



August 11, 2008

File: 44200-50/CMB #07-19

**DELIVERED BY EMAIL**

Ken Falk, President  
Fraser Valley Duck & Goose Ltd.

Bill Vanderspek, GM  
BC Chicken Marketing Board

John Hunter QC  
Hunter Litigation Chambers

David Leung  
Fairline Development Canada Ltd.

S.L. Eddy Ng, Vice President  
Wingat Game Bird Packers Ltd.

Dion Wiebe, President  
Rosstown Natural Foods Ltd.

Scott Cummings, President  
Primary Poultry Processors  
Association of BC

Ken Huttema  
K&R Poultry Ltd. (Farm Fed)

**AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN MARKETING BOARD  
CONCERNING THE ALLOCATION OF CHICKEN FOR PROCESSING**

Attached, please find the decision of the British Columbia Farm Industry Review Board (the "Provincial board") in the subject appeal.

In accordance with s. 57 of the *Administrative Tribunals Act*, "an application for judicial review of a final decision of the (Provincial board) must be commenced within 60 days of the date the decision is issued."

Yours truly,

Gino Nasato  
Case Manager

Attachment

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British Columbia  
Farm Industry Review Board

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IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT* AND  
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN  
MARKETING BOARD CONCERNING THE ALLOCATION OF CHICKEN FOR  
PROCESSING

**BETWEEN**

FRASER VALLEY DUCK AND GOOSE LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA CHICKEN MARKETING BOARD

**RESPONDENT**

**AND:**

FAIRLINE DEVELOPMENT (CANADA) (1992) LTD.  
K & R POULTRY LTD. (DBA FARM FED)  
PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA  
ROSSDOWN NATURAL FOODS LTD.  
WINGTAT GAME BIRD PACKERS INC.

**INTERVENERS**

**DECISION**

**PANEL:**

Suzanne K. Wiltshire, Presiding Member  
Honey Forbes, Member  
Dave Merz, Member

**APPEARANCES:**

For the Appellant:

Ken Falk

For the Respondents:

John Hunter, Q.C., Counsel  
Ron Kilmury  
Bill Vanderspek  
Carol Blatz

For the Interveners:

K & R Poultry Ltd. (dba Farm Fed)

Ken Huttema

Rosstown Natural Foods Ltd.

Dan Wiebe

Primary Poultry Processors  
Association of British Columbia

Scott Cummings  
Bruce Arabsky

Wingtat Game Bird Packers Inc.

Carmen Joe  
Robert Donaldson  
Melissa Ng

Fairline Development (Canada) (1992) Ltd.

Alan Leung

Date of Hearing:

April 16, 17, 18, 2008

Place of Hearing:

Abbotsford, British Columbia

## INTRODUCTION

1. The Appellant, Fraser Valley Duck and Goose Ltd. (FVDG), has a vertically integrated (production and processing) waterfowl operation in the Fraser Valley. As well as waterfowl, FVDG also grows and processes small quantities of chicken. Ken Falk, President of FVDG, represented FVDG at the hearing.
2. In early 2007, FVDG applied for but failed to receive growth allocation under Part 8 New Entrant Program for Processors of the General Orders of the British Columbia Chicken Marketing Board (Chicken Board). On December 21, 2007, pursuant to section 8(1) of the *Natural Products Marketing (BC) Act (NPMA)*, FVDG appealed to the British Columbia Farm Industry Review Board (BCFIRB) the Chicken Board's determination to not provide FVDG with growth allocation.
3. During a pre-hearing conference held on January 10, 2008, two issues were identified by FVDG.
4. FVDG identified the first issue to be the Chicken Board's failure to consider the consequences of Parts 7 and 8 of its General Orders on processors in the non-regulated sector, specifically FVDG. FVDG took the position that its waterfowl operation had been adversely affected because chicken processors could use the economic stability an assured supply provides to compete with FVDG in the duck business but FVDG could not obtain and use assured chicken supply to balance its operations in a similar manner.
5. The Chicken Board objected to BCFIRB's consideration of the first issue identified by FVDG. The panel received written submissions on this preliminary issue from both parties. The panel summarily dismissed this issue for the reasons stated in its decision. See *Fraser Valley Duck and Goose Ltd. v. British Columbia Chicken Marketing Board*, February 29, 2008.
6. The second issue identified by FVDG concerns the Chicken Board's decision to not provide FVDG with growth allocation under Part 8 of the General Orders. This issue proceeded to appeal.
7. The following individuals gave evidence during the hearing:
  - For FVDG: Ken Falk, President
  - For the Chicken Board: Ron Kilmury, Chair; Bill Vanderspek, General Manager; and Carol Blatz, Production Coordinator.
  - For Wingtat Game Bird Packers Inc. (Wingtat): Robert Donaldson and Melissa Ng, Marketing Manager

## ISSUE

8. Did the Chicken Board err in not providing FVDG with growth allocation under Part 8 of its General Orders?

## BACKGROUND

9. Chicken is a regulated product under the *NPMA* and the British Columbia Chicken Marketing Scheme, 1961 (*Scheme*). FVDG as a grower and processor of specialty chicken is subject to the General Orders of the Chicken Board enacted pursuant to the *Scheme* and the *NPMA*.
10. FVDG held a permit to grow specialty chicken. That permit was converted in January 2006 to specialty quota of 7,716 kilograms per 8 week cycle and subsequently increased to 10,166 kilograms effective June 24, 2007. FVDG also processes the specialty chicken that it produces.
11. In 2004 the Fraser Valley region of British Columbia experienced a devastating outbreak of avian influenza (AI) that resulted in significant loss and disruption to the poultry industry. FVDG's entire operation was shut down from May 2004 to January 2005 and it was a further two months before FVDG was back to full-time operation. A second outbreak of low pathogenic AI at FVDG resulted in it again being closed from November 2005 to February 2006. During this second closure FVDG's duck markets were largely taken over by other processors who were not shut down and by imported product. Upon reopening in February 2006, FVDG's original market share for ducks did not return and it started pursuing other means of increasing the viability of its overall operations, including attempts to increase the size of its chicken operation.
12. In the regulated chicken industry in British Columbia, the means by which a small vertically integrated processor like FVDG can increase the size of its processing operation is by obtaining more quota as a grower, signing up additional growers' production, or obtaining a share of the growth in the industry in the form of processor allocation as a "deemed new entrant" (DNE) under Part 8 of the Chicken Board's General Orders.
13. FVDG attempted to increase the size of its chicken operation by all of these means, but it is Part 8 of the General Orders that is the subject of this appeal.
14. On June 15, 2004 the Chicken Board implemented an Assurance of Supply policy for processors in the chicken industry in British Columbia. The policy's purpose is to provide for a more equitable sharing amongst processors of the finite amount of chicken received by British Columbia as a national allocation under the federal provincial agreement for chicken.

15. The first part of the policy, enshrined into the General Orders as Part 7 - Assurance of Supply, provides processors already in the industry an assured supply of chicken. Part 8 works together with Part 7 and sets out the rules by which, if the overall industry is growing, new processors can enter and share in the growth.
16. The relevant portions of Part 8 as it was first adopted in June 2004 are:

**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 be 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;
- 8.4 Provisions for dealing with a “Deemed New Entrant”:
  - a. The “deemed new entrant” will have priority over a “new entrant” in the application process.
  - b. The level of production granted to the deemed new entrant or the new entrant will be set at a determined level for six (6) periods, following which the processor will participate in the industry’s standard allocation process.
  - c. The application of a deemed new entrant must demonstrate the growth in the market that justifies the increase in allocation.

...
- 8.6 Other General Provisions include:
  - a. If there are no applications in any designated timeframe of the designated year, or if the applications do not absorb the total product available to both categories of applicants, applications will be accepted at any time. Once the available product has been absorbed the Board will revert to the policy of the program at the beginning of the next scheduled three-year period. If at the end of a three-year period there is available product remaining it will not be carried forward.

- b. Notwithstanding any of the above provisions on the volume of the product to be distributed under this policy, the Board reserves the right to allocate all, some or none of the amount determined to be available for this program.
17. On March 30, 2005, just before the first round of growth was allocated, the Chicken Board amended Part 8 of the General Orders by adding sections 8.8, 8.9, and 8.10, as follows:
  - 8.8 In response to the new meat inspection regulations implemented by government and which come fully into effect as of September 2006, and the need for small-scale regional specialty processors in BC, the Board will recognize such small-scale processors as those processing up to 77,160 kg live weight per 8-week quota period (annualized at 501,540 kg live weight per year).
  - 8.9 Processors under Section 8.8 will be exempt from Part 7 and 8 of these General Orders, until such time as they reach a processing level exceeding 77,160 kg live weight per quota period.
  - 8.10 Processors upon processing at a level beyond 77,160 kg live weight per cycle would be required to conform to Part 7 & 8 of these General Orders and by doing so would be eligible to apply for additional growth, allocated under the Federal Provincial Agreement for Chicken as a “deemed new entrant”.
18. The first round of growth under Part 8 was allocated in 2005. In a March 1, 2005 letter, the Chicken Board notified four processors that fit within the definition of DNE, including FVDG, of the opportunity to apply for the available growth. FVDG, having been shut down due to AI, was just beginning to rebuild its waterfowl business at the time. It did not consider it prudent to expand its chicken operations at the same time and made no application. The 310,229 kilograms available for the first round ending December 31, 2006 were allocated on April 30, 2005 to other processor applicants.
19. On August 29, 2006, in a letter to the Chicken Board’s Specialty Market Advisory Committee (SMAC), FVDG requested additional processor allocation of 2000 birds per week of specialty chicken either by way of 4 new growers (at 500 birds per week) or through re-direction of production from existing growers. FVDG indicated it was unclear as to how to have allocation granted to it, indicating that while it might be successful in attracting existing growers to ship to it, existing processors might not release the growers to do so. FVDG concluded by stating, “We understand that we are to deal directly with growers, who are to give their existing processors 2 cycles notice, and then are free to ship to us, yet the assurance of supply apparently complicates this.”
20. FVDG’s letter was referred by SMAC to the Chicken Board for their consideration. In a September 22, 2006 letter the Chicken Board responded to FVDG stating, “I would specifically direct you to Section 8.4 subsections a, b, and c that describe how the Board would deal with Fraser Valley Duck and Goose as a deemed new entrant processor. The time period for application for increased processing allocation referred to in section 8.1 and 8.2 will be January 1 to April 30, 2007.” A copy of Part 8 New Entrant Program for Processors, including the previously added

sections 8.8, 8.9 and 8.10 was attached. The Chicken Board also offered to meet with Mr. Falk in order to discuss and clarify Part 8.

21. In an October 31, 2006 email to the Chicken Board, FVDG asked if there had been any progress on its request for allocation of specialty chicken, noting discussions with the Board regarding signing up two new entrant growers and a conversation FVDG had with an existing grower. The General Manager of the Chicken Board via email instructed another employee of the Chicken Board to call FVDG to provide “another rendition of Part 8 as it refers to deemed new entrants and the timetable for making application”. Handwritten notes on a copy of the emails indicates FVDG was called and told the production of the existing grower referred to in FVDG’s email was “spoken for” and that in accordance with the Chicken Board’s previous letter “No G [growth] until after Apr/07... Detailed bus plan req’d”.
22. Then, on January 8, 2007 the Chicken Board sent individual letters to FVDG and also to Farmcrest Foods Ltd. (Farmcrest), Wingtat, Fairline Development (Canada) (1992) Ltd. (Fairline) and Island Farmhouse Poultry Ltd. (Island Farmhouse) advising that applications would be accepted from DNE’s for the three year period ending December 31, 2009 and attaching Part 8 of the General Orders. The letters, which were identical in most respects, noted that for this second round the total amount available for allocation was 696,356 kilograms live weight per eight week period and the application period was January 1 to April 30, 2007. The letters referred in each case to the definition of deemed new entrant in section 8.3(a) of the General Orders and to the criteria specified in section 8.4(c) requiring the application to demonstrate growth in the market justifying the increase in allocation. The letters were individually tailored in either the second or third paragraphs to deal with each recipient’s own circumstances in relation to Part 8. For Farmcrest, Wingtat and Fairline, all of whom had been processing in excess of 77,160 kg live weight per cycle prior to the amendment of Part 8 adding sections 8.8 to 8.10, the letter noted their current processor allocation. In the case of Island Farmhouse the letter advised that having attained the level of 77,160 kg live weight per cycle, Island Farmhouse was no longer exempt from Parts 7 and 8 of the General Orders and “must make application for processing allocation under Part 8 New Entrant Program for Processors.” FVDG was advised that as a processor currently processing less than 77,160 kg live weight per cycle it was exempt from Parts 7 and 8 of the General Orders and that, “Should your plans for the next three years include plans to process in excess of 77,160 kilograms per cycle, you will be required to apply for processor allocation Under Part 8 of the Orders.”
23. On January 17, 2007, FVDG applied under the second round and requested increased processor allocation from 7,716 to 154,320 kg live weight per production period as a DNE.
24. On February 27, 2007 Mr. Falk attended a meeting with the Chicken Board and staff of the Ministry of Agriculture and Lands (Ministry) and BCFIRB. Mr. Falk’s



testimony was that he recalled a conversation where he was told FVDG did not qualify as a DNE but that the Board would try to find a solution. While unable to remember the specific date of that conversation, he put it at or about the time of the February 27, 2007 meeting noting that at that meeting potential solutions to the situation faced by FVDG had been discussed.

25. On March 28, 2007 FVDG, in a letter to the Chicken Board, expressed interest in purchasing quota outright. Its stated intention was to purchase mainstream quota and convert it to specialty quota in order to be processing 77,160 kg per cycle before the end of the application period in order to be eligible as a DNE for second round growth allocation. This effort was not successful. In a follow-up email of March 29, 2007 the General Manager of the Chicken Board noted that if all of the growth allocation was taken up, FVDG would not be eligible for an increase beyond 77,160 kg per cycle until some time after December 31, 2009 but that if it was not all taken up, FVDG's application could be held in abeyance until it reached 77,160 kg per cycle and then it could be reactivated. In an April 16, 2007 letter the Chicken Board advised FVDG that its request to purchase mainstream quota to grow specialty chicken had far reaching implications and that until the Chicken Board's yearly planning sessions had been held in May and decisions made, the Board would not be able to provide answers to the requests made in the March 28, 2007 letter.
26. Second round growth was allocated on April 25, 2007 to four processors, not including FVDG. An April 26, 2007 Chicken Board letter to SMAC indicated "One processor request was deemed ineligible as it had not met the threshold to be a 'deemed new entrant' processing (77,160 kg live weight per quota period) as per section 8.10 of the General Orders." The Chicken Board also advised that the available amount was over subscribed by the remaining four applicants and had been allocated on a pro-rata basis. While letters were sent to the four successful applicants, there is no evidence of a letter being sent to FVDG to advise it of the outcome of the second round and that it had not qualified to receive allocation.
27. FVDG continued to communicate with the Chicken Board in an effort to secure additional specialty quota and/or processor allocation. On November 7, 2007 Mr. Falk, on FVDG's behalf, also met with members of the Chicken Board and BCFIRB.
28. Finally, on November 13, 2007 FVDG requested allocation of 308,000 kg for period A-84 and challenged the interpretation given by the Chicken Board to Part 8 of the General Orders, in particular the definition of a small-scale regional processor and the limiting factor of 77,160 kg. In a December 6, 2007 email the chair of the Chicken Board advised FVDG that the Chicken Board's interpretation of Part 8 of the General Orders remained unchanged and that FVDG was at the relevant times a small-scale regional specialty processor. As such, once it had reached the 77,160 kg threshold, it became qualified to apply to become a DNE processor under Part 8 and once qualified would be eligible for a portion of

available DNE processor allocation in the next round scheduled to take place beginning January 2010. Following this email, FVDG commenced this appeal.

### **APPELLANT'S SUBMISSIONS**

29. FVDG argues that having been mainly a duck grower and processor, it had little experience in the complex supply management system for chicken, and specifically with Assurance of Supply. Prior to the implementation of the Assurance of Supply policy in 2004, FVDG processed chicken supplied by other growers from time to time and would invite growers to supply chicken when needed. Assurance of Supply changed this.
30. When FVDG decided to increase its chicken processing operation, it wrote to SMAC on August 29, 2006 for direction on how to obtain more specialty chicken to process.
31. The letter of response from the Chicken Board on September 22, 2006 directed FVDG specifically to section 8.4, of the General Orders. From reading the section it was directed to, FVDG understood that it was eligible as a DNE and was being asked to wait until the appointed time, January 1 to April 30, 2007 to apply for second round growth allocation to achieve its request.
32. FVDG argues that it had no reason to think it was not a DNE eligible to participate in the second round of growth allocation. FVDG had been classified as a DNE eligible to participate in the first round of growth allocation in March 2005. The Chicken Board's letter of September 22, 2006 did not advise FVDG that its status had changed for the second round, but specifically directed FVDG to the sections related to DNEs and not to added sections 8.8 to 8.10. FVDG therefore proceeded on the belief that it continued to be a DNE eligible to participate in the second round of growth allocation.
33. Even if it had been directed to sections 8.8 to 8.10, FVDG argues that these sections do not apply to it and would not have changed its status as a DNE eligible to participate in the second round. FVDG argues that these sections were added, as stated within their text, specifically to deal with meat inspection issues and small-scale regional specialty processors, in particular one such processor on Vancouver Island. FVDG notes that at the time the sections were added it was already operating a provincially licensed plant and that its chicken operation was located in the Fraser Valley where there are other licensed processing plants. The stated purpose for the sections was not to deal with licensed processors such as FVDG already operating in the Fraser Valley area but rather to deal with processors outside the Lower Mainland of British Columbia, such as the one processor on Vancouver Island. FVDG submits that not being a regional processor, the added sections 8.8 to 8.10 do not apply to it.

34. FVDG says that when it challenged the Chicken Board on this issue, the Chicken Board expanded their interpretation of the purpose and wording of the added sections to include not just regional small-scale specialty processors but all small-scale processors. FVDG submits that the Chicken Board interpreted the purpose and wording of the added sections in this way so that FVDG would not be eligible to apply for available growth in the second round.
35. FVDG argues that the Chicken Board's expansion of the purpose and application of sections 8.8 to 8.10 to all small-scale processors is not consistent with a plain reading of these sections which refer to small-scale, specialty and regional processors. Sections 8.8 to 8.10 still remain in the Orders and have not been changed to apply to all small-scale processors as the Chicken Board now argues.
36. In the alternative, if sections 8.8 to 8.10 apply, FVDG argues that the change in its status, from a DNE eligible to apply for growth allocation to a small-scale processor exempt from Parts 7 and 8, was not communicated to FVDG in a timely manner. It was in fact not communicated until it was too late for FVDG to be able to sign up enough growers to qualify for growth allocation under the second round. FVDG argues that it should have been told whether it was a DNE qualified to participate in the second round or a small-scale processor exempt from Parts 7 and 8 so that it would know whether to apply for allocation of growth under Part 8 or to quickly sign up growers.
37. Lastly FVDG argues that, regardless of its classification, the Chicken Board has the discretion to provide FVDG with increased allocation based on its special circumstances, these being two successive closures due to AI and the decimation of its unregulated duck business by competitors in the supply managed sector. FVDG says that special consideration was provided to other processors: in one case, in the form of ongoing aid and increased regulatory assistance through the addition of sections 8.8 to 8.10; and, in another case, through allocation of production at the outset of the new entrant program.
38. FVDG argues that the Chicken Board must exercise its discretionary powers logically and consistently and that it is inequitable to aid some private business owners while excluding others through its decisions.
39. FVDG seeks several remedies, including:
  - a) an order for compensation for lost opportunity costs since August 29, 2006 and for losses sustained as a result of the failure of the Chicken Board to allocate the amount of production requested in the second round;
  - b) the allocation of 154,320 kg per cycle of specialty chicken as requested on January 17, 2007 in addition to the 77,160 kg per cycle FVDG says that it has subsequently signed up; and
  - c) costs.

## RESPONDENT'S SUBMISSIONS

40. The Chicken Board argues that its obligation is to regulate and control the production, marketing, transportation and storage of chicken; it is not simply to give chicken to processors who want it. The question here is whether or not the Chicken Board erred. The Chicken Board argues that no error has been identified.
41. Addressing first the context in which this appeal arises, the Chicken Board agrees that chicken regulation is complex and that Assurance of Supply adds an additional layer of complexity. Added to this complexity, there has been an evolution of the rules. The Chicken Board submits that it has no obligation to provide chicken to processors. This is not an entitlement case. This is simply a case of the rules changing and FVDG being caught by the change. FVDG is a processor and like other processors it operates under the rules and regulations and must work with the rules and regulations as they change over time.
42. The rules also contain a significant element of discretion and must do so because of the complexity of the industry. Section 8.6(b) reserves to the Chicken Board the right to allocate some, all or none of the amount determined to be available for allocation under Part 8. FVDG's best case is that it did not have the opportunity to seek additional production in the second round of growth allocation. Even for those who qualified to participate in the second round, section 8.4(c) reserves a residual discretion in the Chicken Board to consider the DNE applicant's business plan or proposal for what they are going to do with the additional allocation requested by them.
43. Turning next to the issue of eligibility, this case concerns FVDG's eligibility to have the opportunity to apply for growth allocation as a DNE under Part 8. The Chicken Board's position is that FVDG was not eligible to apply for a growth allocation under Part 8.
44. The Chicken Board argues that FVDG's approach to the interpretation of its eligibility is faulty. FVDG looks at Part 8 sequentially, starting with the definition of a DNE which it meets, concludes it is a DNE and stops there. While it may have been clearer if the added sections had appeared earlier in Part 8, any enactment is to be interpreted in the context of the whole. It is not reasonable to simply look at one definition and stop the analysis there. The Chicken Board submits that the proper approach is to look to the whole to see if the definition even applies. If one takes this approach, one finds that the definition of DNE does not apply to FVDG since Part 8 does not apply to small-scale processors processing less than 77,160 kg live weight per cycle.
45. This exemption for small-scale processors is both a benefit and a corresponding lack of benefit. It permits small-scale processors to sign up as many growers as they like up to the 77,160 kg threshold and as such grow rapidly, free from

restrictions. The corresponding lack of benefit is that small-scale processors do not have the opportunity to share in growth allocation under Part 8.

46. The Chicken Board argues that intention is part of the construction of a document. Looking at sections 8.8 and 8.9 and the definition of small-scale processor and the 77,160 kg threshold, the Chicken Board argues that its intention is clear; to exempt processors who process less than the threshold amount from Parts 7 and 8. So the question of whether such processors fall under the DNE definition does not arise as that definition is found only in Part 8.
47. As a matter of construction as well as a matter of consistent application by the Chicken Board, once Part 8 was amended, FVDG's status changed from being an entity subject to Part 8 to being an entity not subject to Part 8. This was all part of an ongoing process of clarifying and refining the rules for new entrants. Once the rules changed, FVDG was not eligible for an allocation of growth and as such was not eligible for the opportunity to apply.
48. Finally, turning to the question of equity and FVDG's arguments as to fairness and the Chicken Board's treatment of it, the Chicken Board submits there is nothing to these arguments. The Chicken Board argues that it spent a lot of time trying to deal with FVDG, explaining the evolving system. There is no error in what the Chicken Board has done; the Chicken Board has not disallowed or refused to permit FVDG to do something it was otherwise entitled to do.
49. The Chicken Board argues that it was not inequitable that FVDG did not have the opportunity to apply for a round two allocation. The change to the rules came into effect well before round two. FVDG did not meet the threshold requirement of processing 77,160 kg live weight per cycle and therefore clearly was not eligible to apply. There is nothing inequitable about FVDG not being able to participate in round two. FVDG can, if it meets the threshold, participate in the next round.
50. As for FVDG's allegation that the Chicken Board's response to its August 29, 2006 letter precluded FVDG from signing up growers, the Chicken Board argues that its September 22, 2006 letter is not capable of that interpretation. It is a benign letter that acknowledges receipt of FVDG's earlier letter, sends along a copy of Part 8 and directs FVDG to a few sections. It is not a decision of the Chicken Board; it is not an allowance or a disallowance. The flaw in FVDG's theory of this case is that it did not understand it could sign up growers, not that the Chicken Board did not allow it to.
51. The Chicken Board further argues that a reading of FVDG's August 29, 2006 letter leads to the conclusion that FVDG understood it could deal directly with growers but that a grower would have to give two cycles notice before it could move over to FVDG and be "free to ship to us". FVDG knew it could do that but did not want to. Instead, FVDG wanted the Chicken Board to direct production to it. The Chicken Board did not do that and was not obliged to do that.

52. In summary, the Chicken Board argues that FVDG's complaint is that the rules changed. FVDG tried to get the Chicken Board to direct production; the Chicken Board refused. FVDG knew it could have signed up growers but did not do so until it became clear the Chicken Board was not going to simply direct production. After this became clear, FVDG did sign up growers and is now apparently close to the threshold. If it meets the threshold, it will be eligible for the opportunity to apply for allocation in the next round.
53. Accordingly, the Chicken Board argues that there was no error on its part and the appeal should be dismissed.

### **SUBMISSIONS OF THE INTERVENERS**

54. The Panel heard from interveners Ken Huttema for K & R Poultry Ltd. (dba Farm Fed), Dan Wiebe for Rosstown Natural Foods Ltd., Scott Cummings from the Primary Poultry Processors Association of British Columbia, Carmen Joe from Wingtat, and Alan Leung from Fairline.
55. All of the processor interveners described the time, patience and financial resources that were required to nurture and develop the specialty market in the Lower Mainland and to rebuild the confidence of consumers after AI. Wingtat was especially eloquent in describing its reliance, in doing so, on good business practices, including television and radio promotion and advertising, obtaining federal inspection status in order to export excess product, educating the market about food safety and health benefits, teaching consumers how to cook products, diversifying its product line, and creating new markets.
56. Wingtat also described its understanding of competition in the marketplace. While FVDG's entry into the specialty chicken market in the Lower Mainland affected Wingtat's sales, Ms. Ng stated that newcomers entering the marketplace and selling at lower prices to increase their market share was understandable; that is what competition is all about.
57. All the processor interveners indicated that they rely more on competition and good business practices than on protection by regulation. Although they were skeptical of Assurance of Supply when it was first introduced, thinking that it was difficult to understand and would complicate even further an already complex, regulation-laden industry, they realized they would have to live with it. Despite their original concerns they now have marketing and expansion strategies in place based on the allocation they have received and that they believed was assured until 2010. They argue that it would be unfair for the Chicken Board to bring in the Assurance of Supply rules, grant supply to processors based on those rules, and then take it away for redistribution to FVDG.
58. The Association viewed the evidence as indicating a disconnect between the policies and regulations and FVDG's understanding of them, but submitted that

allocation must nevertheless be made within the regulations. While Assurance of Supply is complex, it is not fundamentally flawed and it is working. As to the issue of the regulated versus the non-regulated sectors, the Association argues that this is not relevant to this appeal; the control of product mix is a business decision left to the individual processor.

## **DECISION**

59. The panel begins its analysis with a consideration of whether FVDG was eligible to apply in the second round for growth allocation as a DNE under Part 8.
60. Sections 8.8 to 8.10 were added well before the January 1, 2007 to April 30, 2007 application period for the second round and are clearly applicable.
61. FVDG says that while it is a small-scale specialty processor, the added sections do not apply to it because it is not a regional processor. As a result, it remains a DNE eligible to participate in the second round of allocation just as it was in the first round of allocation. FVDG says that the intention behind the addition of these sections is expressly stated and that it is not necessary to look beyond the words of the section to clarify intention. The Chicken Board, on the other hand, argues that the Orders must be read as a whole and in doing so their intention is evident.
62. The panel first looked to section 8.8 of the Orders to determine whether FVDG was at the relevant time a small-scale processor within the context of the section which provides that "...the Board will recognize such small-scale processors as those processing up to 77,160 kg live weight per 8 week quota period...". FVDG argues that the word "such" must be read in the context of the immediately preceding reference to "...the need for small-scale regional specialty processors in BC" and that as used in section 8.8 small-scale processor would include all three requirements – small-scale, specialty and regional. The panel agrees that the normal reading and interpretation to be given to the words "such small-scale processors" in this section would be small-scale regional specialty processors.
63. FVDG goes on to argue that, although it is a small-scale specialty processor, it is not a regional processor since it is located in the Lower Mainland. On this point the panel does not agree with FVDG.
64. Part 8 is silent on the definition of the word "regional", neither including nor excluding any particular area. The Shorter Oxford English Dictionary (5<sup>th</sup> edition, 2002) provides several meanings for the words "regional" and "region", the following appearing to be closest to the usage in this instance. "Regional" is defined as "Of, pertaining to or characteristic of a region". "Region" is defined as "a definable portion of the earth's surface, esp. one distinguished by natural features, climate, fauna or flora, etc.".

65. Looking beyond Part 8 to the balance of the General Orders to ascertain the usual meaning given by the Chicken Board to the words “region” and “regional”, one finds one other instance where “regional” is used and several references to “region” or “regions”. Most helpful for the present purposes is Part 1 Definitions, where “Interior” is defined as that portion of British Columbia “that is not included in the regions defined as the Lower Mainland or Vancouver Island.” Part 1 thus establishes for the purposes of the General Orders that the province is broken into three regions: the Lower Mainland, Vancouver Island and the Interior. That “region” and “regional” are used in reference to all three of these areas in the General Orders is apparent from a review of the other references to these words in Section 50.19, Schedule 12(7), Schedule 13(1), (2), (9) and,(12) and the Code of Conduct.
66. We find consistent with the usage of the term “region” throughout the General Orders that the Lower Mainland is a region and that the term “regional” as used in section 8.8 includes small-scale processors located in the Lower Mainland, as well as small-scale processors located in the Interior and Vancouver Island regions. We find therefore that FVDG was at the relevant time a small-scale regional specialty processor.
67. Having determined that FVDG was a small-scale regional specialty processor for the purposes of Part 7 and 8 of the Orders, it is not necessary for the panel to consider FVDG’s argument that the Chicken Board either inadvertently or intentionally extended the meaning of the order from small-scale specialty and regional processors to include all small-scale, specialty processors.
68. The intent of the added sections is clearly to make it easier for small-scale specialty processors, no matter which region they are located in, to grow their businesses provided they haven’t yet met the 77,160 kg live weight per cycle threshold. Such processors are exempt from the added regulatory burden of Parts 7 and 8. They can sign up growers as and when they are able until they reach the threshold. Only when they reach that threshold do they become eligible to apply for a share of the growth as DNEs under Part 8. At that point any further increase in their processing operations is subject to the provisions of Parts 7 and 8.
69. The panel’s conclusion with respect to the proper interpretation to be given to Part 8 is consistent with our understanding of the broader context in which the amendments to Part 8 were made. The changes to the Chicken Board’s Orders addressed two significant public interest issues. The first was providing support to small scale processing in response to the new meat inspection regulations. The second was providing a general easing of regulatory restrictions in support of small-scale specialty processing in keeping with the policy framework established by the Ministry’s July 2004 Regulated Marketing Economic Policy and BCFIRB’s September 2003 to 2005 Specialty Review.



70. Thus, in answer to the question of whether FVDG was a DNE eligible to apply for the second round of growth allocation, the panel's answer must be no. As a small-scale, regional specialty processor processing less than the threshold 77,160 kg live weight per quota period at the time the second round of growth was allocated, FVDG was exempt from Part 8.
71. The panel also considered FVDG's argument that the Chicken Board should have exercised its discretion to provide allocation to FVDG based on the special circumstances that it was shut down twice because of AI and, during that time, lost its markets, in particular markets for its unregulated products. The Chicken Board, tasked with weighing the broader interests of the chicken industry as a whole chose not to exercise its discretion to provide allocation to FVDG. It had four qualified DNE applicants who had applied for more than the total available growth allocation for the second round. The Chicken Board exercised its discretion to allocate the available amount on a pro-rata basis to those four applicants; three of whom were located in the Lower Mainland region. FVDG had not yet reached the 77,160 kg threshold and therefore still had room to grow its processing operation. The panel sees no reason, from the evidence provided on this appeal, to intervene and order that production be re-allocated to FVDG on the basis that the Chicken Board erred in the exercise of its discretion.
72. The panel concludes that the Chicken Board did not err when it failed to allocate production to FVDG in the second round under Part 8 of its General Orders.
73. However, the matter does not end here. FVDG also argued that in the event that sections 8.8 to 8.10 applied to it and it was found not to be a DNE, the failure on the part of the Chicken Board to communicate this in a timely manner precluded FVDG from signing up growers to meet the threshold and becoming eligible to apply in the second round. It was not until sometime in February 2007, according to Mr. Falk, that FVDG was told it did not qualify as a DNE for the second round.
74. In order to consider this argument, the panel has carefully reviewed the extensive communications between FVDG and the Chicken Board, noting in particular:
  - a) FVDG's letter of August 29, 2006 requesting additional allocation after its second AI closure;
  - b) The Chicken Board's September 22, 2006 letter of response to FVDG;
  - c) FVDG's October 31, 2006 email to the Chicken Board and the email and notes regarding the Chicken Board's response;
  - d) The Chicken Board's January 8, 2007 letter to FVDG indicating it was exempt from Parts 7 and 8;
  - e) FVDG's February 27, 2007 meeting with the Chicken Board; and
  - f) FVDG's March 28, 2007 letter asking for mainstream quota to try and attain the 77,160 kg threshold before the end of April 2007.
75. The Panel concludes from Mr. Falk's testimony and the documentation that, until some time in January or February 2007, FVDG failed to appreciate that it was not

eligible to apply in the second round for growth allocation as a DNE because it had not yet attained the 77,160 kg threshold. In its August 29, 2006 letter FVDG appears to be asking for clarification when it states that it understands it can sign up growers but adds, “yet the Assurance of Supply apparently complicates this.” With respect to the Chicken Board’s September 22, 2006 letter, FVDG says that because the Chicken Board specifically pointed to the section 8.4 provisions for dealing with a DNE, FVDG understood the Chicken Board to be confirming it was a DNE and directing it to wait until the appropriate time to apply for allocation in the second round. The Chicken Board’s response to FVDG’s October 31, 2006 email request was to again tell FVDG to wait and apply in the second round. Even after the January 8, 2007 letter where the Chicken Board explicitly states that because FVDG had not yet processed 77,160 kg per cycle it was exempt from Parts 7 and 8, FVDG’s response was to apply, on January 17, 2007, for growth as a DNE either still believing it was eligible to apply in the second round or refusing to accept that its status had changed. However by the time of its March 28, 2007 letter, when FVDG applied for mainstream quota in an effort to reach the 77,160 kg threshold before the close of the second round, it is clear FVDG realized that it needed to reach that amount to qualify.

76. The panel agrees with FVDG that the communications from the Chicken Board were far from clear and not responsive to FVDG’s requests for clarification. In particular, the panel was skeptical of the Chicken Board’s explanation that, in their September 22, 2006 letter they were simply stating how they would treat FVDG if it became eligible to apply in the second round as a DNE, not how they will in fact be treating it for purposes of the second round. The response to FVDG’s October 31, 2006 email request was to merely add to the impression that FVDG should just wait to apply in the second round. Also confusing was the Chicken Board’s argument that FVDG should have known that it could sign up growers to reach the 77,160 kg threshold simply by the fact that it was not told that it could not sign up growers. The panel finds it understandable that FVDG would have difficulty knowing what its status was from these communications.
77. The panel accepts that FVDG relied on the Chicken Board’s September 22, 2006 letter to provide direction on how to obtain chicken allocation. The panel notes that the September 22, 2006 letter failed to address FVDG’s query as to how Assurance of Supply might complicate its ability to sign up growers. The Chicken Board argued that FVDG was aware that it could sign up growers but was simply looking for free allocation. This may be true but the panel is unable to come to this conclusion on the evidence presented. FVDG, like other processors, may have first been trying to exhaust all opportunities to obtain allocation through the Chicken Board before further pursuing the process of signing up growers on its own. However, the panel views FVDG’s letter of August 29, 2006 and its email of October 31, 2006 as indicating interest on FVDG’s part in signing up existing growers, but some uncertainty as to how to proceed. The Chicken Board was not responsive to FVDG on this point.

78. The panel finds it problematic that the Chicken Board characterized its September 22, 2006 letter, a letter that appears to have been relied on by FVDG, as benign and written as a courtesy. Although the Chicken Board's response may have been technically correct as far as it went, it raises the larger issue of the Chicken Board's duty and responsibility in establishing clear rules and explaining a complex system to new entrants and other industry participants. If new entrants are to be admitted and welcomed into the system, it must be recognized that they may come from unregulated industries and may not be familiar or have experience with the complex rules of the regulated system. They may not understand the rules, may interpret them incorrectly, or question and challenge them if they seem unclear or are in disagreement with them. It is especially important, particularly in the case of new entrants and those not as familiar with the system, that boards be responsive and clearly explain in plain language, the rules and the reasons for them.
79. New entrants also have a responsibility when coming into a regulated system. It is incumbent on them to develop an understanding of the rules, keep up to date with rule changes and operate within the rules. Given FVDG's prior limited chicken operations and the fact that Assurance of Supply with all its complexity only came into being in mid 2004 at the same point as the AI crisis first caused FVDG to shut down its operations, it is reasonable that FVDG would not have had the same understanding of the system or the current rules as would other processors. However, in this case, there were a number of other issues such as On Farm Food Safety Assurance Program certification, FVDG's request for grower quota and the increasing demand for specialty product that were on the table between the Chicken Board and FVDG at the same time as the allocation issue. Although the panel does not believe these issues were directly relevant to growth allocation, the number of communications between the parties should have provided abundant opportunity for FVDG to seek clarification of the allocation rules.
80. The panel is of the view that clear communications were further complicated and compromised by numerous ongoing issues that distracted the parties from dealing with the issue of second round growth allocation in a timely manner. One of these is the question of FVDG's motive. Although a processor's motive for seeking allocation may be a relevant consideration for the Chicken Board in assessing a business plan or proposal, the time spent on this issue by all parties at the hearing was neither relevant nor helpful to the panel and indicates the unnecessary consideration it was given in the communications between the parties. The panel believes that this may have distracted the parties from establishing, in a more timely manner, whether FVDG met the requirements in order to be eligible to apply for growth allocation.
81. The second issue that the panel believes distracted the parties is that of the interests of the regulated sector versus the non-regulated sector. The panel believes that by FVDG stating unequivocally from the outset that it intended to offset losses in its duck business with chicken allocation, FVDG gave the issue of the regulated versus non-regulated sectors a relevance that was not warranted in this case. FVDG

claimed that, in bringing forward this case, it was attempting to level the playing field between the regulated and non-regulated sectors. This cannot be accomplished by an appeal to BCFIRB. The regulated industries have been recognized and granted rights by legislation that non-regulated industries do not have; it is only through legislative change that this can be altered.

82. Having concluded that FVDG was not eligible to participate in the second round as a DNE but that this information may not have been clearly communicated to it, the panel next addressed to what extent the lack of clear communication of its status resulted in unfairness to FVDG.
83. In the panel's view, any unfairness to FVDG as a result of a lack of clarity in communication of its status is limited to a possible missed opportunity to sign up growers earlier. Any unfairness is mitigated by the fact that, although FVDG may not have clearly understood its status from the communications, it appears from its letter of August 29, 2006 that FVDG was aware that it could sign up growers, and some of the responsibility for not pursuing this course of action must therefore fall on FVDG itself. There were numerous other communications, meetings and opportunities between the Chicken Board and FVDG where these issues could have been clarified. As well, FVDG was clearly provided with a complete copy of Part 8 as an attachment to the Chicken Board's September 22, 2006 letter. FVDG made certain assumptions without seeking further clarification and FVDG cannot now succeed on the basis that it relied solely on the written communications between itself and the Chicken Board to understand its status for the second round of allocation.
84. While lack of clear written communications regarding its status, may have contributed to a missed opportunity for FVDG to sign up growers to the 77,160 kg threshold, to order compensation be paid or production be allocated based on the speculation that FVDG would have otherwise reached the threshold in time to be eligible to apply for the second round would amount to overcompensation. There is no certainty that FVDG would have become eligible and, even if it did become eligible, that it would, in view of the Chicken Board's discretion with respect to growth allocation and the oversubscription for the second round, have been successful in obtaining all or any of the allocation it had requested. Since the total amount available for allocation is limited, it would be unfair to take allocation away from those who were eligible to apply for allocation as DNEs under Part 8 at the time of the second round and give it to FVDG who clearly was not.
85. However, the panel recognizes that the Chicken Board's failure to communicate in a prompt and sufficiently clear manner may have contributed to FVDG's misunderstanding as to its status. In keeping with the Chicken Board's March 29, 2007 email to the effect that if all of the growth allocation was not taken up, FVDG's application could be held in abeyance until it reached 77,160 kg per cycle and then be reactivated, we consider the following an appropriate and at this point the only seemingly available course of action. The panel directs that provided

it has attained the threshold, FVDG be afforded the opportunity to apply for any presently allocated growth from second round allocation that is not fully taken up and utilized by the successful DNEs during the remaining period covered by the second round. The Chicken Board will of course continue to have and be able to exercise its usual discretion with respect to granting any allocation. As well, upon demonstrating that it has attained the 77,160 kg threshold and meets any other then applicable requirements of the General Orders, FVDG will be eligible, as will any other processors who meet the requirements, to apply as a DNE in the next round of growth allocation.

## **ORDER**

86. The panel finds that the Chicken Board did not err in not providing FVDG growth allocation under Part 8 of its General Orders and accordingly, the appeal is dismissed.
87. In accordance with the discussion in paragraph 85 above, the panel makes the following direction:

The Chicken Board is to provide FVDG, upon proof that it has attained the 77,160 kg live weight per cycle threshold under Part 8, the opportunity to apply for any previously allocated growth from the second round allocation that is not fully taken up and utilized in accordance with the terms upon which it was granted.

88. Given the dismissal of the appeal, there will be no order as to costs.

Dated at Victoria, British Columbia this 11th day of August, 2008

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

Per:

(Original signed by:)

Suzanne K. Wiltshire, Presiding Member

Dave Merz, Member

Honey Forbes, Member