

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
PRIOR APPROVAL OF THE FEDERAL PROVINCIAL AGREEMENT FOR CHICKEN
SCHEDULE "B" OPERATING AGREEMENT AMENDMENTS

DECISION

June 30, 2016

British Columbia Farm Industry Review Board
Prior Approval Review of the Federal Provincial Agreement for Chicken Schedule “B” Operating
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DECISION SUMMARY

1. On January 26, 2016 the BC Farm Industry Review Board (BCFIRB) initiated a review of the Chicken Board’s January 15, 2016 request for approval under s. 4.02 of the British Columbia Chicken Marketing Scheme, 1961 to sign the amended Schedule “B” Operating Agreement of the Federal-Provincial Agreement for Chicken. The review included an examination of the issues identified by the Primary Poultry Processors Association of BC (PPPABC) in its appeal of the agreement in principle (precursor to the amended Operating Agreement) originally filed in 2015.
2. BCFIRB, as a signatory to the Operating Agreement, is also required to make its own, independent determination as to whether it will sign the amended Operating Agreement.
3. BCFIRB conducted its review through a principles/outcomes-based approach using SAFETI¹. As required by s. 9 of the *Natural Products Marketing (BC) Act (NPMA)*, BCFIRB must find that the proposed amendments are authorized by governing legislation, regulations and agreements and are in accord with “sound marketing policy”. The panel reviewed the proposed amendments to the Operating Agreement alongside submissions received from stakeholders and related background information in light of these requirements.
4. Following on fulsome consideration and based on the rationale set out in this decision document, the panel is satisfied that moving forward with the proposed amendments to the Operating Agreement for the short-term is strategic and accords with sound marketing policy. BC benefits from being part of a cooperative system, and although

¹ Strategic, Accountable, Fair, Effective, Transparent, Inclusive

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the outcomes may not be ideal, on balance the amendments are a step forward in ensuring federal legislative requirements are met and supports Alberta’s re-entry to the Federal-Provincial Agreement.

5. The panel cannot predict with certainty the full effects on the industry of the proposed amendments to the Operating Agreement over the next ten years. Hence establishing ongoing monitoring and reporting against industry supported performance measures will be key in ensuring national and provincial responsiveness to changing markets.
6. BCFIRB gives its prior approval for the Chicken Board to sign the amended Operating Agreement in its current form no earlier than July 15, 2016.
7. BCFIRB will sign the amended Operating Agreement in its current form no earlier than July 15, 2016.
8. The Chicken Board and PPPABC are to constructively engage with each other and their western counterparts to evaluate options for changes to the Market Development Policy and other options identified in the PPPABC final submission.
9. The Chicken Board is to monitor and publically report on the outcomes of the amended Operating Agreement as part of its annual reporting cycle. Processors and further processors and other stakeholders are expected to engage with the Chicken Board as appropriate in developing performance measures and providing data.
10. As a signatory, BCFIRB expects the annual CFC review under s. 10.01 of the amended Operating Agreement will be based on performance measures developed in cooperation with stakeholders and publically reported (including to all signatories).

INTRODUCTION

11. Chicken production in Canada is managed under supply management – an orderly marketing system intended to provide an opportunity for efficient farmers to earn a fair return, and ensure a continuous, adequate supply of high quality food for the public. The system is founded on three pillars – restricting imports, setting prices, and controlling production.
12. Several agreements guide how national chicken production volumes are determined and shared among provinces. These are the Federal-Provincial Agreement for Chicken (FPA 2001), Schedule “B” Operating Agreement under the FPA (updated 2007 and currently under review), and the Western Allocation Settlement Agreement² (2003).

² The purpose of the Western Allocation Settlement Agreement (2003) is to establish a mechanism that brings Western provinces in line with the established regional range and the market responsiveness pool, when available as set out in the 2001 Operating Agreement.

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13. Total national production is agreed to at the Chicken Farmers of Canada (CFC) table. Current provincial shares of national production, originally determined on a largely historical basis and evolved over time with growth, may not now clearly reflect changing market opportunities across provinces or regions.
14. Over the last several years two interrelated challenges have dominated national and provincial discussions: 1) determining an approach for sharing access to market growth, and 2) consideration of the current overall division of national production among provinces.
15. *Share of market growth* among provinces is a significant topic, often referred to as an “allocation based on differential growth”. The industry saw little or no growth in market demand over the last 10 years beyond that based on population (about 1% per year) until around 2015 (e.g. 3-5%). There are several factors likely contributing to this change in growth, including: the rising cost of beef and pork which shifted consumer purchasing to lower cost chicken; the US avian influenza outbreak which decreased access to imports; and, the effects of the “agreement in principle” referenced in para. 23. Share of growth also raises consideration of whether the current and proposed amended Operating Agreement is consistent with the requirement set out in s. 23(2) of the federal *Farm Products Agencies Act (FPAA)* that the principle of comparative advantage of production to be taken into consideration when distributing growth. The *FPAA* states:

23(2) In allocating additional quotas for anticipated growth of market demand, an agency [CFC] shall consider the principle of comparative advantage of production.
16. *Division of production nationally* is an issue raised by Alberta (2007), followed by Ontario (2012). Both provinces take the position that they are ‘short’ in terms of production, basing some of their argument on their current share of national population.

Brief Chronology of Events

17. Shortly after the 2001 Federal Provincial Agreement was signed, CFC defaulted to distributing production pro-rata to the provinces, in part because market demand was stagnant and there was little to no growth to distribute. Recognizing that distributing growth pro-rata is not consistent with supply management, CFC established a goal to “...develop a strategy to implement differential growth as part of a larger strategy on efficiency and competitiveness” in 2009. Efforts included numerous CFC and bilateral meetings and development of proposals over the years, both at the CFC table and submitted by individual members.
18. In 2012, the Minister of Agriculture and Agri-Food Canada (AAFC) instructed CFC to resolve the on-going “differential growth” issue by December 31, 2012. Farm Products Council of Canada’s (FPCC) instruction was to provide a solution under s.

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23(2) of the *FPAA* if CFC did not reach a resolution. While s. 23(2) of the *FPAA* addresses determining how to distribute shares of market growth, it could not fully address Alberta and Ontario requests to reset base allocations.

19. In November 2012, Alberta filed its notice to withdraw from the FPA as of December 31, 2013. Alberta was seeking an increase to its share of domestic chicken production within a meaningful timeframe.
20. CFC did not reach a resolution on "differential growth" by December 2012.
21. FPCC, who must approve every national allocation, gave CFC a deadline for developing an agreement for distributing growth using comparative advantage for production as per the *FPAA* requirements, otherwise FPCC would use its Comparative Advantage of Production Guidelines it had developed for all national poultry agencies, to distribute any market growth.
22. An interim comparative advantage agreement was reached by the CFC Directors before September 4, 2013. Subsequently CFC and the provincial chicken boards entered into a temporary “agreement in principle” while the Operating Agreement amendments were being developed (July 2014).
23. The Primary Poultry Processors Association of BC (PPPABC) subsequently appealed the BC Chicken Marketing Board (Chicken Board) decision to sign the “agreement in principle” to BCFIRB (August 2014 with the appeal being subsequently amended in December 2014). As part of its appeal, PPPABC expressed serious concern that changes to how the national allocation is distributed “...does not address the needs of the BC chicken industry, it adversely impacts producers, processors, feed companies, contractors and trades, other ancillary businesses and consumers of chicken in BC and it improperly transfers production from BC to central Canadian processors to the detriment of the BC industry, now and in the future.”
24. The appeal was adjourned generally by agreement between PPPABC and the Chicken Board so that BCFIRB could address this matter in its supervisory capacity under s. 7.1 of the *NPMA*. As part of that process, the parties agreed to explore the potential of working with western counterparts in an effort to propose responsive, robust solutions to chicken allocation in Canada that would allow the industry to move forward in a manner that meets the intent of supply management, including responding to specific market demands. However by this point the amendments were essentially “locked in”. The regional and national discussions were unsuccessful.
25. In May 2015 CFC issued the proposed amendments to the Operating Agreement to signatories. Several outstanding issues directly and indirectly related to the Operating Agreement were subsequently addressed (e.g. further processing calculations, increased production under the Market Development Program and amended special vote provisions in the CFC bylaws).

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Next Steps

26. An effective Operating Agreement is more than a formula to distribute production. It is a mechanism to help ensure market responsiveness, which in turn supports growth. The proposed amendments to the Operating Agreement are intended to support market growth being distributed in a manner that reflects “differential growth” (including the required consideration of the *FPAA* comparative advantage of production requirement). The amendments are also intended to address Ontario’s and Alberta’s arguments for a greater share of national production.
27. From BCFIRB’s perspective, key amendments to the Operating Agreement include the addition of a comparative advantage of production-based formula (“differential growth formula”); the removal of the provision providing regions the ability to request additional production based on market demands; and, a discrete share of national growth being provided to Ontario. In relation, CFCs “special vote” bylaw (25(6)) now requires, as an additional safeguard which was proposed to CFC by its members, that Motions on matters referred to in sections 3.27 and 3.28 of the proposed Operating Agreement “...shall only be considered when all provincial commodity board members are present for the vote”. Previously the “special vote” bylaw only required the support of the provincial commodity board members present.
28. On January 26, 2016 BCFIRB initiated a review of the Chicken Board’s January 15, 2016 request for approval under s. 4.02 of the British Columbia Chicken Marketing Scheme, 1961 to sign the amended Operating Agreement.
29. BCFIRB, as a signatory to the Operating Agreement, is also required to make its own, independent determination as to whether it will approve the amendments. This includes an examination of the issues which would have been raised by the PPPABC should it have continued to pursue its concerns by way of appeal(s).
30. BCFIRB conducted its review through a principles/outcomes-based approach using SAFETI³. As required by s. 9 of the *NPMA*, BCFIRB must find that the proposed amendments are authorized by governing legislation, regulations and agreements and are in accord with “sound marketing policy”.
31. BCFIRB’s supervisory role requires it to consider the positions of stakeholders. The panel considered stakeholders respective views on the current system and how the proposed amendments may benefit or disadvantage them, including the evidence offered in support of these views in light of the over-arching purpose of supply management. The panel’s job is to find where the proper balance lies to achieve sound marketing policy. That balancing act sits above the interests of any particular group

³ Strategic, Accountable, Fair, Effective, Transparent, Inclusive

and it is inevitable that decisions in circumstances such as these will be contrary to the expectations of some of the affected parties.

32. This document sets out BCFIRB’s signatory decisions arising from its review process.

LEGAL AUTHORITIES AND AGREEMENTS

Federal legal authorities

33. In Canada the production and marketing of chicken is regulated under the *FPAA* and the Chicken Farmers of Canada Proclamation.
34. The Chicken Farmers of Canada, formed under the Proclamation, is the national agency responsible for regulating marketing of chicken in Canada. Chicken is defined in the Proclamation as “chicken and any parts of chicken, live or in processed form, produced in Canada and marketed in interprovincial or export trade.”
35. FPCC is responsible for supervision of national agencies, including CFC, under s. 6(1) of the *FPAA*.

Federal-provincial and regional agreements

36. Several agreements guide how national chicken production volumes are determined and shared among provinces. These are the 2001 Federal-Provincial Agreement for Chicken which includes Schedule “B” Operating Agreement (updated 2007 and currently under review), and the Western Allocation Settlement Agreement (2003).

Provincial legal authorities

37. In British Columbia, the production and marketing of chicken is regulated under the *NPMA* and the British Columbia Chicken Marketing Scheme, 1961 (Scheme).
38. The Chicken Board, formed under the Scheme, is the first instance regulator of the production and marketing of chicken in BC.
39. Under s. 4 of the *NPMA*, BCFIRB and every marketing board or commission, including the Chicken Board, may cooperate with a federal board (i.e. CFC), act jointly with a federal board and perform the functions and duties and exercise the powers under the *NPMA*.
40. Under s. 7.1 of the *NPMA*, BCFIRB is responsible for the general supervision of all marketing boards and commissions in the province, including the Chicken Board. Section 7.1(2) of the *NPMA* provides for this supervisory authority to be exercised

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“at any time, with or without a hearing, and in the manner [BCFIRB] considers appropriate to the circumstances”. Under s. 9 of the *NPMA*, BCFIRB “has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined by [BCFIRB] under [the *NPMA*]”.

41. Under s. 4.02 of the Scheme, the Chicken Board may not enter into or amend an agreement with the federal board (e.g. the Operating Agreement in this circumstance) without BCFIRB prior approval. BCFIRB, as the BC supervisory agency under the *NPMA*, is also a signatory to federal-provincial agreements, including the Operating Agreement.

ISSUES

42. In summary, the issues before BCFIRB are whether BCFIRB should:

- a) Prior approve the BC Chicken Marketing Board signing the amended Operating Agreement as per s. 4.02 of the Scheme; and,
- b) as the BC supervisory agency, agree to sign the amended Operating Agreement in its current form?

43. To address these two issues BCFIRB conducted the following decision process.

DECISION PROCESS

44. On January 26, 2016 BCFIRB initiated the review process to hear from a broad spectrum of affected stakeholders and interested parties. A follow-up letter on February 9, 2016 set out the review process, including written submission deadlines. BCFIRB reserved the right to amend the deadlines and details as required, and committed to notifying stakeholders as appropriate should any changes be made. BCFIRB requested that submissions include a SAFETI-based analysis of stakeholder positions, including argument and evidence related to:

- a) Are the proposed changes, including providing an additional share of growth to Ontario and Alberta, in compliance with governing legislation, regulations and agreements?
- b) Do the proposed changes address issues related to allocation decision-making?
- c) If the answers to (a) or (b) are no, why not and what would be the proposed remedies?
- d) In considering the answer to (b), are there potential implications arising out of the Trans-Pacific Partnership trade agreement over the course of the proposed

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Operating Agreement, including in terms of the allocation of new tariff rate
quota and adjustments to domestic allocation?

45. Stakeholders receiving BCFIRB’s review communications included all Operating Agreement signatories, the BC Ministry of Agriculture, BC Chicken Growers Association, and the BC Broiler Hatching Egg Commission. BCFIRB communications and stakeholder submissions were posted on BCFIRB’s web site within 2 business days on average.
46. On April 12, 2016 the BCFIRB panel determined that no oral hearing was required. Written submissions supported by affidavits were adequate and nothing further would be gained through direct questioning of parties and witnesses. As such, it requested further written submissions from the Chicken Board, CFC and PPPABC. In particular the panel requested that submissions address the following issue through a demonstrated, substantiated SAFETI analysis:
 - a) “Is a differentiated regional growth mechanism required in the proposed Operating Agreement in order to address concerns raised by the Primary Poultry Processors Association of BC (PPPABC) that the proposed Operating Agreement, including the Chicken Farmers of Canada (CFC) decision-making structure, leaves them at a competitive disadvantage?”
47. Prior to receipt of final submissions, BCFIRB became aware of potential Chicken Board specialty chicken discussions with the Chicken Farmers of Ontario that may have had implications for the current decision and future considerations. In a May 6, 2016 letter the panel requested any responses to these discussions to be included in final submissions from the Chicken Board, CFC and PPPABC.
48. In reviewing the submissions, BCFIRB asked a subsequent question of CFC regarding the special vote provisions in s. 3.28 of the amended Operating Agreement and CFC’s position on whether the special vote provision was in conflict with s. 9.03 of the Federal-Provincial Agreement. CFC’s June 9, 2016 submission was shared with the parties and responses were to be submitted by June 15, 2016. The panel reviewed the responses provided by the Chicken Board and the PPPABC.
49. PPPABC made a further submission on June 9, 2016, based on the CFC A-139 and A-140 allocation decisions which occurred following BCFIRB’s final submission deadline of May 11, 2016. CFC and the Chicken Board were given an opportunity to respond regarding whether the panel should consider the PPPABC further submission, by June 15, 2016.
50. After considering the PPPABC further submission and the CFC and Chicken Board objections, the panel determined it would receive the PPPABC further submission given the allocation information was not available by the final submission deadline and it did relate to the proposed amendments. CFC and the Chicken Board were

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provided an opportunity to respond and PPPABC was given an opportunity to provide a final response.

51. The panel reviewed the proposed amendments to the Operating Agreement alongside the submissions and related background information. Panel considerations included, but were not limited to: sound marketing policy, the intent of supply management, governing legislation, regulations and agreements, amendment history, government policy, good governance practices in relation to regulatory bodies, and SAFETI.

GENERAL SUPERVISORY EXPECTATIONS

52. It is an expectation of Government that the regulated marketing system operate in the interests of all British Columbians. The regulated sector contributes over one-half of B.C.’s farm gate cash receipts, and supports ancillary industries and a significant processing and marketing value chain. Strategic federal-provincial agreements contribute to the Ministry of Agriculture’s Vision “to be an innovative, adaptive and globally competitive agrifood and seafood sector valued by all British Columbians”.
53. Over the last several years BCFIRB, as the supervisory body under the *NPMA*, worked in cooperation with BC’s regulated boards and commissions (including the Chicken Board) to develop and put into practice a principles-based regulation and its founding principles – Strategic-Accountable- Fair-Effective-Transparent-Inclusive (SAFETI) as a means of delivering sound, reasoned and defensible decisions that support a sustainable regulated sector through sound marketing policy in the public interest.
54. As set out in BCFIRB’s June 6, 2016 governance letter, BCFIRB requires commodity boards to demonstrate that the B.C. regulatory system is:
- operating in accordance with governing legislation, regulations, polices and agreements;
 - governed with integrity and fairness; and,
 - acting in the public interest.

And

As the Provincial supervisory board, the BC Farm Industry Review Board (BCFIRB) expects commodity boards will fulfill their responsibilities as first instance regulators through strategic and accountable governance using a principles-based approach to regulation.

55. In summary, from a supervisory perspective, BCFIRB’s role is to ensure better governance and decision-making by BC’s regulated boards and commissions for the benefit of industry and the public.

PRINCIPLES OF SUPPLY MANAGEMENT

56. It is worth taking time to briefly review the intent behind supply management as it forms the foundation of the Federal Provincial Agreement and the associated Operating Agreement.
57. In the 1970’s political and economic factors were significant drivers behind the establishment of supply management. Supply management was considered a pragmatic response to economic and interprovincial trade issues in the chicken and layer egg industries. In an attempt to mitigate economic issues government was providing producer support payments. Concurrently, over supply was resulting in producers selling into other provinces below local prices. The resulting “Chicken and Egg Wars” led to several provinces passing legislation that restricted entry of eggs or chickens from another province. The situation came to a head when Manitoba, whose eggs were seized by the BC Egg Marketing Board in 1971, challenged the legality of interprovincial restrictions in the Supreme Court of Canada, (see *Manitoba (AG) v Manitoba Egg and Poultry Association*, [1971] S.C.R. 689 (Manitoba Egg Reference)). The appeal was dismissed.
58. Meanwhile the federal government was taking steps to discourage provincial ‘economic balkanization’. A bill was initially introduced in March 1970. The proposed legislation would permit a national marketing agency to restrict the quantity of the agricultural commodity being marketed to the volume demanded by consumers, and then allocate a share of that production to each province. Prohibiting dumping and allowing provincial marketing boards to set producer price that would meet cost of production and a fair return would remove incentives for producers to undercut each other. Or in other words, there would be a cooperative system based on market sharing (mutual benefit) would replace market competition (individual benefit).
59. As part of this statutory framework establishing “supply management”, the federal government made a commitment to distributing growth based on consideration of comparative advantage of production. This commitment is set out in *FPAA* s. 23(2). It could be argued that this is the only principle of growth distribution that does not inherently act in individual provincial interests.
60. Since that time agriculture and its associated value chain have changed significantly. Production, processing and marketing are no longer restricted by provincial borders due to factors such as business and operational consolidation, effective, cost efficient storage and transportation, and domestic trade rules. Markets are also changing as consumers look for greater variety based on production methods, ethnic and cultural preferences and requirements and advances in food technology. Alongside consolidation and diverse markets comes a public demand to meet production related standards such as animal welfare and environmental sustainability.

61. Trade agreements increase competition between domestic and import production at the processor, further processor and consumer levels.
62. These changes increase tensions between producers and national/internationally-based processors and further processors in a system originally established at a time when production and processing occurred within the same province. The changes also increase tensions among provinces that recognize economic value in provincial production providing a competitive environment for processing and further processing investment.
63. To add to the complexity, while the regulated system seeks to resolve how growth is distributed among provinces under the Operating Agreement today, processors and further processors have already been taking steps over the years to support their competitive positions. For BC processors, this includes increasing vertical integration and quota holdings alongside establishing operations outside of BC in both Western and Central Canada. It is extremely challenging to untangle processor and further processor benefits and costs within a specific province when considering enterprises that all have unique business models and some of which operate nationally.
64. In summary, provincial agreement to share national production is a prerequisite for an effective supply management system that delivers mutual benefits. The changing nature of agriculture and its value chain, along with individual provincial economic considerations make achieving these agreements more and more challenging.

OPERATING AGREEMENT PROCESS AND OUTCOME

65. The panel considered both the amendment process and the resulting outcomes in reaching its final decision. This approach accords with BCFIRB’s principles-based outcomes-oriented regulatory approach to decision making using the SAFETI principles.
66. As part of its considerations the panel observed the tensions at play between the supply management principles, the importance of addressing the immediate practical realities and looking at the long-term. The panel also observed there are key points of contention between the parties which involve both process (e.g. fair, inclusive, transparent) and outcomes (effective, strategic, accountable).

Process

67. A procedurally fair process is transparent and inclusive. It is designed based on the scope and impact of the questions under consideration. Good process is often a key to reaching effective, strategic and accountable outcomes.
68. Based on the submissions and the history, the panel concludes that tension around the proposed amendments arise in part because of interacting process issues and

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deficiencies. These process issues also make this panel’s job in reaching its decisions extremely challenging. The panel noted issues with both CFC and Chicken Board processes. It also noted issues with processor participation and unsupported information.

69. As can be seen in the Brief Chronology of Events (para 17-25) the path to the amendments under consideration took years and shifted focus several times. In the panel’s view it isn’t effective at this stage to pick apart the details of this process, but the panel would like to highlight a few points with the hope it will be informative should CFC (or other agencies or supervisory bodies) ever seek to coordinate a federal-provincial agreement amendment process:

- a) Appropriate involvement of all signatories. While the panel appreciates CFC’s intent to “streamline” the Operating Agreement amendment process by working only with the provincial chicken boards, this approach excluded half the signatories – who may (and do) as supervisory agencies often provide broader points of view and information. For example, the supervisory agencies represent the public interest, ensure government policy is being considered and provide perspectives and experience from other supply managed commodities. The process was not inclusive, and, as such, did not appropriately reflect the scope and impact of the questions under consideration.
- b) The consultation on key decision points was lacking. There were several key decision points in the amendment process where all signatories were not offered the opportunity to provide input although the decisions had significant impact on them. One example of which was the decision to address Chicken Farmers of Ontario’s request for increased base through the amendments to the Operating Agreement.⁴ Another example was the decision to remove the option for regions to request additional production based on demonstrated market demand.

70. This panel is of the view that BCFIRB’s supervisory process addresses any procedural deficiency by the Chicken Board in reaching its decision to request BCFIRB’s prior approval to sign the amended Operating Agreement process. The panel is also of the view the supervisory process sufficiently addresses, to the extent it can for BC purposes, CFC process deficiencies.

71. The PPPABC, as a major stakeholder in the outcome of this decision, reported ineffective consultation processes by the Chicken Board. However, it did not use this review opportunity to explain what an effective engagement process would have been from its perspective. Without this information it makes it difficult for the panel to

⁴ Although not requested, BCFIRB did provide an opinion in an April 11, 2013 letter to CFC prior to this decision. BCFIRB suggested addressing requests for increased base separately from amending the Operating Agreement to ensure growth was distributed using the principle of comparative advantage of production.

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assess the claim. Further, the panel also understands that the PPPABC did not participate in several engagement opportunities offered by the Chicken Board, including providing market needs data as part of the on-going allocation process.

72. Process deficiencies in this situation made it extremely challenging for this panel to be confident that what is currently proposed is a strategic, accountable outcome. In general, poor process creates significant risk of last minute hold-ups, or, in the worst case scenario, rejection of agreements altogether. While the panel notes there were deficiencies in the process from a SAFETI perspective, the panel accepts that it was complex and time consuming to reach the current point of potential agreement and there is little to gain at this point by repeating the exercise to address any deficiencies. The panel is satisfied this supervisory review process sufficiently addresses its core concerns regarding adequate consultation. Finally, the panel is satisfied there are sufficient gains in the end result despite the imperfect process given that the proposed amendments provide a formula for the distribution of growth that accords with s. 23(2) of the *FPAA* and supports Alberta’s re-entry to the Federal-Provincial Agreement.

Outcome

73. As set out in its process communications, the panel considered whether the proposed amendments were authorized by governing legislation, regulations and agreements and consistent with sound marketing policy.
74. The panel found the amendments were generally in compliance with governing legislation, regulations and agreements.
- a) The panel accepts that addition of the “differential growth formula” component (which relates to only a portion of growth) to the Operating Agreement generally fulfills the *FPAA* s. 23(2) requirement that the principle of comparative advantage of production be taken into consideration in the distribution of growth – as reflected by FPCC approval of allocations following the interim “agreement in principle”. The formula allows for the incorporation of specific provincial factors into the allocation process. This in turn provides the basis for distribution of growth reflecting regional conditions.
 - b) The panel did consider the PPPABC’s argument that the use of the “special vote” in s. 3.28 to add or subtract components of the “differential growth” formula conflicts with s. 9.03 of Federal Provincial Agreement which requires fundamental changes to the Operating Agreement parameters be approved by all signatories. While it is appropriate to use special vote provisions to enable responsiveness to changing situations, the panel questioned whether changing the formula components may reflect a fundamental change to the Operating

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Agreement. The panel requested CFC’s opinion on the matter and provided opportunity for the Chicken Board and PPPABC to respond. CFC and PPPABC provided contrary views.

- c) In summary, CFC reports that “...flexibility design features in the existing OA [Operating Agreement] – including existing special voting provisions - were understood by FPA [Federal-Provincial Agreement] signatories to not trigger the requirement of a formal OA amendment, and to be fully compatible with FPA section 9.03. In a similar manner, amendments to the OA, with approval of supervisory boards, commodity boards and CFC, do not require a formal FPA amendment, and this arrangement is compatible with the authority of Ministers as signatories to the FPA. “
- d) In contrast, PPPABC argues that “[t]he special vote provisions are not consistent with the FPA, which requires oversight and accountability of CFC decisions where amendments to the operating agreement – including fundamental changes to allocation methodology – are contemplated”. In its view, “...CFC proposes to dramatically change the operation of the special vote by extending it to a much broader category of decisions, including those made pursuant to s. 3.28.” Finally, “If s. 3.28 can be amended by special vote, this could result in changes to the methodology of quota allocations as set out in the proposed amendments to the Operating Agreement without the unanimous approval under s. 9.03 of the FPA, and cannot be amended by special vote.” PPPABC highlighted its concern that “[s]ignificant decisions which directly impact the processors operations would be possible with no input from them.”
- e) The panel was satisfied that the existing special vote provisions are a necessary tool to ensure responsiveness and such provisions do not automatically trigger the requirement of a formal Operating Agreement amendment and unanimous approval. That said, the panel recognizes that PPPABC has identified serious concerns that full regional considerations will not be taken into account if all affected stakeholders do not have adequate opportunity to consult on potentially significant decisions with downstream impacts, a matter the panel addresses under “Long-Term – Annual Review”. The panel accepts that the inclusion of a comparative advantage approach to allocation provides a tool to bring regional considerations to allocations. Further, the special vote requirements (agreement of all provincial chicken boards as reflected in CFC’s recently amended bylaws) coupled with the right of appeal to FPCC provide sufficient checks and balances to any attempt by CFC to change the weighting of the components of the “differential growth” formula unilaterally, without due regional consideration or without proper consultation.

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- f) The PPABC also alleges there is inconsistency between the Western Allocation Settlement Agreement and the proposed amendments to the Operating Agreement. However the PPPABC did not specify how the amendments are in conflict with the Western Allocation Settlement Agreement. Again it is challenging for the panel when it is provided with unsupported assertions but no explanation. It is the panel's understanding that the Western Allocation Settlement Agreement was based on the 2001 Operating Agreement. Given federal-provincial agreements are the “umbrella” under which regional agreements are made, the panel expects the Western Allocation Settlement Agreement will need to be either updated, modified replaced or cancelled as necessary should the amended Operating Agreement be ratified by all signatories.
75. Further to legislative requirements, the proposed amendments must be assessed in terms of whether they fulfill sound marketing policy (*NPMA* s. 9(2)(a)).
76. Sound marketing policy involves assessing short and long-term outcomes, including asking whether those outcomes are effective, strategic and accountable.
77. The panel agrees with the Chicken Board that it is sound marketing policy at this time for BC to remain a signatory to the Federal-Provincial Agreement. BC derives significant benefits from being part of the collaborative supply management system. To be clear, not approving some or all of the amendments to the Operating Agreement does not imply BC must exit the Federal-Provincial Agreement. There may be other effective, timely and strategic means to addressing signatory conflicts than exiting the system – which puts all provinces at risk.
78. Further, it is not clear at this time what the next steps would be if the amended Operating Agreement is not signed by the Chicken Board, BCFIRB or the other outstanding signatories.
79. As of the release of this decision there are several signatories outstanding. Without an amended Operating Agreement there is the potential risk that FPCC could start to refuse to approve national allocations as not being in-line with *FPAA* comparative advantage of production consideration requirement.
80. Putting that aside for now, the panel agrees it is sound marketing policy to establish a formula that considers the principle of the comparative advantage of production to distribute growth as required by the *FPAA*. BCFIRB had made arguments earlier in the amendment process that the Operating Agreement already had some tools in place (but not used) to meet this requirement. However FPCC made an assessment that an alternative approach was required based on its understanding of the *FPAA* intent and hence another solution had to be found.

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81. The Chicken Board submissions provide data on predicted production and growth levels going forward for BC, based on the “differential growth” formula and a discrete supply of growth going to Ontario. The projection is based on an annual national growth rate of 2%. The data shows there is no significant difference between future growth allocations under the new formula and discrete supply to Ontario and the pro-rata distribution of growth (ten year projection) under the current Operating Agreement. In other words, the Chicken Board’s numbers reflect that the proposed amendments support meeting the *FPAA* requirement and Alberta’s re-entry (brings agreement into line with legislation and strengthens the cooperative supply management system) with little impact to BC production.
82. While not directly related to the proposed amendments, recent implementation of the CFC specialty allocation forms an important part of the industry context as reflected in the Chicken Board submissions. BC benefits from the new specialty allocation as it allows BC to increase its mainstream production. Previously BC produced both specialty and mainstream chicken under one national allotment of production. This reduced the amount of production available to mainstream growers although it provided overall industry benefit in terms of capturing an unfilled market.
83. PPPABC expressed concern that the data provided by the Chicken Board is based on growth levels that cannot be sustained. However, PPPABC provides little data for comparison, including anticipated growth rates and impact on meeting its market demands over the next ten years. The panel notes that while recent allocations were high relative to the previous ten years (e.g. approximately 3%-5% versus around 0%-1%) that a 2% growth projection averaged over the next ten years is likely reasonable. For example, given the competitive position of chicken in terms of a lower priced protein in comparison to other animal sources.
84. The removal of the provision allowing for additional regional allocation based on market demand was a concern for the panel. CFC rationale for the removal was “it didn’t work”. This is an inadequate explanation – was it the concept or the structure for decision making that “did not work”? Differential regional allocation was one of the reasons why BC rejoined the 2001 Federal-Provincial Agreement. While the structure for decision-making may not have enabled use, the concept was in line with the intent of supply management, including offering equal opportunity for all regions to meet market growth. It is important to be able to separate policy objectives from the mechanisms. That was not done in this case.
85. There was extensive work, led by PPPABC and supported by the Chicken Board to propose that the original concept of additional regional allocation based on market demand be retained, but that it be accomplished through an alternative mechanism (Differential Regional Allocation) than set out in the current Operating Agreement. It is not productive to get into detailed finger pointing on who did (or did not do) what or when in terms of process. The main point at this time is the Differential Regional

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Allocation (DRA) proposal was not included in the proposed amendments. However, as pointed out earlier, the differential growth formula provides some basis for regional specificity in the distribution of growth.

86. Of primary concern to PPPABC, in relation to DRA, is reported supply imbalance between West and Central Canada (with a focus on further processing). The panel is faced with the difficulty of hearing substantive assertions with little to no supporting data to draw on. While the panel appreciates it may be easier for the Chicken Board to provide general production data and related impact of the proposed amendments versus processors and further processors providing confidential business information, there are avenues through which substantive information could have been provided to the panel. To be clear, it isn't a matter of the panel 'believing' or not believing', the panel requires information, not assertions, on which to base a decision.
87. PPPABC proposes a partial alternative solution to its reported and potentially increasing supply shortage in B.C. It puts forward that the CFC Market Development Policy coefficient be increased from 1.25kg to 1.5kg. Under the Market Development Policy extra chicken can be grown beyond the national allocation. A portion of the additional production (white meat) is kept in the country and processors export the extra dark meat. PPPABC reports this may address the ability of producers to supply more white meat for further processing in BC. The national Market Development Policy is not part of the Operating Agreement and can be addressed outside of the signatory process. BCFIRB continues to support the Market Development Policy and its importance to BC.
88. In its submission PPPABC also references “[t]here are a number of other solutions available, but to develop them the BCCMB [Chicken Board] must constructively engage the processors.” In addition to constructive engagement provincially, the panel also notes that it would be strategic to engage all western industry participants (western chicken boards, processors and further processors) in seeking effective approaches to western supply and processing. The panel is aware the Chicken Board has made some efforts in this direction, and recognizes that it can be challenging to engage on a regional basis.
89. It should be made clear that “constructive engagement” takes efforts by all parties. Constructive engagement means there is good process to reach outcomes that matter (sound marketing policy in the public interest). It does not mean that parties can drop in and out at will and that all suggestions are adopted ‘as is’.
90. The Chicken Board reports BC received a beneficial result on the further processing component of the “differential growth formula” once it was updated at the CFC table on December 2, 2015 by special vote (Addendum to Operating Agreement – Further Processing Component as per s. 3.22b). However the PPPABC submission disagrees with this position. PPPABC reports that the Chicken Board support of the further

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processing calculation adjustment would result in serious negative consequences for further processing in BC given lack of consultation. The panel observes the Addendum includes a CFC agreement that a long-term solution to further processing component will be sought. The panel expects the Chicken Board to continue to work with PPPABC to support this process, based on meaningful and relevant data. BCFIRB expects if this issue is important to processors they will participate, including providing necessary data in an appropriate manner. One concern is that the study is scheduled to be completed in 2019 (3 years from now).

91. As in the current Operating Agreement, the proposed amendments contain special vote provisions. The panel expects, despite the demands of a dynamic negotiating process, that the Chicken Board will engage stakeholders as appropriate prior to votes at the CFC table so as to bring sound information to the table for decision making in support of sound marketing policy.
92. In relation to the discrete supply of growth being granted to Ontario, the panel agrees it is important for the chicken supply management system to be responsive to signatory issues. However, reliance on population as a dominant and determining factor is challengeable given that “self-sufficiency” is not a criteria in the Federal-Provincial Agreement. Whatever the response to signatories, it must be strategic, effective and accountable. BCFIRB, as a signatory expects that future responses to signatory issues will be dealt with by taking into account all interests, and be focused on benefits to the industry as a whole as opposed to ad hoc arrangements to appease one signatory at the expense of others. Effective and appropriate national responses should also not automatically be subordinate to regional interests or sectors. Increased production in a province must come by way of growing the market and distribution in accordance with federal legislation, and/or moving existing/future production (benefits) from another province(s). In any scenario, provinces, producers, and processors may see variable benefits and/or losses.
93. Only PPPABC made an attempt to address the potential implications of the Trans Pacific Partnership and future trade agreements on allocations. However it did not adequately explain how Tariff Rate Quota (TRQ) is distributed and used and the resulting impact on processor competitiveness. The panel understands that distribution of TRQ falls under authority of Global Affairs Canada, not the national supply management agencies. Once TRQ is distributed it can be bought and sold around the country – this occurs outside of the control of the supply management system. However, where TRQ is distributed can impact market needs and processor competitive position. PPPABC noted trade agreements will increase further supply imbalance between Central and Western Canada. In the long-term it will be important to appropriately monitor, report on and work with the outcomes generated by interaction between the distribution of production under the Operating Agreement, imports and impacts on the value chain.

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94. The panel understands that Alberta committed to rejoining the Federal-Provincial Agreement if the amended Operating Agreement is signed by all current signatories. This would be a positive step to a sustainable supply-managed system for chicken and would in turn support sound marketing policy in relation to BC. BCFIRB continues to take the position that re-entry requires approval from all Federal-Provincial Agreement signatories (including provincial Ministers) and looks forward to participating in the re-entry process if it is initiated.
95. Despite the shortcomings raised by the PPPABC in this review process and identified above, the panel is satisfied that moving forward with the proposed amendments to the Operating Agreement for the short-term is strategic and fulfills sound marketing policy. BC benefits from being part of a cooperative system, and as noted earlier, although the outcomes may not be ideal, on balance it is a step forward in ensuring federal legislative requirements are met and supports Alberta’s re-entry to the Federal-Provincial Agreement.
96. Looking forward, it is in the best interest of the province for the Chicken Board and the PPPABC to engage constructively with each other (and other stakeholders, including the BC Chicken Growers Association and their western counterparts) to pursue solutions to supporting a strong Western chicken industry.

LONG-TERM -- ANNUAL REVIEW

97. There are many suppositions on how the proposed amendments to the Operating Agreement will work out. The reality is that the supply management system is operating in a very different environment today and that markets and the industry continue to evolve. For example, in its submissions responding to PPPABC regarding supply concerns as growth returns to “normal” the CFC states:

Neither PPPABC nor CFC can predict future market conditions with certainty.

And

It is also speculative to assume that the Operating Agreement will yield the same distribution of growth throughout the ten-year period. Changing demographics, economic circumstances and industry performance can and will influence the outcome of the methodology of the Operating Agreement

98. In order to fulfill legislated responsibilities in an accountable manner, regulators in the supply management system must be responsive to change.
99. The panel cannot predict with certainty the full effects on the industry, and in relation, sound marketing policy, of the proposed amendments to the Operating Agreement over the next ten years. Hence on-going monitoring and evaluation is required.

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- a) The panel directs the Chicken Board to monitor and publically report on the outcomes of the amended Operating Agreement as part of its annual reporting cycle. This requires that processors and further processors work in cooperation with the Chicken Board on relevant performance measures and to provide data.
- 100. Section 10.01 of the amended Operating Agreement states that it will be reviewed annually by CFC. As a signatory to the agreement BCFIRB expects CFC will establish performance measures, in consultation with signatories and stakeholders (including processors and further processors) to be publically reported on an annual basis.
- 101. In relation the panel observes that effective national performance measures and ongoing monitoring may help support CFC requests to FPCC for national allocation approvals.
- 102. Finally, the panel appreciates the amended Operating Agreement is a high level agreement and it is important not to embark on changes on a whim or on the basis of the loudest voice in the room. Appropriate annual reviews based on sound information will support signatories in determining when it is strategic to make adjustments, inform what those adjustments should be, support a timely process and potentially reduce conflict and risk of appeals to FPCC or legal challenges in other jurisdictions.

DECISION

- 103. BCFIRB gives its prior approval for the Chicken Board to sign the amended Operating Agreement in its current form no earlier than July 15, 2016.
- 104. BCFIRB will sign the amended Operating Agreement in its current form no earlier than July 15, 2016.
- 105. The Chicken Board and PPPABC are to constructively engage with each other and their western counterparts to evaluate options for changes to the Market Development Policy and other options identified in the PPPABC final submission.
- 106. The Chicken Board is to monitor and publically report on the outcomes of the amended Operating Agreement as part of its annual reporting cycle. Processors and further processors and other stakeholders are expected to engage with the Chicken Board as appropriate in developing performance measures and providing data.
- 107. As a signatory, BCFIRB expects expect the annual CFC review under s. 10.01 of the amended Operating Agreement will be based on performance measures developed in cooperation with stakeholders and publically reported (including to all signatories).

CLOSING OBSERVATIONS

108. Questions of total production and distribution of growth must also be considered alongside the other two pillars of supply management -- producer pricing and imports (e.g. trade agreements, tariffs, import quotas and other items).

109. As first reflected in BCFIRB’s April 11, 2013 letter to CFC and FPCC:

- a) While pricing is one influence on the national allocation, there are other distorting influences that are not appropriately considered in the national allocation process. These influences – such as tariff rate quota, plant supply quota and spent fowl imports – have a significant repercussion on the volume and timing of regional processor production requests in the bottom-up allocation system. While some of these are outside of direct CFC control, there may be more effective and accountable ways to take them into consideration in the allocation setting process.
- b) Currently, it is estimated that 20 to 25 percent of chicken consumed in Canada is imported, and that share is growing. We are likely foregoing important domestic market share and market growth opportunities due to current allocation and pricing strategies.
- c) It is well recognized that there will be a progressive trend towards liberalization of trade, over time, in Canada. Industry must take the lead in making operational and policy decisions to prepare itself in the best way possible to meet these production and cost price challenges. The status quo will not suffice as Canada cannot out produce or under price the United States, or other international producers in chicken in the near term.
- d) Restricted production, along with import controls, benefits producers and processors through guaranteed price and stable production. Consumers receive a safe, continuous supply of product. Retention of these benefits must be earned through cooperation and coordination along with good governance and sound nationally oriented decision making. Retention of these benefits is not a right or an entitlement.
- e) Continued infighting presents the public with the image of an entitled sector operating inefficiently, without transparency or accountability. Federal and provincial governments may question support of such a system unless the system can clearly demonstrate public benefit delivered in an accountable and transparent manner.

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OUTSTANDING APPEAL

110. While it appears to us that this supervisory decision has addressed the core issues on the PPPABC appeal, the parties to the appeal are to advise BCFIRB in writing within 15 days if they believe there are any outstanding issues that may still warrant consideration by way of appeal. If so, this matter will be remitted to the appeal panel for its consideration as appropriate.

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

Dated at Victoria, British Columbia, this 30th day of June 2016.



John Les
Chair



Daphne Stancil
Member



Chris Wendell
Member