

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA
CHICKEN MARKETING BOARD CONCERNING AN OFFER OF
INCENTIVE QUOTA

BETWEEN:

BEV and BRIAN WHITTA dba WHITTA FARM,
43933 B.C. LTD.,
STEVEN & LORNE JACK dba FIRBANK FARM
and ERIC BOULTON dba SOMERSET FARM

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

TOP SHELF FEEDS INC.

INTERVENER

REASONS FOR DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Suzanne K. Wiltshire, Presiding Member
Andy Dolberg, Member
Diane Fillmore, Member

For the Appellants

Christopher Harvey, QC, Counsel

For the Respondent

Claire E. Hunter, Counsel

For the Intervener

Robert Davison, President
Sherry Davison, Director

Date of Hearing

December 4, 2012

Place of Hearing

Nanaimo, British Columbia

INTRODUCTION

1. This concerns an appeal of the August 21, 2012 decision of the British Columbia Chicken Marketing Board with respect to the discontinuance of ferry freight assistance for chicken not processed on Vancouver Island.
2. The following are the reasons for our June 7, 2013 decision in this appeal.
3. The four appellants are all longer established Vancouver Island Region chicken growers and are sometimes referred to as “commercial growers”. The principal of the corporate appellant, 43933 B.C. Ltd., is Mike Volk.
4. The appeal arose from the December 9, 2011 offer by the Chicken Board to issue 9,924 kilograms (approximately 5644 birds) of incentive quota to eight Vancouver Island Region new entrant growers and the four appellants. The offer was contingent on the acceptance of specified conditions and the delivery of specific undertakings by each grower.
5. Each of the appellants accepted the offer of the incentive quota and signed the required undertaking in January 2012. The undertakings signed by the appellants included, among other things, an agreement that, on acceptance of any amount of the 9,924 kilograms of incentive quota, the subsidy provided by the Chicken Board for the cost of ferry transportation of any chicken not processed on Vancouver Island would cease effective the start of quota period A-118 (June 16, 2013). This included the elimination of ferry freight assistance from Gabriola Island, where one of the appellant farms is located, to Vancouver Island.
6. The appellants were permitted to transfer existing quota to make room for the new quota but existing quota had to be transferred before any of the new incentive quota was issued.
7. By letter dated February 20, 2012, the Vancouver Island Chicken Growers’ Association requested that the Ministry of Agriculture “review the matter of transportation costs for hauling chicken to lower mainland processing plants with the outcome thereof being incorporated within the (Chicken) Board orders”. As the British Columbia Farm Industry Review Board (BCFIRB) is the regulatory agency with the legislated authority to supervise commodity boards and commissions, it responded to this request and referred the issue of transportation costs for hauling chicken to the lower mainland back to the Chicken Board for its review.
8. After conducting the review, the Chicken Board released its August 21, 2012 decision confirming its original policy decision to discontinue ferry freight assistance as a condition of the incentive quota offer to the commercial growers on Vancouver Island; which decision gave rise to this appeal.

9. Top Shelf Feeds Inc., the only feed mill on Vancouver Island, was granted limited intervener status and appeared in support of the appellants.

ISSUE

10. Did the Chicken Board err when it determined in its decision of August 21, 2012, to uphold its previous determinations of December 7 and December 20, 2011 and January 25, 2012, respecting the discontinuance of the Vancouver Island ferry freight assistance to commercial Vancouver Island growers as a condition of the grant of incentive quota?

BACKGROUND

Supply Management

11. The supply of chicken in Canada is regulated under a supply managed system that is designed to fill, but not overfill, the domestic market. A key component of supply management is quota, which entitles a grower to produce and sell a certain quantity of chicken. The finite supply of quota has meant that it has become very difficult to acquire. Under the *British Columbia Chicken Marketing Scheme, 1961*, (the *Scheme*) a regulation enacted under the *Natural Products Marketing (BC) Act, c. 330 (NPMA)*, the Chicken Board has the authority and responsibility to “regulate and control in any and all respects” the production of chicken in BC. The *Scheme* also provides the Chicken Board with the authority to establish the terms and conditions of issue of quota.

Historical Context

12. Financial support for Vancouver Island chicken growers started in 1980 when the Chicken Board instituted a price premium to be paid to Vancouver Island growers to compensate for their higher costs of production. A prohibition on the transfer of quota off Vancouver Island had been in place through Chicken Board order since the 1960’s when the *Scheme* was enacted.
13. In 1987, without consultation, the Chicken Board cancelled the payment of the Island price premium. This decision was overturned on appeal to the then BC Marketing Board (now BCFIRB) and the Chicken Board was directed to take into consideration, among other things, regional economic disparities in the development of pricing and financial policies.
14. In 1995, the federal government terminated the Feed Freight Assistance (FFA) Program, which had offset a portion of feed grain transportation costs since the 1940’s in various parts of Canada, including Vancouver Island and several other regions of BC. Transition funding was provided under the FFA Adjustment Fund for 1996 and 1997 to assist fund recipients to adapt to the loss of the subsidy.

15. The issue of ferry freight assistance goes back to 1999 when Lilydale Cooperative Ltd. closed its Vancouver Island processing plant. Following the plant closure, in December 1999, the Chicken Board proposed a number of policies concerning Island chicken production, including the removal of its prohibition on the transfer of quota and the reimbursement of processors for the Island price premium and for actual ferry transportation costs. In 2000, Vancouver Island growers agreed to the discontinuance of the price premium in return for continued ferry freight assistance.
16. On March 9, 2000, the [*British Columbia Marketing Board \(“BCMB”\) Review of the Vancouver Island Chicken Industry – Supervisory Decision*](#) was issued. As part of the directions in the review, the BCMB directed the Chicken Board to pay ferry freight costs for chicks placed on Vancouver Island until June 2000, to pay the price premium for chicks placed on Vancouver Island farms from February 13 to April 8, 2000 inclusive and to terminate the price premium after that period. The Supervisory Decision stressed that “the BCMB does not accept that regulation should be used to direct that non-Island chicken growers should provide, on anything but an interim basis, any further financial subsidy to support Vancouver Island production.”
17. In early 2000, government had amended the *Scheme* by adding section 5.01 which temporarily prohibited the transfer of quota off Vancouver Island. Following its supervisory review, in order to assist Island growers impacted by the termination of ferry cost support and the price premium, the BCMB recommended to the Minister of Agriculture that the prohibition on the transfer of Vancouver Island chicken quota contained in the *Scheme* be amended or repealed not later than May 12, 2000. Government accepted the recommendation and amended section 5.01 to remove the freeze on transfers of quota off Vancouver Island. Much of the Vancouver Island chicken quota was subsequently transferred off the Island, greatly reducing the amount of chicken production in the region. The amended version of section 5.01 also contained a provision that was intended to enable the Chicken Board to re-allocate quota transferred off Vancouver Island back to the Island should circumstances warrant. As per the BCMB Supervisory Decision direction, ferry freight assistance was also discontinued after June 2000.
18. In December, 2004, the [*British Columbia Farm Industry Review Board Supervisory Review of the Vancouver Island Chicken Industry – 2004*](#) was issued. In this review, BCFIRB, among other things, considered the Chicken Board recommendation that a general levy be imposed on all chicken growers to allow the reintroduction of a degree of freight support for Vancouver Island growers. BCFIRB was not supportive of this approach, stating at page 11:

From our point of view, the problem with a transportation subsidy is that it is at best a temporary solution and will not prevent the further migration of quota off Vancouver

Island. A transportation levy is a very indirect substitute for a full regionalization strategy, and a poor substitute for the strategic thinking necessary to address the need for bio-security in areas where chicken production is concentrated.

19. BCFIRB, repeating the earlier recommendation made in its 1999 Mundhenk decision¹, also strongly recommended that the Ministry of Agriculture review its regional policies with respect to agriculture on Vancouver Island. This overall policy review was never undertaken by government but, in its absence, both BCFIRB and the Chicken Board subsequently determined that supporting the establishment and growth of small regional processing plants such as Island Farmhouse Poultry Ltd. (discussed under separate heading below) would be important for the long term viability of the chicken industry on Vancouver Island.
20. In 2006, ferry freight assistance was re-established on a temporary basis as the Chicken Board pursued a long term solution to the Vancouver Island freight issue. The Chicken Board advised Island chicken growers of its intent to facilitate an all-industry driven, long term solution to the Vancouver Island freight issue.
21. On November 7, 2007, the Chicken Board passed a motion to continue the Vancouver Island and Gabriola Island ferry freight assistance but reserved the right to revisit the program at any time, without notice.
22. In the Chicken Board's 2009 Strategic Plan, the Chicken Board identified as one of its goals the review of Board policies regarding the Vancouver Island freight issues with the intention of keeping the issue on the agenda until a reasonable solution was found.

Island Farmhouse Poultry Ltd.

23. In 2005, Island Farmhouse Poultry Ltd. (IFP) began operating a small processing plant on Vancouver Island with an aim of providing essential processing services for poultry and increasing the Vancouver Island grown food supply, thus improving local food security and increasing jobs on the Island. The plant serviced approximately 350 small Island farms, including new entrant chicken growers, and to some degree the larger operations of commercial Island growers such as the appellants. Since its inception, IFP has frequently had difficulty in accessing an adequate supply of chicken to make its operation viable.
24. In 2005-2006, following the [*British Columbia Farm Industry Review Board Specialty Market and New Entrant Review – September 1, 2005*](#), the Chicken Board initiated a New Entrant Grower Program to attract new growers to the industry, where successful applicants received a grant of quota

¹ 89 *Chicken Ranch Ltd. et al v. British Columbia Chicken Marketing Board et al*, October 6, 1999.

to help ease the financial burden of becoming chicken growers. The program was focused on getting more production into Vancouver Island and the Interior and more specialty production in the Lower Mainland. The program encouraged specialty production to meet specialty product requirements and supported smaller regional processors.

25. With respect to Vancouver Island, the Chicken Board's intent was for the New Entrant Grower Program to supply sufficient product to IFP to ensure its viability. To date, this has not happened as the higher production costs on Vancouver Island made the program less attractive than in other regions in BC. In addition, many large chicken growers have left the Island or transferred quota off the Island, thus reducing overall chicken production in the region.
26. In 2010, IFP still did not have a sufficient supply of chicken. The Chicken Board determined that additional new entrant quota was needed to allow existing new entrants to have larger and more viable operations and to supply IFP. Incentive quota was offered to 17 new entrant growers, including ten growers on Vancouver Island. Of those ten, seven Island growers accepted the offer, which included a condition that both new and previously issued new entrant quota would be tied to Vancouver Island as long as a processing plant continued to operate in the region and the quota would not be eligible for transfer to another region. The growers accepting the offer were also required to contract and ship all production to a specific processing plant in their region as directed by the Chicken Board.² The 2010 incentive quota offer was made to recent new entrants only and was not extended to the appellants.
27. Under the Chicken Board's August 26, 2011 General Order (Part 7 Assurance of Supply to Processors), IFP was assured a supply of chicken to a maximum level of 260,000 kilograms (live weight) per eight week cycle (approximately 150,000 birds).
28. However, given that IFP's supply concerns continued, even with assurance of supply, the Chicken Board decided that further intervention was necessary. Following industry consultations, the Chicken Board made the offer of incentive quota on December 9, 2011 to all Vancouver Island growers, including the appellants, which is the subject matter of this appeal.

²This decision was the subject of an appeal, *Paul Kuszyk, Three Gates Farm v. British Columbia Chicken Marketing Board*, January 4, 2011 wherein the hearing panel upheld the Chicken Board's decision to issue incentive new entrant quota with conditions.

APPELLANTS' CASE

29. The appellants are Island chicken growers and all but Mike Volk of 43933 B.C. Ltd. appeared as witnesses at the hearing. The witnesses were appellants Eric Boulton, who has farmed on Gabriola Island since 1948; Lorne Jack, who has farmed in Saanichton since 1962; and Brian and Bev Whitta, who started their Nanoose Bay chicken farm in 1994. Andre Patton, a new entrant chicken grower who farms in Duncan, also appeared as a witness for the appellants.
30. Mr. Jack testified that incentive quota was offered to all Vancouver Island growers but only the four commercial growers (the appellants) were required, as a condition of the offer, to forgo ferry freight assistance. In his opinion, this condition created two classes of quota holders and does nothing to support IFP. He indicated costs are higher on Vancouver Island and the elimination of ferry freight assistance is another hit to Island growers shipping to the mainland for processing. He also identified difficulties associated with shipping product to IFP; it cannot take all of his production at once resulting in farm management issues relating to multiple shipments and feed withholding.
31. Brian and Bev Whitta testified that they signed the agreement for the incentive quota but cannot utilize this quota until they build a new barn. They cannot build a barn and pay for ferry freight as well. They want an extension of time to build a barn to be in a position to ship to IFP. They argue that ferry costs should be spread across all BC chicken growers; the savings to the other growers by eliminating the ferry freight assistance is miniscule. They too identified difficulties in supplying IFP with product; IFP cannot commit to taking birds on the same night they ship to the mainland. They agree with Mr. Jack that multiple shipments in a single cycle are not desirable. They want to keep their agricultural land in production but to do so their business must be economically viable.
32. Mr. Boulton is in his 80's and testified that he was ready to slow down. He decided that the best economic move for him was to sell most of his quota before taking up the offer of incentive quota. He now has quota, including the incentive quota, for 11,000 birds, down from 26,000 birds. He has done multiple shipments within a single cycle from a single barn to provide IFP with product and now ships his entire production to IFP. He too wants to preserve farmland but says that is dependent on remaining economically viable.
33. Mr. Patton is a new entrant grower on Vancouver Island as his first location choice of the Okanagan was not available at the time. He wants to be in the chicken industry for a long time and is interested in this appeal because he would probably have to move if there was no ferry freight assistance. He

conceded that as a new entrant grower shipping to the Island processor he has never benefited from ferry freight assistance.

34. The appellants all acknowledged that they had been to meetings with the Chicken Board where the conditions of the incentive quota were explained and agreed that they were aware that ferry freight assistance would end once they agreed to accept the incentive quota. Ms. Whitta met with the Chicken Board Chair and General Manager at her home and understood from that meeting that the loss of ferry freight assistance was tied to the acceptance of the incentive quota and even if she did not take the incentive offer, she should not expect the ferry freight assistance to continue indefinitely. Ms. Whitta indicated that she understood the advantages and disadvantages of accepting the incentive quota with the attendant loss of the ferry freight assistance and that this was a business decision they had to make.
35. The appellants' position on this appeal is that the Chicken Board's decision is unfair, discriminatory, irrational and contrary to the interests of the chicken industry and the public interest on Vancouver Island and in BC generally. It is unfair and irrational in that:
 - (a) the cost of ferry freight assistance should in fairness be borne by the chicken industry generally since the cost when spread out is minimal and the earlier loss of a large commercial processing plant on Vancouver Island was not the fault of the Island growers;
 - (b) there is no rational basis for attaching discontinuance of ferry freight assistance as a condition to the issuance of incentive quota, and doing so is an attempt by the Chicken Board to extort a concession from the four growers affected and to preclude an appeal to BCFIRB. The removal would only be justified if all Vancouver Island product could, and were required to be, sold on Vancouver Island.
36. The decision is discriminatory in that:
 - (a) within the class of Vancouver Island growers, the condition targets the four larger commercial growers and differentiates between them and the Vancouver Island new entrant growers notwithstanding that they all produce chicken on Vancouver Island and ship their incentive quota product to a Vancouver Island plant;
 - (b) within the supply management sector of BC agriculture, the discontinuance of ferry freight assistance differentiates between Vancouver Island chicken growers and Vancouver Island producers of milk and eggs, notwithstanding that they all produce supply managed commodities within British Columbia.

37. The appellants also argue that the decision is contrary to chicken industry and public interests on Vancouver Island and BC generally and undermines and is inconsistent with support for:
- (a) the maintenance of agriculture and agricultural land on Vancouver Island by threatening the economic viability of the appellants;
 - (b) regionalization;
 - (c) diversification and reduced density in an industry subject to biosecurity concerns;
 - (d) Vancouver Island agricultural support industries such as feed mills;
 - (e) a Vancouver Island hatchery, and
 - (f) local jobs, local food production and consumer access to local foods.
38. The appellants contend that the fact that they accepted the offers of incentive quota and signed the agreement accepting the Chicken Board conditions does not preclude them from appealing the conditions under which the quota was offered. The appellants understood that the Chicken Board had advised the appellants to sign the agreement and then appeal. Regardless, the issue on appeal should be decided on the basis of whether the conditional offer is sound marketing policy.
39. The appellants state that the “grower price” is the minimum domestic live price fixed by regulation to be paid to growers by processors. The price paid is intended to be the same as the price received and to be the same throughout the province. They argue that the price must be the same for all in accordance with the underlying equity principle. The Chicken Board must, therefore, pool or equalize the cost of ferry freight. It is a primary function of a marketing board to rectify the inequality between growers to the extent of ensuring equal returns for their product.
40. The appellants also argue that equalization and subsidy are different concepts and that ferry freight assistance should not be regarded as a subsidy. The appellants are not asking for higher Vancouver Island costs to be subsidized but rather want to receive the same fixed minimum live price for their product as all other regulated growers in the province by having the ferry freight assistance continued.

RESPONDENT’S CASE

41. Daphne Stancil, Chair of the Chicken Board, Bill Vanderspek, General Manager of the Chicken Board; and Rick Thiessen, past president of the BC

Chicken Growers' Association and a member of the Chicken Board all testified on behalf of the Chicken Board.

42. The respondent set out the circumstances faced by the Chicken Board in late 2011 leading to the offer of the incentive quota, which included:

- (1) The appellants' farms produced more than sufficient chicken to supply IFP;
- (2) Notwithstanding (1), IFP was not able to access sufficient chicken to meet its needs and that the supply situation for IFP was at a crisis point;
- (3) the Chicken Board and BCFIRB had determined that it was sound marketing policy to support IFP;
- (4) the New Entrant Grower Program had not attracted sufficient new entrants to the industry to meet IFP's needs;
- (5) the Chicken Board was providing a ferry freight subsidy to the appellants to ship their chicken to the mainland instead of supplying IFP;
- (6) the ferry freight subsidy was effectively being paid for by growers across the province and had long been unpopular with growers in other regions;
- (7) BCFIRB had directed in the 2004 supervisory review that there should not be a permanent ferry freight subsidy; and
- (8) as a result of a period of little or no growth in BC's provincial allocation, growers across the province were receiving allotments of chicken in amounts less than their total quota holdings.

43. Because of the circumstances listed above, in the fall of 2011, the Chicken Board considered options to meet the supply problems of IFP and revisited the ferry freight assistance program. Increased quota was seen as the best choice for a permanent solution to meet the needs of IFP. Ms. Stancil indicated that one option before the Chicken Board was to tie the offer of incentive quota to commercial growers to the elimination of ferry freight assistance. The consensus of the Chicken Board, at its October 18-19, 2011 meeting, was to undertake consultations with the Vancouver Island commercial growers and IFP about a potential offer of 9,924 kg live weight (approximately 5144 birds) per cycle to all Vancouver Island growers on the conditions that the new quota be shipped to IFP, that the commercial growers

agree to ship a greater amount to IFP and that the commercial growers agree to the elimination of the ferry freight subsidy.

44. The Chicken Board carried out extensive consultations with Vancouver Island growers and IFP. Ms. Stancil stated that in later meetings the Chicken Board documented what the offer would be, went over how the offer would affect different growers and made it clear that growers were not compelled to accept the incentive offer.
45. The Chicken Board consulted with the Pricing and Production Advisory Committee (PPAC), which was dissatisfied with the proposal to offer additional quota to Vancouver Island growers. The PPAC felt that both growers and processors would be shortchanged if Vancouver Island growers received additional quota tied to IFP. If new quota were to be given, it should be done in stages. Processor members were concerned as they were short of product and were forced to buy product across Canada. The grower members did not agree with the offer of incentive quota but supported the removal of ferry freight assistance and felt that all product should be sold farm gate FOB.
46. Ms. Stancil also confirmed that the Chicken Board's consultations indicated that BC growers were concerned about tensions between regions and that mainland growers felt that Island growers were getting preferential treatment by getting the incentive quota.
47. On December 7, 2011, the Chicken Board made its decision to offer incentive quota to all Vancouver Island growers, subject to conditions. For the four commercial growers, the conditions included the elimination of the ferry freight subsidy.
48. The Chicken Board points out that each of the appellants accepted the offer for the incentive quota within the deadline for acceptance and signed undertakings in which they agreed "on acceptance of any amount of the 9,924 kilograms of incentive quota by the grower, the subsidy provided by the Board for the cost of transportation of any chicken not processed on Vancouver Island will cease effective with the start of quota period A-118 (June 16, 2013)." This included the elimination of the current subsidy from Gabriola Island to Vancouver Island.
49. Ms. Stancil acknowledged that she advised the appellants that their recourse was to appeal the Chicken Board's decision. She referred to her January 9, 2012 letter to the appellants where she explained to the appellants that their concerns had been considered by the Chicken Board and gave the reasons why the offer as made would stand.
50. The Chicken Board argues that it did not err when it made the decision to offer incentive quota on conditions. It acted within its authority under the

NPMA and the *Scheme*. Since January 2012, the Chicken Board has relied on the appellants' acceptance of the offers of the incentive quota and, in the case of Mr. Boulton, permitted the sale and transfer of quota off Vancouver Island to make space for the new quota. It has also made allocations commensurate with the increased quota levels to those with sufficient barn space to accommodate the additional birds.

51. The Chicken Board argues that its offer of incentive quota tied to the elimination of ferry freight assistance to the four commercial growers accords with sound marketing policy.³ It is consistent with the regionalization strategy for Vancouver Island; it considers and balances the interests of all industry stakeholders; and it provides a business opportunity for Vancouver Island growers. The history of Chicken Board support for ferry freight assistance shows that it was always seen as an interim measure, a temporary solution. The policy was never established in its General Orders because of BCFIRB's clear direction that ferry freight assistance should not be made permanent.
52. The Chicken Board argues that BCFIRB has previously endorsed the Chicken Board's view that it is sound marketing policy to support the establishment of small regional processing plants such as IFP. In 2010, BCFIRB considered and dismissed the *Three Gates Farm* appeal, *supra*, related to the conditional nature of an earlier 2010 incentive quota offer, stating at paragraphs 47 and 48:

We accept the arguments of the Chicken Board that under its *Scheme* it had the power to offer this incentive quota and did so in a manner it considered best serves sound marketing policy. Situations change over time and regulations need to be adapted to emerging circumstances. The panel agrees that maintaining a viable chicken industry on Vancouver Island is sound marketing policy. The Chicken Board's quota incentive offer is an exercise of its discretion to create a regulatory means of supporting sound marketing policy for the good of the entire industry.

Further, we note that this June 2010 offer of the Chicken Board fits well with the BC Ministry of Agriculture's 2004 *Regulated Marketing Economic Policy*. This Policy expects that regulated marketing boards in British Columbia will ensure that their policies and decisions do not inhibit the economic viability of regional industries; that they consider the need for appropriate mechanisms to sustain regional industries; and that they strive to accommodate producers and processors who pursue innovative or specialized market opportunities which are available in a region because of the region's location or natural characteristics.

53. The Chicken Board argues that the conditions attached to the 2011 incentive quota were similarly intended to promote a regionalization strategy of a long term chicken farming industry on Vancouver Island by supporting the local processor. The 2011 incentive quota was offered to both new entrant growers and the appellants. Unlike the 2010 offer to the new entrant growers

³ Section 9 (2)(a) and (b) of the *NPMA*.

which tied their entire incentive quota holdings to Vancouver Island, the Chicken Board did not think it was reasonable to attach this same condition to the commercial growers' offer. Instead, commercial growers were made an offer of incentive quota conditional on the elimination of ferry freight assistance.

54. In response to the suggestion from the appellants that it was unfair to require the commercial growers to give up the ferry freight assistance benefit when other Island growers were not so required, Ms. Stancil responded that not all growers are in the same situation. She noted that the commercial growers are the only ones who regularly send product to the mainland and regularly benefit from ferry freight assistance.
55. The Chicken Board considers its offer to be consistent with broad regional policy objectives, particularly, to support regional processing capacity and to be consistent with sound marketing policy. Board member, Mr. Thiessen observed that Vancouver Island commercial growers were upset when they were not included in the 2010 quota offering to new entrant growers. Other growers in the province did not agree with quota being offered to the Vancouver Island commercial growers and so the elimination of ferry freight assistance was suggested as a way to be fair to growers in the rest of the province as the benefit of the incentive quota would offset the loss of ferry freight assistance. It balances the interests of all industry stakeholders and specifically, balances the interests of commercial and new entrant growers on Vancouver Island, growers in other parts of the province, IFP, larger processors in the lower mainland and consumers. Further, the offer of incentive quota met sound marketing goals and allowed IFP to meet its marketing objectives based on consumer interests in local production, and was seen as the most efficient way to meet the production needs for IFP in the long term.
56. The Chicken Board states that it selected the time for removing the ferry freight assistance to coincide with the time when the Board would have to consider the live price agreement to allow for possible negotiations between the growers and processors regarding transportation costs.
57. The Chicken Board also considered the egg and milk industry examples where freight expenses are equalized. In those sectors, the commodity board is the first receiver of regulated product or monies, while in the chicken industry growers contract independently with the processors to whom they ship.
58. The Chicken Board contends that while it was not required to consider the economic impact of acceptance of the offer on the appellants, it did so. Its analysis concluded that the additional revenue from the incentive quota should offset the loss of ferry freight assistance. The decision is a

compromise that does not meet the full expectations of all industry members but it takes account of and balances the interests of all industry members, which is what the Chicken Board is required to do in order to accord with sound marketing policy. Its obligation is not to ensure equal returns in all cases for growers but to make decisions consistent with sound marketing policy. It is the responsibility of individual growers to make their own business decisions within the confines of the supply managed system to maximize their own returns.

59. The Chicken Board maintained that it would be contrary to sound marketing policy to consider only those aspects of the offer that suit the appellants' economic interests while ignoring the balancing of interests of other industry stakeholders, particularly when the appellants agreed to accept the quota on the conditions imposed by the Chicken Board. The Chicken Board says that to allow this appeal would be tantamount to creating a new quota that best suits the appellants' interests, without regard to the interests of other industry stakeholders. Such an approach was rejected in the *Three Gates* decision, *supra*.

POSITION OF THE INTERVENER

60. Sherry Davidson represented Top Shelf Feeds Inc., the only feed mill on the Island. In her view, the loss of the ferry freight assistance will have long-term consequences adverse to the interests of chicken growers and the entire agricultural community. If Top Shelf becomes less efficient, it would affect the service to other sectors. As well, the elimination of ferry freight assistance is discriminatory between Island chicken growers and producers of eggs and milk. It is grossly unfair to the four commercial growers. It is also discriminatory to treat the four commercial growers differently than the new entrant growers. The Chicken Board has created two classes of chicken growers on the Island and has failed to pursue sound marketing policy.

ANALYSIS

61. Section 9(2) of the *NPMA* gives BCFIRB the authority to inquire into whether a decision, order or determination of a marketing board or commission accords with either or both sound marketing policy and the scheme or orders of the marketing board or commission.
62. There is no issue taken with the legality of the Chicken Board's August 21, 2012 decision to offer incentive quota to the appellants on the condition that ferry freight assistance be eliminated. The panel agrees with the parties that the issue is whether the Chicken Board's decision to offer incentive quota on conditions accords with sound marketing policy. If it does not, it must be overturned. The appellants' argue that it is not sound marketing policy to ignore the difficulties experienced by the four commercial Island growers

and eliminate the ferry freight assistance. The Chicken Board argues that its conditional offer reflects sound marketing policy in that it will help ensure the survival of the Island chicken processor and balances the interests and concerns of other growers and processors in the province.

63. As a preliminary matter, the panel agrees that the appellants' acceptance of the incentive quota offer does not preclude this appeal. While we agree that a decision in the appellants' favour may create some difficulties in crafting an appropriate remedy, that difficulty does not prevent the appellants from advancing their appeal. We have proceeded on the basis that the Chicken Board's decision must be considered in light of sound marketing policy.
64. Consideration of what is or is not sound marketing policy is not static but rather it evolves and reflects circumstances as they change from time to time. One only need look at the Background section of these reasons to see the historical evolution of Chicken Board policy regarding Vancouver Island chicken production. In considering sound marketing policy, the panel agrees that the Chicken Board must take into account the interests of chicken growers, both in the Vancouver Island region and the rest of the province, processors and the public interest. In the panel's view, the Chicken Board would not be fulfilling its statutory mandate and exercising sound marketing policy if it developed policy taking into account a segment of the industry and not the industry as a whole.
65. The Chicken Board has laid out a succinct statement of the circumstances that existed in late 2011 (see paragraph 42 above) which formed the basis for the development of its incentive quota policy. The appellants do not appear to take issue with these circumstances, rather they argue that the Chicken Board has not developed the right policy in light of their circumstances.
66. There has been a history of the Chicken Board enacting policies to support regional chicken production on Vancouver Island with the approval of BCFIRB. In 1999, this support was achieved through the implementation of the ferry freight subsidy. However, since its introduction, BCFIRB has given consistent direction that this should not be a permanent subsidy. The March 2000 BCFIRB supervisory decision states:

FIRB also does not accept that regulation should be used to direct that non-island chicken growers provide, on anything but an interim basis, any further financial subsidy to support Vancouver Island production. All BC chicken growers are under significant economic pressure in a very competitive marketplace.

67. In its December 2004 supervisory decision, BCFIRB observed that a transportation subsidy is "at best a temporary solution and will not prevent the further migration of quota off Vancouver Island." Mr. Vanderspek

confirmed that this migration has indeed occurred despite the ferry freight assistance that is the subject of this appeal.

68. Since 2005, the Chicken Board and BCFIRB have jointly supported regional chicken production and processing on Vancouver Island. In a letter dated June 22, 2007, to Lyle Young, General Manager of IFP, the then Chair of BCFIRB, stated:

BCFIRB and the Chicken Board have determined that it is sound marketing policy to support the establishment of small regional chicken processing plants, such as IFP, in BC.

69. The panel accepts that it continues to be sound marketing policy to support a plant such as IFP as a way of facilitating the viability of a chicken industry and its allied trades on Vancouver Island.
70. We turn now to consider the appellants' specific criticisms of this policy. The appellants argue that it is unfair to expect them to bear the ferry freight costs alone; if these costs were spread among all BC growers, the impact would be minimal. The panel rejects this argument. Whatever the cost is when spread across all BC chicken growers, it does not mean that it is fair to expect all BC growers to subsidize these costs. The ferry freight costs are part of the costs of doing business on Vancouver Island but only for product that is shipped off the Island. In the view of the panel, these are not costs that the appellants should expect will continue to be shared by all growers in the province. Given that the situation for the chicken industry as a whole today is one of slow growth in a very competitive marketplace, the panel agrees that non-Island chicken growers should not be required to provide ferry freight assistance on a continuous basis.
71. The appellants argue that equalization of returns is a fundamental element of regulated marketing involving price controls. The panel does not accept that equal returns are a fundamental part of regulated marketing. In fact, the Chicken Board is authorized to establish a minimum live price, not equal returns. There are too many cost variables between growers and between regions to ensure equal returns. It remains the responsibility of growers to make their own business decisions to maximize their returns within the regulatory framework that exists.
72. The appellants also argue that it is a fundamental principle of orderly marketing that regional disparities be minimized. The panel does not accept this argument either. Again, there are many elements of cost that vary from region to region. The regionalization strategy of the Chicken Board does not mean that regional disparities must be minimized, rather it is a policy to encourage viable industries in different regions of the province by means appropriate for that region. In the case of Vancouver Island, BCFIRB has

long accepted the sound policy basis for supporting processing capacity on the Island to service growers and supply consumer demand for local product.

73. This same principle is also consistent with the BC Ministry of Agriculture's 2004 *Regulated Marketing Economic Policy*. The panel notes in particular, the expectation for commodity boards to consider the need for appropriate mechanisms to sustain regional industries and to accommodate producers and processors who pursue innovative or specialized market opportunities available because of the region's location or natural characteristics. It is the view of the panel, that the Chicken Board's policy meets this expectation.
74. The appellants argue that there is no rational basis for tying the discontinuance of ferry freight assistance to the offer of the incentive quota. The panel rejects this argument and accepts that there is a very real rationale for tying the two policies together. The gains received by the appellants from the increased production related to the incentive quota (or alternatively the sale of quota off Island prior to accepting the offer of incentive quota) and any subsequent sale of the incentive quota should offset the increased costs from the loss of the ferry freight assistance. The Chicken Board also timed the elimination of the ferry freight assistance to coincide with the negotiations for the live price agreement. Given the evidence that processors are having difficulty accessing sufficient product, there is an opportunity for the appellants to obtain a more favourable transportation arrangement with their processors. The panel observes that the Chicken Board did have the authority to terminate ferry freight assistance at any time without any balancing benefit to offset increased costs to growers as long as the Chicken Board could demonstrate a sound marketing basis for such a decision.
75. The appellants argue that the condition respecting discontinuance of ferry freight assistance is discriminatory in that it targets them and differentiates between them and the Vancouver Island new entrant chicken growers. The panel notes from the Chicken Board's evidence that the Vancouver Island commercial growers were upset when they were not included in the 2010 quota offering to new entrant growers. The decision to include the commercial growers in the 2011 offer that is the subject of this appeal was opposed by the other growers in the province but they favoured the elimination of ferry freight assistance. The elimination of ferry freight assistance tied to the offer of incentive quota served as a means of being fair to those other growers.
76. As well, the panel notes that seven of the eight new entrant growers accepting the 2011 offer had also accepted the 2010 offer and thus were already subject to conditions that tied the 2010 incentive quota and the incentive quota they had previously received as new entrants, and the production from all such quota, to Vancouver Island. For those seven new entrant growers, the conditions attached to the 2011 offer similarly tied the

2011 incentive quota and production from that quota to Vancouver Island. As for the eighth new entrant grower, the 2011 incentive quota offer to that grower included conditions that tied the 2011 incentive quota and the incentive quota that grower had received as a new entrant in 2007, as well as production from all such quota, to Vancouver Island. The panel observes that for these eight new entrant growers, not only was their production tied to the Island, the concession they made in accepting incentive quota in 2010 and 2011 was to tie all their previous new entrant quota as well as the 2010 and 2011 incentive quota to Vancouver Island.

77. The panel accepts the Chicken Board argument that the 2011 offer balances the interests of British Columbia industry stakeholders and, specifically, balances the interests of commercial and new entrant growers on Vancouver Island and is therefore not discriminatory.
78. The panel does not accept the appellants' argument that what they are seeking is a pooling of transportation costs similar to what is done in the egg and milk industries. In this case, all that was sought to be pooled was the partial ferry costs of four growers. In the examples of the milk and egg industries that were raised by the appellants, the pooling of transportation costs applies generally to industry producers from all regions of the province, not to a limited few.
79. The appellants suggest that they accepted the incentive quota in order to help IFP. The panel does not accept this characterization. Each of the appellants made a business decision on whether to accept the conditional offer of incentive quota. The appellants all testified that they evaluated the offer in terms of what was best for their particular business. Mr. Boulton took advantage of the Chicken Board's offer to allow the sale of existing quota off the Island by selling a significant portion of his quota.⁴ Mr. Jack and Mr. Volk of 43933 B.C. Ltd. have accepted and produced the incentive quota, thereby, having the benefit of revenue from increased production. Ms. Whitta presented an extensive analysis of the pros and cons of the offer for their operation. While at the time of the hearing the Whittas had not yet accepted the incentive quota due to insufficient barn space, they did sign the agreement offering the incentive quota and were aware that they could sell quota to free up barn space. However, until the Whittas accept any amount of the incentive quota, the ferry freight assistance will still be available to them.
80. The panel observes that had the commercial growers on Vancouver Island been more supportive of IFP in the first place and shipped less product off Island, the 2011 offer of incentive quota may not have been necessary. With

⁴ His evidence on this point was that he sold his quota for approximately \$2 million dollars. The lost ferry freight subsidy for the 4 commercial growers in total would be in the order of \$60,000 to \$70,000 per year.

the exception of Mr. Boulton on Gabriola Island, shipments to IFP do not incur ferry costs.

81. The panel adopts the following reasoning from the *Three Gates* decision (paragraph 38):

If Mr. Kuszyk chooses not to accept this offer, nothing changes for him. It is only if he accepts the offer of incentive quota, which he has no obligation to do, that the rules change. In our view, the appellant would like the free incentive quota, but is not prepared to accept the conditions that come attached to it. The panel accepts the argument of the Chicken Board on this issue. Mr. Kuszyk cannot have it both ways...Mr. Kuszyk cannot require the Chicken Board to create new quota that best suits his interests.

82. It is unreasonable of the appellants to assume that if they were successful in removing the elimination of the ferry freight subsidy by virtue of this appeal, that they would still receive all the benefits of the policy. The Chicken Board only offered the incentive quota to the appellants on the condition that the ferry freight assistance would cease. This balancing of the interests of the Vancouver Island growers, IFP, growers in the rest of the province and other processors in the province was an essential part of the offer of incentive quota.

83. As set out in our decision of June 7, 2013:

- We find the August 21, 2012 decision of the Chicken Board consistent with sound marketing policy. Accordingly, we find the Chicken Board did not err when, in August 21, 2012, it upheld its previous determinations of December 7 and 20, 2011 and January 25, 2012, to discontinue ferry freight assistance to commercial Vancouver Island growers as a condition of the grant of incentive quota.
- We therefore dismissed the appeal.

Dated at Victoria, British Columbia this 14th day of June, 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Suzanne K. Wiltshire, Presiding Member



Diane Fillmore, Member



Andy Dolberg, Member