

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION AND ORDER CONCERNING CHICKEN
PRICING FOR PERIOD A99

BETWEEN:

PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

BC CHICKEN GROWERS' ASSOCIATION

INTERVENER

DECISION – PRELIMINARY ISSUE ON APPEAL

APPEARANCES:

For the British Columbia Farm Industry
Board

Suzanne K. Wiltshire, Member

For the Appellant

Wendy A. Baker, Q.C., Counsel

For the Respondent

John J. L. Hunter, Q.C., Counsel

For the Intervener

Paul D. McLean, Counsel

Date and Place of Hearing

August 10, 2010 by phone and by
written submissions (August 13 and 16,
2010)

INTRODUCTION

1. On August 10, 2010, I presided over a prehearing telephone conference involving the appellant (Primary Poultry Processors Association of BC), the respondent (British Columbia Chicken Marketing Board) and the intervener (BC Chicken Growers' Association) arising from the appellant's appeal of the Chicken Board's July 14, 2010 Decision and related Pricing Order for period A99 (July 18-September 11, 2010). The Processors' appeal from the Chicken Board's "A99 Order" is the latest in a series of appeals by the appellant and intervener from Chicken Board pricing decisions and related orders.
2. By letter decision dated August 11, 2010, I ordered, pursuant to section 15 of the *Administrative Tribunals Act*, that the following issue on appeal was to be heard by me on an expedited basis:

Did the Chicken Board comply with the directions of the BC Farm Industry Review Board (BCFIRB) in its June 9, 2010 Supervisory Decision¹ when the Chicken Board set the live price for chicken in period A99?

3. The issue arises because in setting the live price of chicken for period A99 – the live price being the cost processors have to pay to purchase chicken from producers – the Chicken Board added a "catching cost"² factor it had not used in setting the live price in periods A90-A98 (approximately 17 months, starting in March 2009). The Chicken Board's purpose in introducing the catching cost factor for the first time in period A99 was to offset an increase commencing in period A91 of almost 1 cent/kg in the catching cost "fee" processors "charge" producers. The Processors argue that by introducing the catching cost factor for the first time in period A99, the Chicken Board acted in a fashion that was contrary to BCFIRB's Supervisory Decision – the Supervisory Review panel being well aware of the catching cost issue, but nonetheless directing the Chicken Board to maintain the *status quo* with respect to the setting of live price during a transitional period which encompassed period A99.
4. The parties' initial oral submissions during the prehearing conference, as well as the written materials provided by the parties at that time (as referred to in my August 11, 2010 decision) and the additional evidence and submissions provided in writing on August 13 and 16, 2010, have been considered by me.
5. The supervisory direction at paragraph 87 of the June 9, 2010 Supervisory Decision concerning the "transition period" provides:

¹ June 9, 2010 Supervisory Decision "In the Matter of the *Natural Products Marketing (BC) Act* and a Supervisory Review of BC Chicken Marketing Board Pricing-Related Recommendations".

² Briefly described, "catching costs" refer to the costs involved in processors picking up chicken from a grower's farm. The issue as to who bears, or should bear, responsibility for these costs, and when the product is "Free on Board (FOB)", was an issue on the Supervisory Review, as described further below.

The panel recognizes that the changes contemplated by this decision cannot be brought into effect overnight. ... Accordingly, we direct that the current manner of setting price, assurance of supply and MDP remain in place for up to three months (until September 15, 2010) by which time the Chicken Board is directed to either have implemented any necessary changes to the General Orders or prepared and published its transitional plan for implementation of these changes. [emphasis added]

SUBMISSIONS

6. The Processors submit that this direction is absolutely clear, and the direction that “the current manner of setting price” remain in place does not permit a variation in the methodology and rationale adhered to and expressly affirmed by the Chicken Board in its pricing decisions for each of periods A90 to A98 predating the supervisory direction. The Processors argue that by factoring catching costs into the pricing decision for period A99, the Chicken Board has failed to maintain the *status quo* which BCFIRB has clearly mandated, and has in the process caused them to face the highest live price for chicken in Canada.
7. The Chicken Board submits that the issue of catching costs is integral to the determination of price, and that if the Chicken Board had not addressed this factor in its decision, they would have been allowing the Processors to effectively set the price of chicken. The Chicken Board states that when it set the price for A90 catching costs were 2.8 cents per kilogram and had been set at that level for many years, permitting the Board to set a price by reference to Ontario with an understanding of what the effective price would be for the industry. However, after the Chicken Board’s determination of price for A91, the processors unilaterally and in concert increased the catching costs by approximately 1 cent. The Chicken Board notes that it commented adversely on the increase in its A92 pricing decision, and further commented on the catching costs issue in its A94, A95 and A96 pricing decisions. The Chicken Board submits that the Supervisory Decision did not resolve this issue but did seem to accept that there needed to be a baseline catching cost level for a pricing model to work properly. In this latter regard the Chicken Board referenced comments made by the panel at the end of paragraph 86 and in paragraph 29 of the Supervisory Decision.
8. The Chicken Board submits further that the price setting process it followed from A90 to A99, as described in detail in each of its decisions, was the same. The Chicken Board says that catching costs were one of many considerations throughout this period, referring to its decisions for periods A92, A94, A95 and A96. But until A99 it was of the view that it would not be productive to set a price that included a correction for the catching cost increase. The Chicken Board states: “Following the supervisory review, the Board was in a position where it was necessary to exercise its discretion on this issue.”
9. In conclusion, the Chicken Board submits the A99 pricing decision cannot be said to be contrary to any direction of the Supervisory Review panel.

10. The Growers submit that the reason the issue of catching costs is a live issue is the arbitrary decision by the Processors to “arrogate” the A91 live price increase by increasing catching costs. It submits catching costs did not arise for the first time in period A99 but were considered by the Chicken Board in periods A91 through A95 and, having advised the Processors and Growers following the completion of the Supervisory Review that it would do so, the Chicken Board again considered catching costs in A99. Finally, the Growers submit that the Supervisory Review Panel could have easily expressly directed that the Chicken Board not consider catching costs when setting the live price until the transition period was completed. However, it did not do so, “leaving the CMB free to continue its (correct) practice of assessing catching costs when fixing the live price.”

DECISION

11. The question before me is not what the Supervisory Decision should or should not have directed regarding catching costs during the transitional period. The question is what it did direct, having held a full hearing on all issues addressed in the review.
12. Nor is the question before me whether further supervisory direction is required in respect of future periods or as a result of new and/or exceptional circumstances. The narrow question before me is whether the appellant can satisfy the onus of showing that the Chicken Board’s A99 Pricing Order, insofar as it introduced a catching cost factor designed to address an earlier catching cost increase that was imposed by processors in period A91, is contrary to the clear language and intent of the Supervisory Decision regarding pricing during the transition period.
13. For the reasons that follow, and having considered all the material before me, I find that the appellant has satisfied this onus.
14. The first point to note is that the Supervisory Review Panel identified, as separate issues, (a) the Chicken Board’s recommendations with respect to the live price model for BC and (b) its stated intentions with respect to catching costs. The Panel dealt with these subjects in separate sections of its decision and in separate directions.
15. At paragraph 88, in giving specific direction as to the implementation of the new pricing model, the Panel did not provide for adjustments with respect to earlier changes in catching costs since period A91. Rather, catching costs were separately dealt with in the Supervisory Decision at paragraph 95, where the Supervisory Review Panel directed the Chicken Board to refer the issue to the Pricing and Production Advisory Committee (PPAC) “to consider in light of the Alberta model and to develop appropriate catching standards and pricing structures for the approval of the Chicken Board”.
16. I note further that two separate deadlines were set – September 15, 2010 for implementation of the live price model (or publication of a transition plan) and

December 1, 2010 for the PPAC to develop the appropriate catching standards and pricing structures.

17. While the above directions are all focused on what is to be the new system rather than the transition period, they do clearly demonstrate the Supervisory Panel's intention that the pricing formula and catching costs be dealt with as separate issues. All this being so, it makes no sense to read paragraph 87 as allowing the Chicken Board to take new action on an issue that has been on the table for a long time and which the Supervisory Panel was clearly very much aware of.
18. The Chicken Board has emphasized paragraph 29 of the Supervisory Decision: "We also accept that the Chicken Board's support of the pricing formula is predicated on catching costs returning to the recent level of \$.0.028/kg."
19. Paragraph 29 acknowledges the basis upon which the Chicken Board indicated its support for the Processor's model advanced during the supervisory hearing. I do not think it is fair or reasonable to read more into it than that. In any event, that paragraph is about the live price model to be implemented through changes to the General Orders at the end of the transition period. As noted above, the Panel's treatment of how those separate issues should be addressed "at the end of the day" only reinforces that the Panel did not intend this factor to be introduced in the transitional period to address a matter going back to period A91.
20. The "current manner of setting price", for purposes of the transition period, clearly and obviously referred to the Chicken Board's pricing decisions and orders for A90 through A98. They were the "current" decisions setting price. These decisions all followed a similar process and adopted a single methodology and the same rationale for setting the live price in each of those periods.
21. In the A90 pricing decision, the Chicken Board established a 6 step consultative process which it expanded to a 9 step process in the subsequent decisions to accommodate the possibility of an exceptional circumstances request. This was specifically referred to in the Chicken Board's decision as the "process".
22. In each of the decisions from A90 to A98, the Chicken Board decided that the domestic live price for the period would be set at the Ontario posted price plus a differential based on BC's historical pricing relationships with the provinces of Manitoba, Saskatchewan and Alberta. The Chicken Board utilized the same methodology and rationale in each of the decisions setting the domestic live price for each of the quota periods A90 through A98. In each case, the starting differential to Ontario base price for live chicken for the Chicken Board's calculation of the differential was period A62, where British Columbia's differential to Ontario was 4.35 cents. The Chicken Board then calculated the change in the differential for each of Manitoba, Saskatchewan and Alberta between period A62 and the most recent period (i.e., A97 for A98 calculation purposes) on a weighted average basis using the kilograms of live chicken domestic allocation share for each of these provinces. The

sum of the measured changes was then added to the A62 differential of 4.35 cents to arrive at the differential to be added to the Ontario posted price.

23. The Chicken Board did not make any separate adjustment in any of periods A90 to A98 for any cost or other factors identified by the parties through the consultation process. Despite the increase in catching costs of almost 1cent/kg in period A91, the Chicken Board did not adjust the domestic live price in any of the subsequent periods A92 through A98 to address or compensate for that increase.
24. When that increase in catching costs was raised by the Growers in their submissions before the Chicken Board, the Chicken Board did comment on the matter.
25. In its decision for period A92, the Chicken Board stated that its expectations were that there would be “no further unilateral price/cost decisions by the Processors or affiliated hatcheries with respect to A-92 BC differential to Ontario” (emphasis added). It went on to advise that in future pricing decisions, consideration would be given to catching or other cost increases which were effective from A91, so far as they were judged to be arbitrarily offsetting the Board’s pricing decisions.
26. In its decisions for periods A94, A95 and A96, the Chicken Board expressed its view that it was not sound marketing policy to increase the domestic live price at the particular time to reflect the change in catching costs while undergoing the BCFIRB Supervisory Review. The Chicken Board’s view was that there was nothing to be gained by the industry by inciting further controversy. The Chicken Board noted in its A96 decision that it remained an ongoing concern that the catching cost increase in period A91 continued to be unresolved.
27. From my review of the prior A90 through A98 pricing decisions, I conclude that the phrase “the current manner of setting price” could only have been referring to the consistent methodology and rationale adopted by the Chicken Board in all of those decisions. Despite its concern regarding the issue, that methodology and rationale did not include an adjustment factor for the previous catching cost increase.
28. While the Supervisory Panel obviously had the jurisdiction to have endorsed the Chicken Board addressing the earlier catching cost increase during the transitional period, it did not do so. Despite being well aware of the issue, the Supervisory Panel clearly ordered that the *status quo* be maintained during the transitional period. This is consistent with the overall approach taken by the Supervisory Decision of separating the issues of pricing and catching costs, and seeking to maintain industry stability during the transition period.
29. On the latter issue, the Chicken Board has emphasized paragraph 86 of the Supervisory Decision, which states, in part, that: “The system does not work when growers use supply or pricing to hold processors at ransom and gain concessions, while processors arbitrarily raise catching costs to offset grower gains. This ‘tit for tat’ approach is unhelpful, non-productive and non-sustainable”.

30. The wisdom reflected in paragraph 86 is unassailable. It helps explain why the Supervisory Decision insisted on catching standards and costs being studied thoroughly and separately. There is no evidence that, prior to the A99 Pricing order, the necessary work regarding catching costs was done. Instead, a Pricing Order was made which responded to a previous action, not a new or exceptional circumstance that was unknown to the Supervisory Panel. Paragraph 86 only reinforced that in ordering the *status quo* to be maintained regarding the manner of setting price during a transitional period designed to allow work to be completed to engender industry stability, the Supervisory Panel clearly did not intend to authorize the Chicken Board to take actions – even actions motivated by the best of intentions – that might reasonably be perceived, given the prevailing background and dynamics – as continuing the cycle of reactions and counter-reactions paragraph 86 was seeking to stop.
31. To summarize, the Chicken Board’s pricing decision for A99 added \$0.0099/kg to the calculated price to reflect the average catching price increase made by the Processors after the A91 pricing decision. In all other respects it employed the same methodology and rationale for setting the price that it had for periods A90 to A98. While the Chicken Board felt that it was sound and appropriate policy to make an adjustment in the pricing formula to reflect the earlier increase in catching costs, I find it was not in a position to do so in view of the supervisory direction in paragraph 87. I find that in adding \$0.0099/kg in respect of the A91 increase in catching costs when it set the price for A99, the Chicken Board did not act in accord with the directions set out in paragraph 87 of the Supervisory Decision.

ORDER

32. This leaves the question of remedy. While the appellant has requested extensive remedies, including compensation, it is my view, and I so order, that the appropriate direction at this time is as follows:
- “That the Chicken Board reset the live price for period A99, effective the date of this decision, to exclude the catching cost factor of \$0.0099/kg introduced in its A99 Order”.
33. It is neither necessary nor appropriate to go further than this at this time. In my judgment, issues of remedy for the period July 18-August 19 are properly addressed at the conclusion of the hearing of all grounds of appeal.
34. I wish to emphasize again the narrow focus of the issue addressed in this decision – namely, that the Chicken Board, in its Period A99 order, erred in including a catching cost factor that responded to actions taken by the Processors in period A91.
35. My decision is limited to the particular facts before me. If parties require further supervisory directions pertaining to the implementation of the Supervisory Decision

directions and/or any exceptional circumstances that may arise, they will have to take that up with BCFIRB in its supervisory capacity.

Dated at Victoria, British Columbia, this 19th day of August 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
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A handwritten signature in black ink, appearing to read 'SK Wiltshire', is written over a light blue rectangular background.

Suzanne K. Wiltshire, Member