live pricing for the two periods in question.

15. As the Pricing Committee was unable to come to unanimous agreement on the live price, the Chicken Board passed Pricing Order #077 on July 18, 2008. On September 12, 2008, Pricing Order #078 was subsequently passed at the same 5.35 cent rate.

## **POSITION OF THE INTERVENER**

16. The Growers' Association supports the process followed by the Chicken Board. It argues that growers need to recoup their costs which are presently in a state of turmoil and changing rapidly. It recognizes that the arbitration model has not created good relationships in the industry and agrees there is a need to look at a way to stabilize the industry. The Growers' Association states that it was consulted about the price setting and agreed to the process undertaken by the Chicken Board. However, it too disagrees with the differential set as growers believe it should have been much higher.

## **DECISION**

17. The panel accepts that the *British Columbia Chicken Marketing Scheme, 1961 (Scheme)* clearly confers the authority and statutory responsibility to set the

price of live chicken upon the Chicken Board. Section 4.01(g) grants the Chicken Board the powers:

to fix the price or prices, maximum price or prices, minimum price or prices, or both maximum and minimum prices at which the live chickens over 2 days old that are regulated product, or any grade or class thereof, may be bought or sold in the Province, or that shall be paid for the regulated product by a designated agency, and may fix different prices for different parts of the Province.

In addition, section 4.01(l) grants the Chicken Board the right:

to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, pack, storage or marketing of the regulated product, and to amend or revoke the same.”

18. In this appeal, the Appellant does not take issue with the authority of the Chicken Board to set the price of live chicken and instead focuses on what it sees as the flawed process followed by the Chicken Board in setting the live price in periods A-86 and A-87. The Appellant argues that, as a public decision making body, the Chicken Board has a duty of procedural fairness and must ensure that its decisions benefit the entire British Columbia chicken industry. However, for periods A-86 and A-87, the Appellant argues that the process followed to set the live price was procedurally flawed in that the Chicken Board failed:

- a) to comply with its General Orders;
- b) to provide the PPPABC with any meaningful opportunity to be heard in relation to the price setting for periods A-86 and A-87 or a rationale for the pricing decision; and
- c) to take into account the interests of the BC processors operation in a national market and the interests of the industry as a whole.

We will examine each of these arguments in turn.

**a) Failure to comply with General Orders:**

19. The Appellant argues that the pricing process set out in the General Orders is mandatory and should have been followed. The General Orders require that if the Pricing Committee cannot agree on a price differential, it *must* go to arbitration. The Appellant argues that “arbitration was the only option for this public body in the absence of consensus”. However, the Chicken Board chose to circumvent its General Orders and set the price differential itself.

20. The Appellant points to following language used in Schedule 3 of the General Orders:

Pursuant to Section 3.20(3) of the Scheme, the Board *must* consult with the PPAC and consider the PPAC’s advice before the Board makes any decision relating to price or production; and

In the event that no consensus is reached as a result of facilitated discussions, the opinion of an independent arbitrator *will* be sought. [emphasis added]

The Appellant argues that the use of the terms such as “must” and “will, indicates a specific procedure that must be followed.

21. The Appellant argues that there is a legitimate expectation that the Chicken Board will follow its General Orders and if it chooses not to do so, it must demonstrate a high standard of fairness through the use of a fair, impartial and open process. The Appellant argues that the Chicken Board did not do this when it set the price for A-86 and A-87 and as such was procedurally unfair.
22. The Chicken Board agrees that consensus on price is always the best option; however it states that in this case consensus was not possible. Given that all parties had indicated a willingness to have a “cooling off” period from arbitration, the Chicken Board exercised its regulatory power to set the price. It viewed this decision as a one time “ad hoc” process to replace arbitration while the consultative process was underway.
23. The Chicken Board argues that it complied with the provisions of the *Scheme* which creates the Pricing Committee. After setting out the composition of the Pricing Committee (three growers, three processors and further persons appointed by the Chicken Board), s.3.20 provides:

The role of the committee is to advise the board, on the request of the board or on the initiative of the committee, concerning any matter relating to the pricing or production decisions the board has made or may make.

The board *must* consult with the committee and consider the committee’s advice before the board makes any decision relating to pricing or production. [emphasis added]
24. The Chicken Board argues that it complied with the *Scheme*. By consulting with the Pricing Committee, the PPPABC and the Chicken Growers’, it not only complied with the *Scheme*, it did more than was required. The Chicken Board concedes that it did not comply with its General Orders but argues it met its duty of fairness, fully aware that the pricing process had to be transparent, fact based and defensible.
25. In the view of the panel, while the *Scheme* gives the Chicken Board the authority to set price, its General Orders state that if the Pricing Committee cannot agree on a price differential, it *must* go to arbitration. The Pricing Committee was put in place to move away from ad hoc decision making in the very contentious area of pricing negotiations. In choosing to depart from its established pricing process, the Chicken Board had a duty to ensure that the new process to set price was fair, equitable and transparent to all participants. For the reasons that follow, we are not satisfied that the pricing process undertaken by the Chicken Board for A-86 and A-87 met the standards of procedural fairness required.

**b) Failure to provide an opportunity to participate in the process or a rationale for the decision:**

26. The Appellant argues that as part of procedural fairness, the Chicken Board was obligated to give the PPPABC input into the pricing process and provide the parties with its reasoning or rationale when it reached its decision on price. The PPPABC received neither.
27. The Chicken Board argues that it did consult with the parties and understood that they were “on board” with the process. The minutes of the May 22, 2008 meeting with Ference Weicker confirm that all of the parties were polled and agreed to a cooling off period. The Chicken Board maintains that it was clear to the industry that the arbitration process was not working and that the Chicken Board would set the price to allow time to get a better system in place.
28. The Appellant argues that while it may have agreed to a cooling off period, it was not consulted as to how price would be set in the interim.
29. The Chicken Board argues that it did consult with the Appellant. Ron Kilmury, Chair of the Chicken Board testified that he called Scott Cummings, President of the PPPABC, regarding the price under consideration by the Chicken Board. As a result of this conversation, the Chicken Board lowered the price differential to 5.35 cents after Mr. Cummings stated that the price of 5.65 cents was unacceptable to the PPPABC.
30. In addition, the Chicken Board points to its June 5, 2008 letter to the Pricing Committee as further evidence of its consultation. This letter notified the Pricing Committee of the motion to set the price differential and requested further advice on the matter:

The Board would ask you to convene a meeting of the PPAC to discuss this matter and to provide the Board with the positions of the PPAC members and any further advice as it related to live pricing for the two periods in question.

In the opinion of the Chicken Board, this was a request for the members of the Pricing Committee to give their input on the proposed price.

31. The Appellant takes a different view of the June 5, 2008 letter. Given that the letter contained the Chicken Board’s motion setting the price differential at 5.35 cents, the PPPABC members believed that the price was already set and understood that unless the Pricing Committee came to a unanimous agreement on a different price, this price would not be altered. On this point, the panel heard from processor representatives, Scott Cummings, Bruce Arabsky, and Ken Huttema, who all agreed that they did not see the June 5, 2008 letter from the Chicken Board as requesting their viewpoints, rather they saw it as *fait accompli* that the price had already been set without their input.

32. The Appellant also notes that after this letter was received, they believed there was little chance of reaching unanimous consensus with the grower members on the Pricing Committee. There was no incentive for the grower representatives to accept anything less than the 5.35 cents already agreed to in the Chicken Board's motion. Finally, the Appellant argues that in addition to not being consulted about the process or the price set, it has never been given a rationale for the 5.35 cent differential set by the Chicken Board, even though a rationale has been requested.
33. The Chicken Board concedes no rationale was given. It made the decision not to give its rationale for the 5.35 cents differential because of the contentiousness of the issue. In the opinion of the Chicken Board, to explain the rationale would simply have caused the parties to argue over its merits.
34. The panel agrees with the Appellant that the consultation process followed by the Chicken Board in setting the price differential for A-86 and A-87 was flawed. We say this for the following reasons:
  - a) all parties agree that pricing negotiations are highly contentious;
  - b) the General Orders set out the established method for getting both grower and processor input on price and failing consensus, a fair and transparent process for setting price;
  - c) choosing to replace the established method for setting price, even on a short term basis, requires that the new price setting formula be fair and transparent and defensible to those parties that may disagree with the price set;
  - d) in this case, the consultation with the processors was minimal; while the telephone call to Mr. Cummings was a start, it was not enough;
  - e) the consultation with the Pricing Committee undermined the negotiation process by removing the incentive for the grower members to agree to a lower price;
  - f) in light of the price setting process outlined in Schedule 3 of the General Orders, the Appellant had a legitimate expectation that when the Chicken Board varied that process, it would be consulted on the price setting process, as well as the price and be given the rationale for the price itself.

**c) Failure to take into account the interests of the BC chicken processors:**

35. The Appellant presented a great deal of evidence demonstrating the importance of the pricing decision to the processors. It was not given the opportunity to make a presentation to the Chicken Board regarding the following important factors which might have impacted on the pricing decision:
  - a) the importance of the live bird pricing to the processing industry and its impact on industry margins;
  - b) the uncertainty in the industry due to lack of long term agreements on pricing;
  - c) the present large storage stocks of frozen product due to nation-wide overproduction;

- d) the difficulties created for processors by the requirement that they place production requests for quota periods before knowing the price and then being obligated to buy the amount requested regardless of price;
  - e) consumers have choice regarding sources of protein and will switch to other products when chicken becomes too expensive;
  - f) processors compete in both local and national markets and an excessive BC price puts processors and the entire BC industry at a serious disadvantage;
  - g) processors buy at a fixed price yet sell in an open market where wholesale prices are presently low, and;
  - h) processors have long-term contracts at set prices which must be honoured regardless of the input costs.
36. The Appellant was denied any opportunity to present this important background information to the Chicken Board before it made its pricing decision. Further, it contends that given the composition of the Chicken Board, with no processor representative, the board made its decisions on price without the benefit of the viewpoint of the PPPABC. The Appellant argues that in light of its composition, the Chicken Board needed to ensure that its process was procedurally fair.
37. For its part, the Chicken Board argues that it did not feel that a presentation from the PPPABC was necessary as it is well aware of the factors influencing pricing in the market place.
38. The Appellant relies on the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 to set out the appropriate principles of law. Madame Justice L'Heureux-Dubé's decision is summarized in the head note as follows:
- The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights within the duty of fairness is to ensure that administrative decisions are made using a fair and open procedure appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.
39. We find that the pricing decision was not arrived at using a fair and open process. The Appellant was affected by the decision, yet did not have sufficient opportunity to put forward its views. Even if the Chicken Board felt it was fully aware of those views, it owed the Appellant the opportunity to be heard on this very contentious issue important to the industry as a whole. Because the established pricing process was set aside, the Appellant had a legitimate expectation that any interim method of setting price would have high levels of procedural fairness. In our opinion, these levels were not met. In addition, the Appellant was entitled to a rationale for the

Chicken Board's decision. The refusal of the Chicken Board to give its rationale was a further lack of procedural fairness.

## **REMEDY**

40. In light of our conclusion that the Chicken Board erred in the process it undertook to set the price for live chicken for the periods A-86 and A-87, the panel must consider the appropriate remedy to be granted. We note that s. 8(9) of the *Natural Products Marketing (BC) Act* confers upon BCFIRB broad remedial jurisdiction:

8(9) On hearing an appeal under subsection (1), the Provincial board may do any of the following:

- (a) make an order confirming, reversing or varying the order, decision or determination under appeal;
- (b) refer the matter back to the marketing board or commission with or without directions;
- (c) make another order it considers appropriate in the circumstances.

41. Our conclusion that the Chicken Board's pricing order was made following a flawed process does not answer the question on the merits as to what the proper price of chicken should be for periods A-86 and A-87. A decision that is procedurally flawed may be correct or incorrect on the merits.
42. At the outset of the appeal hearing, the panel advised the parties that if the appeal was successful, a second hearing day would be set to consider the question of price. This recognized that remitting the matter to the Chicken Board for a new pricing decision could very likely result in the further expense and delay of another appeal to the BCFIRB, even if the second Chicken Board process was fair.
43. Since hearing the appeal, the panel has given significant consideration to whether an alternative process – an adaptation of the Pricing Committee process presently set out in the Chicken Board's General Orders – might offer a solution that is more practical, more timely and more logically connected to our findings and the Appellant's fundamental grievance on this appeal.
44. The course of action we propose is that the Appellant and the Growers' Association return to the table and attempt to reach consensus regarding price for the periods under appeal. If they cannot agree, they will proceed to final offer arbitration. The panel will then consider the recommendation of the arbitrator, including any written submissions regarding the exceptional circumstances that any party (including the Chicken Board) believes requires departing from the arbitrator's recommendation.
45. We appreciate that the final offer arbitration process may not be sustainable in the long run. However, it appears to offer several advantages here. It offers a process that squarely addresses the procedural concerns of the Appellant. It is a process familiar to the parties, and seems preferable to the unprecedented step of arguing price "at large" in a BCFIRB appeal hearing without the discipline, realism and critical analysis offered by final offer arbitration. By having BCFIRB rather than the Chicken Board

make the final decision following issuance of the arbitrator's opinion, finality will be achieved. The appeal will be disposed of at this level rather than through a remittal which carries the possibility of a further appeal to BCFIRB from the Chicken Board.

46. As this potential remedy was not discussed at the hearing, we think it is only fair to give the parties an opportunity to make any representations they wish regarding this proposed approach to the process arising from our findings above. The parties have until October 16, 2008 to provide those comments, following which we will issue our final order and any procedural directions regarding next steps.

Dated at Victoria, British Columbia this 10<sup>th</sup> day of October, 2008.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

*(original signed by)*

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Sandi Ulmi, Vice Chair

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Garth Green, Member

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Dave Merz, Member