

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*
AND

AN APPEAL BY ROSSDOWN FARMS LTD. OF PART 8 (NEW
ENTRANT PROGRAM FOR PROCESSORS) OF THE JUNE 15, 2004
GENERAL ORDERS OF THE BRITISH COLUMBIA
CHICKEN MARKETING BOARD (#04-08)

BETWEEN:

ROSSDOWN FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

HALLMARK POULTRY PROCESSORS LTD.

SUNRISE POULTRY PROCESSORS LTD.

LILYDALE CO-OPERATIVE LTD.

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION
BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

INTERVENORS

DECISION

APPEARANCES BY:

For the British Columbia
Farm Industry Review Board

Richard Bullock, Chair
Christine J. Elsaesser, Vice Chair
Garth Green, Member

For the Appellant Rossdown Farms Ltd.

Delwen Stander, Counsel

For the Respondent

John J.L. Hunter, Q.C. and
Julie L. Owen, Counsel

For the Intervenors Hallmark Poultry Processors Ltd. and Sunrise Poultry Processors Ltd.

Bruce Arabsky
Scott Cummings

For the Intervenor
Lilydale Co-operative Ltd.

Mike Heppell, President and CEO

For the Intervenor
British Columbia Chicken Growers' Association

Rick Thiessen, President

Location of Hearing

Abbotsford, British Columbia

Date of Hearing

November 10, 2004

INTRODUCTION

1. On September 17, 2004, a Panel of the British Columbia Farm Industry Review Board (the “Provincial board”) released its decision in three appeals relating to direction of product orders made with respect to the production from a number of chicken (broiler) farms; including the “7 Growers”.¹ In that decision, the Panel dealt with two out of the three issues raised by the 7 Growers and their processor, Lilydale Co-operative Ltd. (“Lilydale”). The Panel ruled on part of the appeals but adjourned the underlying policy issue relating to the “wisdom” of issuing the direction of product orders, to be dealt with in conjunction with the related appeal by the British Columbia Chicken Growers’ Association (the “Growers’ Association”) with respect to Part 7 (Assurance of Supply) and Part 8 (New Entry Program for Processors) of the new General Orders enacted on June 15, 2004 by the British Columbia Chicken Marketing Board (the “Chicken Board”). The second part of that appeal was heard on November 8, 9 and 27, 2004. That decision is the subject of separate reasons.
2. Dan Wiebe, the President of Rostdown Farms Ltd. (“Rostdown”), also appealed the General Orders seeking an exception or a grandfathering from the application of Part 8. This appeal was heard on November 10, 2004. By agreement between the parties, evidence received in the Lilydale, 7 Growers and Growers’ Association Appeals was evidence in the Rostdown Appeal.
3. At the hearing of this appeal, Lilydale and the Growers’ Association appeared in support of Rostdown. Sunrise Poultry Processors Ltd. (“Sunrise”) and Hallmark Poultry Processors Ltd. (“Hallmark”) intervened in support of the Chicken Board.

ISSUE

4. Did the Chicken Board err by not excepting Rostdown from the maximum amount of production available to an individual new entrant processor under Part 8.3(b) of the General Orders?

BACKGROUND

5. The relevant history is set out in the Provincial board’s decision in the Growers’ Association Appeal released contemporaneously with this decision.
6. On June 15, 2004, the Chicken Board enacted its new General Orders. In its appeal, Rostdown takes issue with Part 8 which provides in part:

¹ The 7 Growers who filed an appeal of the direction of product orders were Pennington Holdings Ltd., Cherwood Farms (John Bartel), Firbank Farms (Lorne Jack), Alex and William Westeringh, Norm Knott, Homeland Farms Ltd. and Don Hooge.

Part 8 New Entrant Program for Processors

- 8.1 At the end of every third year, if in the preceding three years there has been an average of at least 1.0% growth per year in total BC production, the Board will consider applications for the entrance of a new processor or an increase in allocation of an existing smaller processor. The application period will be between January 1 and April 30 of the year following the end of the third year of the period used to calculate provincial growth.
- 8.2 The Board will allocate up to 2.5% of the average live weight of total BC production of the last six (6) cycles of the three-year period. The total available to New Entrants and Deemed New Entrants will be available for distribution over the ensuing three (3) years.
- 8.3 There will two types of applicants for the growth:
 - a. a “deemed new entrant” is an existing processor who can demonstrate a need for additional production. To qualify as a deemed new entrant an existing processor must be processing less than 1.5% of the production of the last six (6) cycles of the three-year period used to calculate provincial growth;
 - b. a “new entrant” may apply for production up to a maximum of 1.5% of the production of the last six (6) cycles of the three-year period used to calculate provincial growth. A new entrant may not be an existing processor or related, either directly or indirectly, to an existing processor;
7. As BC production has grown in 2001, 2002 and 2003, the Chicken Board at Schedule 1 to Part 8 has set aside 2.5% (774,823 kgs) of BC’s production for use by new entrant processors in 2004, 2005 and 2006.
8. Schedule 1 also sets out a procedure to be followed in the first round of new entrant applications and provides for the following with respect to the Appellant, Rostdown:
 - 4) Due to exceptional circumstances, on a one-time basis, the Board will consider an application by Rostdown Farms Ltd. to be the first applicant for a new processor licence and, for this period only, that application from a new entrant, Rostdown Farms Ltd. will be given priority over any application for increased allocation from a deemed new entrant. The maximum volume for which Rostdown Farms Ltd. may apply as a new processor is 1.5% of the average of A-49 through A-55 which is 464,594 kg live weight.
9. Mr. Wiebe operates Rostdown, a large chicken (broiler) and broiler hatching egg producer in BC. For the past several years, Rostdown has been attempting to vertically integrate. In 1999, it began developing plans for its own hatchery to hatch the eggs from its broiler hatching egg operation to produce chicks for its broiler operation. Rostdown proceeded with its plan to develop a hatchery despite the advice of both the Chicken Board and the Provincial board that it not proceed without first obtaining a commercial agreement with a processor. Rostdown’s processor, Lilydale was not supportive of the decision to build a hatchery and was unwilling to process chicken grown from chicks from other than its own hatchery.
10. Rostdown’s move towards vertical integration has resulted in a number of supervisory and appeal decisions by the Provincial board as well as appeals and

enforcement actions in the Supreme Court. These decisions have shaped much of the policy that now finds itself enshrined in Parts 7 and 8 of the General Orders. Of the foregoing, one decision bears mention. The Primary Poultry Processors' Association of British Columbia (the "PPPABC"), of which Lilydale was a member, appealed an order of the Chicken Board which purported to deem Rostdown a processor. Despite the fact that Rostdown had no processing facilities and was in fact a grower, the Chicken Board's order allowed Rostdown to custom kill part and eventually all of its production. On appeal, the Provincial board overturned this order concluding that allowing Rostdown as a grower to control its own production through a custom kill arrangement was a subversion of the bottom up allocation system and that such significant changes should not be made on an ad hoc basis without consultation with major industry stakeholders. However, the Provincial board did recognise that it was within the Chicken Board's power to develop the rules by which new processors enter the BC industry and accordingly directed the Chicken Board "to continue its consultation with industry participants and to develop a comprehensive new entrant program for processors".

11. Thus, it was the PPPABC Appeal which led the Chicken Board to embark upon the process of developing the policy which is now enshrined in Parts 7 and 8.

DECISION

12. In the companion decision issued in the Growers' Association Appeal, the Provincial board upheld Parts 7 and 8 of the General Orders finding they were within the core regulatory powers conferred on the Chicken Board by the *British Columbia Chicken Marketing Scheme, 1961*, arrived at through a proper consultation process and reflective of sound marketing policy. In this appeal, it remains for the Panel to consider whether the Chicken Board erred, by not excepting Rostdown from the maximum amount of production available to an individual new entrant processor under Part 8.3(b) of the General Orders and allowing Rostdown to process all of its production (563,144 kgs quota including the production from Wiebe Holdings Ltd. plus any additional export production).
13. Rostdown argues that it should not be restricted to processing only the 464,594 kgs contemplated in Schedule 1 to Part 8. Rather it seeks an order from the Provincial board allowing it to process all of its current production. Rostdown advances several justifications for its position. It was the only new applicant for a processor licence in 2003, even before the New Entrant Program came into force, and it has the support of both the Growers' Association and Lilydale. Allowing Rostdown to enter the processing industry at a level that suits its business is good for the efficiency of the chicken industry as it promotes order.
14. Further, Rostdown argues that fairness dictates that this appeal be granted; Rostdown has endured a great deal of adversity over the past three years as it has sought to realise its dream of becoming a processor. The industry, the Chicken Board and the Provincial board have expended considerable sums of money dealing

with the problems associated with Rossdown's move towards vertical integration. It would be punitive to stop Rossdown's integration plans now. Other processors are similarly integrated and Rossdown is ready to go with its plans.

15. In response, the Chicken Board characterises Rossdown's argument thus. Having created significant cost to the industry in its attempts to do something that does not fit within the regulatory framework, the Chicken Board should now simply let Rossdown do what it wants. The theme running through this appeal appears to be that the Chicken Board has an obligation to support Mr. Wiebe's long held desire to be vertically integrated. The Chicken Board does not accept this rationale. Mr. Wiebe and Rossdown should fit into the regulatory framework like everyone else.
16. Further, the Chicken Board points out that contrary to shutting Rossdown down, it has given special consideration to its circumstances. Despite the fact that Rossdown is not a processor but rather a grower with a custom kill arrangement, it was placed at the head of the line with respect to new entrants. In addition, the Chicken Board granted to Rossdown the maximum 1.5% allocation available to an individual new entrant processor. To go further and allocate the full 2.5%, the total amount available to all new entrant processors, is simply not justified. To do so could only be done in reference to the needs of Rossdown's hatchery and its vertical integration plans, something the Provincial board has expressly disagreed with such considerations.
17. The Chicken Board argues that it has balanced the interests of the industry and attempted to steer the right course with respect to Rossdown and its desire to enter the processing business.
18. The Panel has considered the submissions of the parties. We find that the Chicken Board has fairly accommodated Rossdown's operation within the new entrant program found in Part 8. In the PPPABC Appeal, the Provincial board directed the Chicken Board, "within its discretion, to treat Rossdown like any other new entrant". There was no obligation on the Chicken Board to give Rossdown any special consideration under its new entrant program. However, in exercising its discretion, the Chicken Board determined that it would give some accommodation to Rossdown. The fact that the accommodation only allows for Rossdown to process a portion and not all its production does not in and of itself justify the Provincial board's interference.
19. Rossdown has not demonstrated that the Chicken Board was wrong in deciding to accommodate only part of its production. While it may be simpler for Rossdown's business model to process all of its production rather than having to process some and ship the rest to another processor, there is a balancing of interests which must take place here. Processors have long argued that they are short of production and that provincial allocations have not kept up with their requests. Allowing Rossdown to process any of its production necessarily means that other processors

will lose production. Further, if Rossdown is given the larger allocation it seeks (2.5%), the necessary implication is that no other new entrant could take advantage of this program as Rossdown would have taken up all the production available to new entrants during the first three years of the program.

20. Further, the Panel notes that under the new entrant program, growth is contemplated. After six periods as a processor, Rossdown will be eligible to share in the future growth in the BC's production through participation in the industry's standard allocation process.
21. In the circumstances, the Panel finds that the Chicken Board has weighed the broader interests of the industry and steered the course which it determined was appropriate in the circumstances. The Panel is not prepared to interfere with this decision.

ORDER

22. The appeal is dismissed.
23. There will be no order as to costs.

Dated at Victoria, British Columbia, this 21st day of February 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Richard Bullock, Chair
Christine J. Elsaesser, Vice Chair
Garth Green, Member