

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION CONCERNING THE DENIAL OF A
REQUEST FOR A PERMIT TO GROW CHICKEN

BETWEEN

BEN VANECK

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Suzanne K. Wiltshire, Presiding Member
Ron Bertrand, Member
Cheryl Davie, Member

For the Appellant:

Ben VanEck

For the Respondent:

Claire E. Hunter, Counsel
Gregory Gauthier, Vice Chair
Bill Vanderspek, General Manager

Date of Hearing

October 7, 2011

Place of Hearing

Abbotsford, BC

INTRODUCTION

1. The appellant, Ben VanEck, is appealing the July 6, 2011 decision of the British Columbia Chicken Marketing Board denying his request for a permit to grow chicken under Part 51 (now Part 50) of the Chicken Board's General Orders. The Chicken Board's decision states that the appellant's application was denied because producing chickens under a permit on a property that already holds regulated quota production is contrary to the General Orders.
2. On September 23, 2011, the Chicken Board reconsidered the matter and confirmed the original decision to deny the request for a permit.
3. The appeal proceeded to a hearing on October 7, 2011

ISSUE

Did the Chicken Board err in its July 6, 2011 decision to deny the appellant's request for a permit to grow chicken?

STATUTORY FRAMEWORK

4. The supply of chicken in Canada is regulated under the supply managed system that is designed to fill, but not to overfill the domestic market. A key component to supply management is quota, which entitles a producer to produce and sell a certain quantity of chicken. At the national level, the marketing of chicken in Canada is regulated by a series of federal and provincial laws and regulations coordinated through the Federal-Provincial Agreement for Chicken (FPA). The FPA establishes a quota system and provides for the allocation of quota to each signatory province according to the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36.
5. Under the *British Columbia Chicken Marketing Scheme, 1961*, B.C. Reg. 188/61 (the *Scheme*) enacted under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c.330, the Chicken Board has the authority to "regulate and control, in any and all respects" the production of chicken in British Columbia (section 2.01).
6. In 2001, the Annex to the FPA was signed to address the production of chicken for personal use; British Columbia was initially given an exemption for unregulated growers to grow a maximum of 200 chickens per year for personal use.
7. In 2006, following a major avian influenza outbreak, the Chicken Board and the BC Ministry of Agriculture established a more extensive registration system for small lot producers, ensuring that the Chicken Board would be able to identify and locate small lot producers in the event of another significant disease outbreak. The resulting permit program (then Part 51 of the 2006 General Orders) provided for permits to small lot growers and self-marketers up to 3,000 kg live weight per year. In March 2011, the limit was changed to 2,000 birds (rather than kg) per year based

on grower preference as different types of chicken grow to different weights¹. The most recent (September 2011) amendment to Annex 1 to the FPA reflects this change, exempting small lot growers and self-marketers who obtain a permit under the current Part 50 of the General Orders to grow a maximum of 2000 birds per year.

8. Part 50 of the General Orders sets out the terms and conditions of the permit program. Part 50.8 limits the number of permits per person or property to one per year. It also prohibits both the combining of a permit with any class of quota and the growing of product under a permit on any premise that is registered with the Chicken Board for the production of regulated product.

BACKGROUND

9. Mr. VanEck is the farm manager at 9285 Banford Road in Chilliwack and he lives on the farm. His employer, V & H Joint Ventures (V & H) owns the farm property and holds the quota to produce chicken. V & H owns a number of other chicken farms as well as a processing facility that does business under the name of “Farm Fed”.
10. In a September 20, 2011 letter to the Chicken Board, V & H supported Mr. VanEck’s application for a permit, confirming that the production unit at the end of Barn 2 was not currently being used to grow any regular class of quota and could be operated as a separate biosecurity zone.
11. At the hearing, the Chicken Board provided a sketch of the property at 9285 Banford Road with the barns labeled from 1 to 6. At one end of Barn “2”, there is a rectangular area identified as “Plan A” (34’ x 48’ 8”) at the end of the barn nearest the back of the property. Mr. VanEck confirmed that this is the area where he has applied for a permit to grow chicken. The parties agree this area is self-contained.

SUBMISSIONS

Appellant

12. Mr. VanEck makes two main arguments as to why the Chicken Board’s decision is wrong.
13. His first argument is that he is a separate legal entity. Although he lives on the same premises registered with the Chicken Board, he argues that he has a rental agreement with his landlord and should be treated as a separate legal entity. Mr. VanEck testified that the agreement is oral and that in return for his monthly rental

¹ This and other changes to the permit program (including the renumbering of Part 51 to become Part 50) are reflected in the latest version of the Chicken Board’s General Orders dated August 26, 2011. Subsequent references in this decision are to Part 50 of the August 26, 2011 General Orders unless otherwise noted.

payment he receives the use of a house, a machine shop, some land and the area of Barn 2 identified as Plan A where he applied for a permit to grow chicken. He indicated that if he did not get a permit V & H would use the Barn 2 space.

14. In response to the Chicken Board's testimony that the entire area of Barn 2 is registered with the Chicken Board by V & H for the production of regulated product and V & H has not taken any initiative to de-register any part of the barn, Mr. VanEck stated that V & H is prepared to de-register Plan A of Barn 2 if he is successful in obtaining a permit.
15. Mr. VanEck's second argument is that the Chicken Board's decision is not sound marketing policy. Mr. VanEck testified that he plans to grow SPCA certified chicken in batches of 500 birds and sell them directly to restaurants with the processing and marketing of the chicken being done in co-operation with V & H because they have the "contacts in Vancouver". Mr. VanEck argues that V & H will not benefit from this permit application. He states that while details of the finances have not yet been discussed, he expects V & H would provide both the processing and marketing services in respect of his chicken as partial compensation for his employment similar to a performance bonus.
16. Mr. VanEck argues that the Chicken Board's decision hinders the positive development of the chicken industry, eliminating the possibility for innovative entrepreneurship. Mr. VanEck testified that he has done market research to show that the "specialty" product he intends to grow is being underserved and that the Chicken Board should take measures to better supply this market. Additionally, Mr. VanEck argues that the Chicken Board should adjust its policies to protect new farmers from high quota prices which often make entry into the system prohibitive.

Respondent

17. The Chicken Board argues that because the permit program is an exemption to the provincial quota allocation, it is necessarily a limited program and has always contained a number of restrictions to ensure it does not expand unduly.
18. The Chicken Board submits that one of the most significant restrictions in terms of limiting the scope of the permit program is the restriction that prohibits permits being used to increase quota holdings. This general restriction is reflected in various of the prohibitions set out in part 50, including those in section 50.8 limiting permits to one per person or property per year, prohibiting the combination of a permit with quota, and prohibiting a permit to be grown "on any premise registered with the [Chicken] Board for the production of regulated product". The Chicken Board submits that without such limitations, current quota holders could use the permit program as a loophole to increase production by applying or arranging for friends, colleagues or other parties to apply for permits to be grown on registered premises.

19. The Chicken Board submits that its denial of a permit in this case is consistent with the provisions of its General Orders, in particular the prohibition against growing a permit on a premise registered for the production of regulated product.
20. The Chicken Board is of the view that allowing permits on sites where regulated chicken is already being grown would open the “floodgates” for permit applications on sites of quota holders. It submits that the permit program’s protection as an exemption program for small lot producers under the FPA might then be put in jeopardy. To allow exceptions to the limitations and prohibitions respecting permits would also risk disrupting the delicate balance of interests represented by the FPA. If other provinces were to seek to amend the FPA to include the amount of chicken grown under permit in BC’s provincial quota allocation, the Chicken Board would have to either cancel the permit program or incorporate quota allotment into the permit program, neither of which accords with sound marketing policy. Firstly, cancelling the permit program would drive production back underground, hindering efforts to improve traceability for biosecurity purposes. Secondly, granting quota to permit holders would undermine the new entrant grower program because it would allow permit holders to “jump the queue” of bona fide new entrant applicants. The Chicken Board submits therefore that the denial of the appellant’s request for a permit accords with sound marketing policy.
21. Further, the Chicken Board submits that the permit program was never intended to be used as a new entrant program. The Chicken Board argues that it has a separate new entrant grower program to support new farmers in the chicken industry and testified that it has supported 30 new growers (about 10% of all growers) over the last five years, giving priority to specialty products according to market demand.

DECISION

22. Section 50.8 of the Chicken Board’s General Orders provides:

50.8 A maximum of one permit per person or property per calendar year may be issued. A permit may not be combined with any class of quota or be grown on any premise registered with the Board for production of the regulated product.

23. The term “registered premises” as defined in Part 1 of the General Orders means “building(s) or portions of buildings and the lands appurtenant thereto owned by the grower and registered with the Board for the production of chicken under the grower’s quota”. Although section 50.8 refers to “any premise registered with the Board”, for the purpose of this analysis the panel has read this definition into the section so that the Chicken Board’s prohibition can be understood to read as follows:

A permit may not be combined with any class of quota or be grown on any premise registered with the Board for production of regulated product (where registered premises means building(s) or portions of buildings and the lands appurtenant

thereto owned by the grower and registered with the Board for the production of chicken under the grower's quota).

24. Other provisions of the General Orders make it clear that a quota holder must own (i.e. have title in fee simple to) the registered premises, while permit holders are not required to own the property on which they produce chicken (Part 1 definition of "owner" and section 6.3 of the General Orders).
25. In the present case, V & H has registered the entire premise at 9285 Banford Road with the Chicken Board for production of regulated product. While the evidence indicates that V & H supports the appellant's request for a permit and that Plan A of Barn 2 is currently not in use and could be used as a separate bio security zone, V & H has not applied to deregister Plan A of Barn 2. In the absence of such an application and any evidence as to what such an application would entail to accord with sound marketing considerations, the outcome of any such application and its impact on a permit application by the appellant remains uncertain.
26. Given that the entire premise at 9285 Banford Road was and remains "registered with the Board for the production of regulated product", the panel finds that the Chicken Board's denial of the permit to Mr. VanEck is entirely consistent with section 50.8 of the General Orders.
27. We have considered Mr. VanEck's argument that he is a "legally separate entity". By this we take Mr. VanEck to mean that because of his arrangement with V & H to use a portion of a building to produce chicken, the area identified as Plan A should be treated as a separate premises from the remaining portion of Barn 2, the other buildings and the land appurtenant thereto used by V & H to produce chicken at 9285 Banford Road.
28. The panel is not persuaded by this argument. Section 50.8 does not only prohibit a permit from being combined with any class of quota. It also creates a general prohibition against growing permit production on *any* premise registered with the Board for the production of regulated product, no matter who is growing the permit production. The arrangement as described by Mr. VanEck for his use of a portion of Barn 2 creates the very situation that is prohibited namely the growing of permit production on a premise registered with the Board for the production of the regulated product. Whether Mr. VanEck is or is not a "separate legal entity" is not determinative.
29. The appellant also argues that the Chicken Board's decision is not consistent with sound marketing policy because it limits innovation, leaves an important market segment underserved and restricts new entrants. In the panel's view this argument cannot succeed in light of the existing provisions in the General Orders for new entrants, specialty products, and small lot producers.
30. There is nothing in the General Orders that prevents Mr. VanEck from applying for a permit for a premise not registered with the Board for the production of regulated product. Alternatively, Mr. VanEck could apply under the new entrant grower

program if he complied with the rules of that program and acquired a suitable property to house the new entrant quota he would receive.

31. The panel does not find any special circumstances that would warrant providing Mr. VanEck with an exception to the current General Order.
32. In the view of the panel, the Chicken Board did not err in refusing Mr. VanEck a permit to grow chicken. We accept the arguments of the Chicken Board that its decision to deny the appellant's request for a permit accords with the *Scheme* and the General Orders. We also accept that as a matter of sound marketing policy it is appropriate to place restrictions on permit production so as to avoid any negative impact on the provincial allocation of chicken quota.
33. The appeal is dismissed.

Dated at Victoria, British Columbia this 27th day of March 2012.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Suzanne K. Wiltshire, Presiding Member



Ron Bertrand, Member



Cheryl Davie, Member