

**IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND TWO APPEALS FROM A DECISION CONCERNING CHICKEN PRICING**

BETWEEN

PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA
BC CHICKEN GROWERS' ASSOCIATION

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

BC CHICKEN GROWERS' ASSOCIATION
PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA
BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Al Sakalauskas, Vice Chair and
Presiding Member
Peter Donkers, Chair
Daphne Stancil, Member

For the Appellant/Intervener
Primary Poultry Processors Association

Morgan Camley, Robin Dean,
Roark Lewis, Counsel

For the Appellant/Intervener
BC Chicken Growers Association

Paul D. McLean, Counsel

For the Respondent
BC Chicken Marketing Board

Claire Hunter, Rebecca Robb,
Counsel

For the Intervener
British Columbia Broiler Hatching Egg Commission

Robert Hrabinsky, Counsel

Date of Hearing

October 1-5, November 1, 2, 2018
and by written submission

Place of Hearing

Vancouver, BC

INTRODUCTION

1. This decision relates to two separate appeals from a decision of the British Columbia Chicken Marketing Board (Chicken Board) dated July 6, 2018 implementing an interim pricing formula for periods A-151 – 156 (July 2018 to May 2019) for live chicken (Pricing Decision) filed by the Primary Poultry Processors Association of BC (Processors) and the BC Chicken Growers Association (Chicken Growers):

BC Posted Price = Ontario price + 75% of the difference in feed costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average) + \$0.0365 (catching).

The Ontario price will be the posted price at the weight category (2.45 kgs to 2.65 kgs).

The price is inclusive of catching at 3.65 cents per kilogram. Any increase or decrease to the price of catching will be reflected in the BC live price going forward.

2. The Processors also sought a “partial stay” of the interim pricing formula pending the outcome of the appeal “to the extent necessary to allow the Processors to pay the difference in chicken prices between the 2018 pricing formula and the 2017 pricing formula (excluding the \$0.012 modular loading levy) into trust pending the BCFIRB’s final decision on this appeal”. On July 10, 2018, the Chicken Growers applied for and were granted intervener status and they participated in the stay application.
3. On July 13, 2018, the then presiding member dismissed the stay application on the basis that the Processors had not demonstrated irreparable harm, concluding there were effective mechanisms within the regulatory system to allow the Processors to recover any overpayment in the event the panel determined that the Pricing Decision was flawed. He also concluded that the balance of convenience favoured maintaining the Pricing Decision until the appeal could be heard and decided.
4. On July 16, 2018, the Chicken Growers filed their appeal of the Pricing Decision and the Processors were granted intervener status.
5. The British Columbia Broiler Hatching Egg Commission (Commission) was granted intervener status in both appeals.
6. These appeals were heard October 1-5, 2018 and November 1-2, 2018. Closing submissions were received in writing with the last submission received December 20, 2018.
7. In brief, the Processors argue that the Pricing Decision is inconsistent with sound marketing policy in that it implements an unsustainable and uncompetitive pricing model that strikes the wrong balance between processor competitiveness and fair returns to growers. The Chicken Board increased the live price differential to benefit growers at the

detriment of processors, without due regard for their ability to competitively sell BC chicken in the Canadian market.

8. The Processors also allege that the Pricing Decision resulted from a “sham” consultation process where the Chicken Board placed undue reliance on its experts resulting in an improper and narrow analysis that favoured grower interests. The Processors also point to errors in implementation compounding the unpredictability of the pricing formula.
9. As a result, the Processors seek an order setting aside the interim pricing formula, returning to a fixed differential of approximately 6 cents for a period of 3 years (inclusive of catching) to allow the BC processors to re-establish a long term competitive position across the country and particularly in central Canada. As increases to the current Ontario live price are anticipated, the Processors argue that a bridging formula may be necessary to allow the impact of the annual efficiency adjustments to be shared more equitably between BC processors and growers which could be implemented through mediation or arbitration.
10. The Processors, as interveners in the Chicken Growers appeal, oppose increasing the feed/chick differential to 100% and say that such an increase would further compromise processor competitiveness and is not based in the reality of the Canadian chicken industry.
11. The Chicken Growers generally agree with the Pricing Decision except the Chicken Board’s decision to reduce the feed differential from 100% (as proposed in June 2018) to 75% after Ontario increased its live price. They say this decision was fundamentally flawed as any increase in the Ontario live price would be borne by all processors, both inside and outside BC. If the Ontario live price increased, all provinces reflect that change and BC processors would not be adversely impacted. Conversely, having recognized that a 100% differential was a fair return to growers, the arbitrary reduction to 75% merely lowered the return to growers and provided further profit to processors.
12. As Intervenors in the Processors’ appeal, the Chicken Growers say the Processors’ claims of loss of competitiveness are not valid; there is no verifiable evidence of hardship. The Processors could have adduced objective evidence in confidence but chose not to do so. With respect to the Processors allegation that this has been a sham process by an institutionally biased board, the Chicken Growers say there is no evidence of institutional bias and the Chicken Board has undertaken an exhaustive live price formula review.
13. In response, the Chicken Board says it is important to remember that its Pricing Decision is interim in nature and only applies to periods A-151 – 156 (July 2018 to May 2019) and the work to develop a longer term pricing solution has already begun. On these appeals, the Chicken Growers and Processors challenge the outcome of the pricing formula; the Chicken Growers complain that the formula results in a price that is too low and the Processors say it is too high. The Processors also allege that the process the Chicken Board followed to collect information used to establish the pricing formula was procedurally unfair. The Chicken Board argues that its process for establishing the pricing formula at

issue was consistent with principles of procedural fairness and SAFETI¹ and that the decision represents sound marketing policy and as such these appeals should be dismissed.

BACKGROUND

14. In order to place this appeal in context, it is necessary to briefly review the lengthy history within the chicken industry of pricing appeals and supervisory processes before BCFIRB. A November 17, 1997 British Columbia Marketing Board pricing report stated as follows (para. 39):

The exercise of this pricing authority has been a source of significant controversy. There is an historic and natural tension between the price that growers want to be paid for their birds, and the price that processors want to pay for them. As we noted in our decision on *89 Chicken Ranch* “the persons charged with the responsibility [of making these decisions] must arrive at a price sufficiently high to maintain the BC chicken growing industry and sufficiently low to maintain the BC processing industry.

15. By 2000, pricing was moved outside the Chicken Board to be set through a mandatory period-by-period process where the Pricing and Production Advisory Committee (PPAC) comprised of three chicken growers, three chicken processors, one broiler hatching egg producer and an independent chair which met prior to the commencement of each 8 week quota period to discuss price and production levels. If PPAC reached consensus on price, it informed the Chicken Board of its decision and the Chicken Board issued an order. If there was no consensus, an independent arbitrator set the price after a final offer selection process.
16. Although the PPAC process brought a period of stability to chicken pricing, by late 2008 the situation had deteriorated and arbitrations were occurring regularly. Sometimes growers won, sometimes processors won, but the procedure was not working to avoid disputes because either the growers or the processors or both invariably invoked the arbitration process. The Chicken Board decided to suspend the PPAC arbitration process and retained economist and certified management consultant Don Ference to provide options for pricing formulas.
17. In 2009, the Chicken Board ordered a new pricing formula, which was appealed and ultimately resulted in BCFIRB conducting a supervisory review. After a ten day hearing, BCFIRB issued its supervisory decision on the Chicken Board’s Pricing Related Recommendations (2010 Supervisory Decision) directing a new pricing model using a weighted average of Ontario and prairie production plus a fixed differential (\$0.0435).
18. This model was modified in September 2010 when BC processors agreed to a \$0.0480 differential until period A-112, increasing to \$0.0485 beginning A-113. The pricing model

¹The “SAFETI” principles have been developed by BCFIRB in consultation with the commodity boards to support a principles based approach to decision-making by commodity boards to carry out their regulatory responsibilities. SAFETI stands for “Strategic”, “Accountable”, “Fair”, “Effective”, “Transparent”, and “Inclusive”.

with the modified differential brought a period of stability and remained in place until A-140 (October 2016) when the differential was raised to \$0.0571.

19. In 2015, the Chicken Farmers of Ontario changed their formula for setting the live price of Ontario chicken, resulting in a price decrease to Ontario chicken farmers. Prairie provinces also began increasing their historic differentials over the Ontario price. Given the BC pricing model used a weighted average of prairie and Ontario live price, the BC live price moved considerably higher than Ontario (between 8 - 9.5 cents).
20. By 2016, the Chicken Board was hearing that growers needed some recognition of the differences in feed and chick costs between Ontario and BC and that processors felt the changes in the differentials in prairie provinces were skewing the differential between B.C. and Ontario. In light of these concerns, the Chicken Board again retained Mr. Ference to develop another pricing formula.
21. In June 2016, the Chicken Board began its review of the pricing formula and consulted with industry stakeholders. This process took more than a year. The Chicken Board retained agricultural economist Robert Burden to develop a Cost of Production (COP) model and Mr. Ference prepared a report. After engaging with the stakeholders, the Chicken Board issued its pricing decision of May 29, 2017 establishing a new pricing model for chicken:

Ontario Posted Price based on the historical weight category of 1.84 to 1.95 kg (as agreed by the PPAC on March 4, 2015)

Plus 50% of the difference in feed costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average)

Plus 50% of the difference in chick costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average)

Plus 3.5 cents for catching costs. Changes to the cost of catching will be reflected in the pricing formula and must be submitted to the Board for approval prior to the beginning of a pricing period.

The pricing formula will be evaluated by the Board on an annual basis. This new formula will be used beginning in period A-144. Shipments for this period begin on June 11, 2017.

22. The Processors appealed the May 2017 pricing decision arguing it was inconsistent with sound marketing policy as it incorporated a feed differential that was not transparent, and would result in irreparable harm to the processing and further processing industries in BC. The parties participated in a mediation on September 8, 2017, which resulted in a new pricing formula agreement following which the Processors withdrew their appeal.
23. Subsequently (May 16, 2018), the Processors filed an appeal in relation to the Chicken Board's implementation of the mediated pricing formula agreement. This appeal was summarily dismissed with written reasons dated August 24, 2018, as the panel found the

appeal was out of time and finding there were no special circumstances to warrant extending the time limit for filing an appeal.

24. As was agreed in the mediation (September 8, 2017), the Chicken Board began a review of the mediated pricing formula in April 2018 and requested submissions from the Processors, the Chicken Growers and the Commission. In May 2018, there was a further opportunity for submissions and in-person meetings were held. The Chicken Board retained Mr. Ference to review the submissions of the Chicken Growers and Processors, the impact of the new pricing formula in the A-144 period and to update his 2017 report.

25. On June 11, 2018, the Chicken Board circulated a preliminary pricing formula:

- Ontario weight category of 2.45 to 2.65 kilograms exclusive of the \$0.012 per kilogram CFO modular loading cost recovery.
- Plus a fixed differential of \$0.1024 per kilogram which represents 100% of the average for periods A-145 to A-150 in the difference in feed and chick cost per kilogram between BC and Ontario.
- Plus \$0.0365 per kilogram which is the current price of catching. Increases or decreases in the price of catching must be approved by the BCCMB in advance. If approved, these increases or decreases will be reflected in the live price. (emphasis added)

26. After another round of consultation where stakeholders had an opportunity to comment on the preliminary pricing decision, on June 27, 2018, the Chicken Board issued its 12 page Pricing Decision which set the following pricing formula:

That the Board set the price for the next 6 periods (A-151 to A-156 inclusive) based on the following formula:

Ontario posted price at the weight category of 2.45 to 2.65 kg. The price will NOT include the Ontario 1.2 cent modular loading cost recovery.

PLUS

75% of the difference in feed and chick costs per kilogram of live chicken between BC and Ontario (based on a 6 period rolling average).

PLUS

3.65 cents catching costs. Any increase or decrease in catching costs will be reflected in the formula, after approval by the Board.

PLUS

Guardrails: The differentials between Ontario and BC live prices will be set at a maximum of \$0.1249 and a minimum of \$0.0970. The guardrails are to be a “ceiling” and/or “floor”. The guardrails will be adjusted to reflect any changes in catching costs.

The interim formula will be reviewed upon the completion/implementation of the Ontario COPF2 and/or the completion of the BC initiatives respecting Pricing Linkage and update to costs for BC chicken production which may occur prior to the completion of quota period A-156.(emphasis added)]

27. It is this interim pricing formula that is the subject of these appeals.

ISSUE

28. Did the Chicken Board err in its June 27, 2018 decision to implement a new pricing formula for the live pricing of mainstream broiler chicken effective for periods A-151 to A-156?

FINDINGS OF KEY FACTS

The Parties

29. The Chicken Board is a regulatory board established under the *Natural Products Marketing (BC) Act (NPMA)*. The panel disagrees with the Processor appellants' characterization of the Chicken Board as a "producer board". It is comprised of an appointed chair, two appointed members and two elected producer members. The chair at the time of the appeal had an extensive background in poultry processing and had worked for many years as a consultant in the agri-food industry. The other appointed members had backgrounds in dairy processing. The elected producer members, in addition to having broiler operations, worked for poultry processors in various capacities. The executive director has approximately 28 years' experience working in management for poultry processors.
30. The Chicken Growers are a producer association made up of all registered chicken growers in BC.
31. The Processors are represented in this appeal by an association (the Primary Poultry Processors Association of BC) made up of the major processors in the BC chicken industry today. Members include the Hallmark group of processing companies, which has primary processing plants in BC, and Saskatchewan; the Sunrise corporate group which has primary processing plants in BC, Alberta and Manitoba, and further processing plants in BC and Ontario; the Sofina Foods corporate group which has primary processing plants for chicken branded as product of Lilydale Foods in BC, Alberta, Saskatchewan and Ontario, and further processing plants in Ontario. The further processor, J.D. Sweid has facilities in Langley and Waterloo, Ontario and is affiliated with the Hallmark group. The three major primary processors have corporate farms which hold approximately 20% of the broiler quota in B.C. They also have economic ties with hatcheries.

The Experts

32. The Chicken Board relied on two expert witnesses, Mr. Burden and Mr. Ference, who the Chicken Board engaged to assist with the analysis of the pricing formula from a broad industry perspective and in the industry's best interests. Mr. Burden provides ongoing economic advice to both the Chicken Board and the Commission regarding costs of chicken and chick production. Mr. Ference has provided advice to the Chicken Board over many years with respect to the live price of chicken. The Chicken Board has never asked Mr. Burden or Mr. Ference to advocate for the interests of growers or processors in

providing their advice to the Chicken Board. They appeared as witnesses to explain the advice they had given the Chicken Board in the development of the pricing formula.

33. The Chicken Growers' expert witness, agricultural economist Kevin Grier, testified about his research on grower profitability. In his view, assessing processor competitiveness requires an analysis of whether processors are maintaining or gaining market share and whether or not they are profitable. In his monthly report on chicken where he provides a measure of chicken processor margins, "month after month I report that the chicken processors are ... extraordinarily profitable and have gone through a period of exceptional margins over the last few years, five years probably".
34. The Processors called expert witness David Egan, financial analyst and accountant with PricewaterhouseCoopers (PWC) to provide an accounting review of data supplied by the Processors. Ultimately the panel placed little weight on Mr. Egan's report. This is not a reflection of Mr. Egan's qualifications or expertise, but rather reflects the restricted scope of his engagement by the Processors and the lack of independent verification of data in the analysis.
35. The Processors also called economist, Dr. Richard Barichello. While we found Dr. Barichello's evidence helpful, we note that Dr. Barichello's scope of engagement was also limited and he was not provided access to data specific to the Processors which would likely have shown relevant information regarding competitiveness. Given these factors and his reliance on the Egan report, we placed limited weight on Dr. Barichello's conclusions. Specifically, we reject the notion that quota values should be considered in assessing grower returns.

Key Facts

36. BC is a high-cost province in which to grow chicken due in large part to the high feed and chick costs in comparison to other provinces. Historically, Ontario sets the live price of chicken and the other provinces, to a greater or lesser degree, price off the Ontario price. BC has historically started with the Ontario price and adjusted it upward using various factors, which has always included some estimate of the difference in BC and Ontario cost for feed and chicks to attempt to reflect the actual costs incurred by BC growers.
37. It was common ground on this appeal that the live price formula must be consistent, predictable and transparent and that it is in the interest of all stakeholders that the BC formula be based on the Ontario live price with recognition of some of BC's specific costs. Feed and chick costs make up the largest component in any pricing model.
38. In 2015, Chicken Farmers of Ontario moved to a modernized cost of production (COP) model to update grower costs taking into account technical advances in the industry, production efficiencies and changes in the costs of important inputs in order to provide more accurate, objective evidence of grower costs overall. Unfortunately, the Chicken Board is not privy to all of the elements in or calculations of the new Ontario COP model

which complicates the issue of determining the appropriate differential between the BC and Ontario live price.

39. BC has a COP model developed and used by Serecon to establish the linkage between hatching eggs and broiler producers. However, this model is not considered a “true” COP and it is not relied on for live pricing. It is however, a source of objective, transparent grower data which shows increasing costs to growers and slowly diminishing returns.
40. The Processors do not dispute that they are profitable but say that they have a higher cost structure within BC which contributes to them becoming less competitive when comparing their businesses with those of central Canada. In short, it is becoming more difficult for them to compete nationally.

DECISION

41. These appeals relate to an interim Pricing Decision which came into effect July 2018 and which the Chicken Board planned to replace by a new pricing formula in May 2019. According to the Chicken Board, work on the new formula is underway. Mindful of this context, the panel understands the need for this decision.
42. We note that although the panel has considered all of the evidence, the testimony of the expert witnesses and the closing submissions, we do not intend to refer to all of it in this decision. Nor do we intend to review the considerable number of cases referred to by the parties as we do not see these appeals turning on a pure application of law. Rather, the appeals turn on very practical matters – the process the Chicken Board followed in making its decision in setting price and the actual approach to and factors the Chicken Board used to set price. We have based our decision on our interpretation of the data and facts before us.
43. Part I of this decision addresses the Growers’ appeal. Part II addresses the Processors’ appeal, first addressing process concerns and then addressing the more difficult question of whether the interim pricing formula is inconsistent with sound marketing policy in that it strikes the wrong balance between processor competitiveness and fair returns to growers.

Part I – Chicken Growers’ Appeal

44. We have set out our findings first followed by our supporting reasons.

Finding The Chicken Board’s decision to adjust the preliminary pricing decision from a 100% feed and chick differential to 75% is consistent with sound marketing policy.

45. The Pricing Decision concluded as follows (at page 5):

The processors and growers agreed that pricing needed to be based on the Ontario live price and some recognition of BC specific costs, and that chick and feed costs make up a largest components in any pricing model.

The advantages of the pricing formula are that it is fact based; the formula is based on feed and chick cost differences as stated in the BC COP and Ontario COP - both COP's are based on regular surveys of feed mills in each province.

The Board's preliminary decision recognized 100% of the feed and chick differential. Prior to the Board's final decision, Ontario increased its live price which increased returns to BC growers. Consequently, the Board reduced the percentage to 75% to assist processors with the issue of being competitive.

46. The Chicken Growers take issue with the Chicken Board's justification that Ontario increased its live price, as sufficient reason to move off the initial proposal of a 100 % differential to 75%. The Chicken Growers' argue that this decision is fundamentally flawed as any increase in the Ontario live price is borne by all processors, inside and outside BC. If the Ontario live price increased by 5 cents, all provinces would address and reflect that change. As BC processors are not adversely impacted by the increase, they argue the reduction from 100% to 75% was unnecessary and arbitrary. Having recognized in June 2018 that a 100% differential was a fair return to growers, reducing the feed and chick differential to 75% lowered the return to growers and provided further profit to BC processors.
47. The Chicken Board in response says that the Chicken Growers seek an adjustment of the feed/chick differential to 100% without any quantitative analysis supporting the adjustment. This position results in BC's higher cost of chicken production due to feed and chick costs not being shared between growers and processors as currently contemplated but instead puts this cost solely on processors.
48. The Chicken Board's witnesses explained the reasons behind the changes to the formula, one being that Ontario had just finished going through a discovery process on the COP for part of their hatching egg business/market which resulted in a substantial increase to chick price. The feed differential also increased, resulting in a 5.5 cent increase in the Ontario price. The Chicken Board says it would not be fair to use a fixed differential as this would put the full burden of the Ontario increases on BC processors.
49. The Chicken Board's evidence is that it tried to improve circumstances for growers without placing the full burden of the Ontario changes on processors and went back to Mr. Ference seeking options to potentially mitigate Ontario's annual adjustments to its COP. This work resulted in a proposal for a 78% differential. After deliberations, the Chicken Board determined that an appropriate solution was a 75% differential with guardrails setting a ceiling and a floor to limit the potential live price increase in each period. The Chicken Board concluded that because the growers would receive an increase in price because Ontario's live price increased, a reduction from a 100% differential to 75% would assist the

processors who would be required to buy chicken based on the increase in the Ontario live price.

50. The Chicken Growers' argument that if the Ontario price increases and this increase is directly incorporated into the BC price, this increase alone should not alter the competitiveness of BC processors compared to Ontario (because the BC processors are in no different position than their Ontario counterparts due to the increase), is a logical one. Despite this logic, in our view, the Chicken Board's rationale for moving from the 100% differential to 75% is reasonable and consistent with sound marketing policy.
51. We accept the Chicken Board's explanation that it moved off the 100% differential as a way of balancing grower and processor interests. The Chicken Board has weighed the advantages and disadvantages of policy alternatives and selected the policy approach that, on balance, it feels best achieves the objectives of regulated marketing given the realities of the chicken industry in the short term. It reflects a significant underpinning to pricing that the growers and processors share in increasing and decreasing costs, provided that the industry can be sustained with this approach. We dispense with the Chicken Growers' appeal on this basis. Having addressed the Growers' appeal, we turn now to consider the Processors' appeal.

Part II – Processors' Appeal Process Issues

52. The Processors allege that the Pricing Decision resulted from a "sham" consultation process where the Chicken Board placed undue reliance on its experts which resulted in an improper and narrow analysis favouring grower interests.

Finding The Chicken Board followed a procedurally fair process based on regulatory requirements, which is appropriate to the interim nature of the decision it was making for a pricing formula for periods of A-151 through A-156.

53. The Processors level harsh criticisms against the Chicken Board's process, saying it was a "sham" process designed to increase grower returns. They say their submissions were largely ignored or unreasonably dismissed by the Chicken Board and Mr. Ference and while the consultation process may look good on paper, there was little substance to the engagement and the Processors felt that the Chicken Board had not heard their concerns. They suggest this could be because they lacked direct access to the full Chicken Board during the decision-making process. They also claim the process was not fair, transparent, or inclusive. By ignoring the inconvenient facts raised by the Processors, the Chicken Board demonstrated a plan to forge ahead with its pre-determined goal of increasing grower returns.
54. The Processors also argue that the Chicken Board failed to disclose key documents – the May and June 2018 reports written by Mr. Ference and the 2016/2017 Income/Expense Analysis provided by Art Friesen in or around November 2017. The Processors say they had no knowledge of Mr. Ference's critiques of their submissions until this appeal.

Mr. Shier testified that it felt “like we were submitting, submitting, submitting and then we were putting it to Mr. Ference to assess” without any direct dialogue with Mr. Ference.

55. The Processors say the Income/Expense Analysis was highly relevant and would have helped all parties engage in the fact-finding process, without divulging any competitively sensitive information. The failure to disclose these key documents to the Processors was a breach of the SAFETI² principles, in particular the need to be fair and transparent and a breach of the Chicken Board’s duty of fairness at common law, as it prevented the Processors from being able to fully present their case and breached their legitimate expectations which had developed based on the process followed in 2016-2017.
56. The Chicken Board’s response is that the setting of a pricing formula for the chicken industry is on the legislative end of the spectrum of decision-making by marketing boards, to which attaches a lower requirement of procedural fairness at common law. Despite this lower standard, the Chicken Board says it invited the participation of industry stakeholders in its pricing formula reviews given the importance of the decision to the industry. The 2016-2017 review was more extensive than the 2018 review as it was an attempt to find a long term solution for live price in BC and was the first review since BCFIRB’s 2010 Supervisory Review Decision and the change to the Ontario COP formula (2015). With the 2018 review, the Chicken Board followed the more limited process agreed to by the parties in the September 2017 mediation and that agreement is what ought to inform the legitimate expectations of the stakeholders.
57. The Chicken Board invited submissions and evidence from the Chicken Growers and Processors, a summary of which can be found at page 2-3 of the Pricing Decision. Each party had multiple opportunities to engage with the Chicken Board. Even in this somewhat shortened round of consultation and review, the Chicken Board engaged with PPAC prior to its decision as required by the Scheme³.
58. Mr. Ference’s role was limited in comparison to his involvement in the 2016-2017 review. He provided both positive and negative comments on the submissions and commented on the impact of the 2017 pricing formula. Further, the Chicken Board sought Mr. Friesen’s evidence to provide a further view on grower returns. The Chicken Board says it is within its discretion to consult with independent consultants on the issues arising in relation to the live price formula and nothing unfair arises from such consultation. It is clear from the Pricing Decision that the Chicken Board did not simply adopt the advice or information provided by the consultants, but considered it in the context of all of the information available.
59. In light of the above, we conclude that the Chicken Board followed a procedurally fair process in coming to its interim pricing decision. The Chicken Board may very well be correct that establishing a pricing formula is more in the nature of a legislative decision and

² Strategic Accountable Fair Effective Transparent Inclusive

³ British Columbia Chicken Marketing Scheme, 1961. BC Reg 88/61, section 3.2.

as such, the procedural fairness requirements are attenuated. But despite that characterization, we conclude that based on the actual steps taken by the Chicken Board, it followed the requirements of its Scheme to refer the matter to its PPAC and to take into account the responses from the committee members. In fact, it went further in inviting and ensuring that both the growers and processors made relevant and practical input by releasing a preliminary pricing formula to focus the responses from each group. Although we understand the Processors' frustration with the process and their need to have a fair price set to remain competitive, we do not agree that the Chicken Board's process was a sham. In our view, the evidence demonstrates that the Chicken Board followed the direction set by regulation, sought meaningful input from its stakeholders and took that input into account, along with the advice of its consultants, before arriving at its decision.

Merits of the Appeal

Comments on Remedy

60. We turn now to consider the substance of the Processors' appeal that the Pricing Decision is inconsistent with sound marketing policy as it implements an unsustainable and uncompetitive pricing model that strikes the wrong balance between processor competitiveness and fair returns to growers. By way of remedy, the Processors ask this panel to do two things. First, they want the panel to establish a long term chicken pricing formula for BC based upon the Ontario live price (2.15 - 2.45 kgs weight category net of levy) plus a fixed differential of 6.5 cents for a period of 3 years, inclusive of catching. Second, in recognition of anticipated changes forthcoming in Ontario, it proposes an interim bridging formula be established through a formal mediation or arbitration session amongst the affected parties.
61. We will deal with the proposed remedy for a bridging formula first.

Finding The development of the June 27, 2018 pricing formula was based on a procedurally sound process and should remain in place until such time as the Chicken Board establishes a new pricing formula.

62. The Processors seek a bridge to a more permanent pricing solution. Above this panel has found that although the Processors sought more in the way of consultation, the process conducted prior to setting the June 27, 2018 pricing formula was adequate and procedurally fair. We also have found and reported above that the June 27, 2018 pricing formula as established using a 75% differential is based on a sharing of the costs in the differential between processors and growers, and as such represents sound marketing policy.
63. For these reasons, the panel dismisses the Processors' request for a further interim pricing formula established through alternative dispute resolution such as mediation, in favour of extending the June 27, 2018 pricing formula to establish pricing for period A-160, to allow the Chicken Board to continue its work on a long term formula. The long term pricing formula must be in place for period A-161.

64. The panel now turns to the more permanent solution that the processors seek of a three year formula (Ontario live price (2.15 - 2.45 kgs weight category net of levy) plus a fixed differential of 6.5 cents for a period of 3 years, inclusive of catching).

Finding **While the panel supports, in principle, a chicken pricing formula based on the Ontario price and a fixed differential, there is insufficient evidence before the panel on this appeal to establish such a formula.**

65. In order for the panel to endorse the Processors' proposal, BCFIRB would be required to step into the shoes of the Chicken Board. The Chicken Board has not concluded its work to establish a new pricing formula and such there is no basis, in the circumstances of this appeal, upon which we would substitute our view for that of an as yet undetermined Chicken Board decision.
66. The Chicken Board is currently undertaking a cost of production study with the assistance of consultant Mr. Burden. The Chicken Board is also expecting that Ontario will have completed a review of its COP by the end of 2018 and will soon thereafter release a new pricing formula. The review of the BC linkage now underway (scheduled every three years) will soon be complete. All of these initiatives will provide useful fact-based data regarding trends in the growers' costs, and will serve the Chicken Board well as it works towards developing a new pricing formula. It would not be appropriate to allow this appeal to usurp the Chicken Board's role in coming to a decision on a multi-year formula. Further factual analysis based on relevant data is required in order to do so. This is not the role of a panel on appeal when that information is not before it.
67. Despite this determination, the panel is prepared to make some observations regarding the submissions of the Processors regarding a long term solution, which the panel includes in the following discussion of grower returns and processor competitiveness.

Finding **The Chicken Board's finding that BC grower returns were sufficiently low so as to require an adjustment in the Pricing Decision was based on verifiable data and as such, was reasonable.**

Grower Returns

68. The Chicken Board's Pricing Decision concluded as follows (at page 5-6):

As a feed deficient province, BC must import virtually all of its grain from other areas of North America resulting in high freight costs which must be borne by BC chicken growers and processors. In the view of the Board, there are unique costs to producing chicken in BC which must be considered. As has been stated many times, "there is a cost to being a chicken grower in BC." This applies equally to BC processors. The formula recognizes the need for BC chicken processors to be competitive with chicken processors in other parts of Canada and in particular Ontario as the largest chicken producing province; it recognizes the higher feed and chick costs of growers in BC; and encourages growers and processors to work together to minimize feed and chick cost differentials.

The model is transparent and predictable, as it is based on Ontario and BC feed and chick costs which are readily available to both growers and processors. The model uses a six period rolling average to smooth out market shifts for feed and chick costs. The model uses a one period lag for BC chick pricing as the chicken price must be set before the chick price can be determined for the period. (BCCMB/BCBHEC pricing linkage).

Some of the operational advantages to Ontario processors versus BC processors are simply out of the control of the BCCMB or the BC chicken industry. An example of this would be the BC processor's lack of access to TRQ as compared to their counterparts in Central Canada.

The new pricing formula is a major shift from the previous BCFIRB mandated formula in that it does not use as a component the live prices in Alberta, Saskatchewan or Manitoba. The BCCMB agreed with the processors that the departure of the West from historic price differentials to Ontario were causing unintended consequences. The BCFIRB formula was not designed to account for structural changes to the pricing regimes in the Prairie Provinces that did not always come with full transparency or rationale for those changes.

The Board continued to struggle with the concept of "fair return to growers" and "keep processors competitive" as both concepts are somewhat subjective. The new documents provided by the parties did not provide clear definitions and the data was, in some cases incomplete. The Board noted that in the mediated agreement notes of September 8, 2017 one of the caveats added by the growers and endorsed by the processors was "a commitment was made by all parties to establish what constitutes a fair return to growers and processor competitiveness". The Board cannot see any agreement, nor any new work done by the parties on this issue. Consequently, the Board focused again on what the two sides could agree to and what was "fact based, and transparent, with information readily available."

Verifiable data from independent sources identified grower costs and returns. Grower margins in BC are some of the lowest in the country.[emphasis added]

69. The Processors argue that the Chicken Board justifies implementing a higher live price on the basis that BC growers have lower returns than growers in other provinces and this rationale is unreasonable and inappropriate in a supply-managed sector. They argue that the relative return of growers in other provinces is totally irrelevant as BC growers do not compete extra-provincially; growers in BC have fair absolute returns which have steadily increased in the last four years. The Processors argue that the Chicken Board has failed to consider the benefits that BC growers enjoy from increased volume and some operational production costs that are lower than in Ontario. Further, the fact that quota values remain high is an indicator that BC growers obtain fair returns when all factors are considered.
70. We agree with the Chicken Board that prior to implementing its June 27, 2018 Pricing Decision, it sought and considered verifiable data from independent sources that indicated grower returns in BC were some of the lowest in the country. This independent data came from agricultural economist Mr. Burden who explained the process followed in 2015 and 2016 to assess growers' comparative costs as part of his work on the COP linkage. He

surveyed 44 broiler operations stratified across the province's three production regions, collecting financial and operating information. Although Mr. Burden did not participate in the 2018 process, he is in the process of updating his data for the Chicken Board to reflect the Ontario model. Mr. Burden reviewed the historical data with respect to feed and chick costs in BC and based on his work says that in BC, feed is 12-18% and chick cost is 5-11% higher than Ontario. He collects feed and chick cost data every 8 weeks as it forms part of the Chicken Board's COP analysis.

71. Mr. Burden's analysis was, in large part, confirmed by the Chicken Growers' agricultural economist Mr. Grier, who used data from feed companies and Statistics Canada to come up with his own benchmark calculations for gross margins. His analysis confirmed a clear (but varying) differential in feed costs between BC and the rest of Canada. He also found BC's chick cost marginally higher than Ontario. He concluded that, considering all the costs and revenues and trying his best to make "an apples to apples comparison", BC has the lowest gross margins in Canada.
72. The Chicken Board also relied on the work of Mr. Ference to provide a third party opinion on the submissions received, assess the impact of 2017 pricing formula and provide updates to his 2017 report. Mr. Ference disagreed that he did not take into account grower operational cost advantages as alleged by the Processors. His evidence is that the BC COP is based on a lower stocking density than the Ontario COP, which in turn results in BC having higher overhead costs per kg. Further, his COP analysis in his February 2017 report confirmed that it costs significantly less to produce chickens in Ontario than BC due primarily to differences in feed and chick costs as total capital operating costs (other than those for feed and chicks) were similar. Similarly, Mr. Ference was of the view that any alleged benefits that flow from volume increases are taken into account as volume is directly related to overhead costs.
73. In addition to relying on Mr. Ference, the Chicken Board took the extra step of seeking verification of grower margins by having accountant Mr. Friesen "test" the numbers. His analysis supported Mr. Ference's conclusions that an adjustment in the feed/chick differential was required.
74. The Processors argued that the fact that quota values continue to increase should be considered a "helpful", though not determinative, barometer of grower financial health. Dr. Barichello testified that four factors affect the value of quota: (1) grower returns, (2) the prospect of those returns growing over time, (3) interest rates, and (4) risks to quota value through trade agreement renegotiation. Given that risk and interest do not explain increasing quota values (increasing risk related to trade negotiations would lower quota values and interest being relatively constant would be a neutral factor), he concludes that the factors explaining increased quota values must relate to grower returns or the prospect of returns growing. As noted in paragraph 35 above, the panel gave less weight to this evidence.

75. Mr. Burden, Mr. Grier and Mr. Ference all disagreed with this conclusion. Mr. Burden did not believe there was a relationship between quota value and grower returns because that assumes that there is a “rational” purchaser; a rational producer would not pay \$125 a bird for quota based on cost of production. He suggested for another commodity that the steadily increasing values for quota reflect future expectations about producing a commodity. This comment aligns with the second point Dr. Barachello made about quota values, that they include an element reflecting future income. Mr. Grier preferred to look at model COP and revenues as a starting point as quota values are based on supply and demand and what someone is willing to pay at any given point in time. In his view, quota values are far down the list of measures of grower returns. Mr. Ference was of the view that there were too many other factors influencing quota values to use them as a basis for assessing grower returns.

76. Perhaps the most compelling statement on the use of quota values as a barometer of grower returns came from Mr. Ference who stated:

And why use such a indirect methods when you have a much better data? Why not use actual grower margins, live price minus feed and chick costs. We have that data, why try to use something as indirect as quotas and try to speculate that there is some relationship between the two?

77. As a result of the foregoing, the panel concludes that the Chicken Board has established, through the testimony of its expert witnesses and the data analysed, that the Ontario annual adjustments to its COP have resulted in a downward pressure on grower live price. The downward trend in grower price in turn, creates a negative environment for growers. The negative environment not only led to but required consideration in the pricing formula review, as it has now been four years since Ontario changed its COP calculation in 2015 and further changes are anticipated. Of course, grower returns are only part of the equation. We turn now to consider the issue of processor competitiveness.

Processor Competitiveness

Finding The panel does not accept that the Processors demonstrated, through verifiable data from independent sources, declining competitiveness.

78. The Pricing Decision concluded as follows (at page 6-7):

Evaluating processor competitiveness is more subjective. The main issues concerning a competitiveness gap raised in the processors submission and supported in their November 2016 report by Price Waterhouse Cooper (PWC) included:

- Labour costs differing from Ontario
- TRQ volume
- Scale and efficiency factors

The Board accepts that these factors have negative impacts on processor competitiveness but also recognize factors that have positive effects on competition including:

- Catching costs
- Premiums (incentives) payments to growers
- Transportation costs

The labour cost information presented in the PWC document was for three BC processing plants out of the seven in the PPPABC. This data should include all plants (as some are not unionized) and the final number should be weighted by volume of production with each plant. This is the standard rigour used in weighted average costs in a COP.

The Board can accept the argument that with only six percent of Canada's TRQ compared to 88% in Ontario and Quebec that BC processors are at a price disadvantage, as are those in other provinces with even less TRQ. The processors have not confirmed whether 100% of their TRQ is used in BC.

Understandably the scale of Ontario plants versus BC suggests greater operating efficiency. The size and consolidation of processing plants is a decision for processors not the Board.

In BC, growers pay for catching and that cost is added to the live price, thereby increasing the price differential between BC and Ontario. In Ontario, processors pay for catching and it is not in the live price. This currently gives the BC Processors a \$0.0365 per kilogram positive contribution over Ontario processors.

The "loyalty" premium or incentive paid voluntarily by processors to growers are reported to be higher in Ontario compared to BC, again giving the comparative advantage to BC Processors. During price discussions in 2017 BC Processors voluntarily increased this premium from \$0.02 per kilogram to \$0.03 per kilogram.

Transportation costs from the farm to the processing plant are lower in BC than in Ontario due to the shorter transportation distances. This is not reflected in the price, but is a positive contribution to BC Processors competitiveness.

In summary, there are several factors that contribute either negatively or positively to processor competitiveness. How to incorporate such factors into a pricing formula could be an important subject area for discussion between all parties.

As processors have not provided processor margin information specific to BC, the Board must assume that BC processors' margins are no different from those reported by CPEPC for Canada. Those margins have been considerable higher in recent years than they were historically. Although BC live prices are higher than those in Ontario, so too are the retail prices of chicken.[emphasis added]

79. In this appeal, the Processors raised many of the same arguments and argued that the Chicken Board failed to properly consider the deteriorating competitive position of BC processors as opposed to their profitability. They point to such factors as the market for chicken being both national and regional and advances in packaging and transportation which allow fresh chicken to travel further. Frozen primary and further processed products can be sourced from a single supplier at a national price. The five large national retailers seek long term fixed price contracts where BC processors must compete against processors

from lower cost provinces. BC processors cannot simply focus on the local market as the reality is that most of the BC processors' business is both regional and national and central Canadian processors have a dominant share of the business with national retailers. The Processors point to the disproportionate holdings of TRQ and fowl that allows central Canadian processors to sell beyond domestic allocations and dominate the national market.

80. The Processors argue that they cannot merely pass on live price increases to customers as they compete on regional and national priced contracts. High retail prices in BC do not mean that BC processors are receiving higher prices than other markets when intervening factors such as higher land, logistics and labour costs are factored in. Further, the Processors say the focus on high wholesale prices is misguided given the ephemeral nature of wholesale pricing. In 2017, wholesale prices were abnormally high due to a crackdown on illegal imports of fowl and prices remained high until supply caught up and exceeded demand. The Processors argued that Chicken Farmers of Canada data suggests wholesale prices are now declining and ask whether that means the live price will come down?
81. The Processors challenged Mr. Ference's conclusion that BC chicken processors pay about the same price for live chicken as Ontario processors. They say this conclusion fails to recognize factors which increase their costs such as scale, labour, TRQ and fowl and uses unverified transport and premium costs. According to their calculation, BC processors pay between 3.10 - 5.85 cents per kg more than Ontario even before considering scale, labour, TRQ and fowl. They say once those factors are added in, further increases to live price are unwarranted.
82. The Processors dispute the Chicken Board's reliance on the Canadian Poultry and Egg Processors Council (CPEPC) gross margin reports and say they do not provide indications of competitiveness but rather provide a measure of gross profitability nationally as opposed to the ability of processors to competitively sell chicken in different provinces. This data is not representative of BC processor margins as BC processors do not report their data as they have very little product that falls within the commodity category.
83. The Processors and their expert, Dr. Barichello, relied on a survey of frozen boxed chicken in BC, Alberta and Ontario which shows that 85% of SKUs of frozen boxed chicken products in BC come from Ontario as an indication of the competition that BC processors face from out-of-province processors. They say this competition is significant and should not be dismissed. Mr. Grier's estimate was that the market for retail boxed chicken was about 25-30% of the market for chicken in Canada.
84. The Processors also criticize the Chicken Board's reliance on the fact that BC processors pay premiums as justification for imposing higher live prices saying that this ignores the reality that growers can leverage their control of the chicken supply in BC and as such, BC processors must pay premiums to secure a supply of chicken to meet long term contracts.
85. Despite having the benefit of a full hearing and argument, we find that we are in much the same position as the Chicken Board. The Processors do not appear to dispute that they are

profitable but rather they say that they are seeing a deterioration of their ability to compete regionally and nationally and it is this deterioration in competitiveness that warrants an adjustment to the pricing formula. The Processors have pointed to many factors which they say make them less competitive which include

- the fact that the market for chicken is both national and regional,
- primary and further processed products can be sourced from a single supplier at a national price,
- the national nature of long term fixed price retail contracts,
- the dominance of central Canadian processors and their access to TRQ, and
- higher land, logistics and labour costs.

86. They argue that all of these factors mean that BC processors cannot pass on live price increases to customers as they compete on regional and national priced contracts.
87. While we found many of the Processors' arguments compelling and we do not dispute that there are significant challenges to being a processor in BC, the panel finds there is a distinct lack of meaningful and verifiable data regarding how processor competitiveness has changed over time in order to allow the panel to evaluate these assertions.
88. The Processors argue that commercially sensitive information from BC processors is meaningless and has no value without having comparable data from Ontario processors which will not happen, as Ontario processors are private companies.
89. However we note that there was also incomplete data provided on labour costs. There was no evidence on how BC processors use TRQ especially given that one of the Processors receives TRQ in Ontario. Further, it is unclear how the lower Canadian dollar impacts TRQ.
90. We acknowledge the Processors did submit the retail box chicken survey, but this survey only reports the number of different SKUs on retailer shelves but does not comment on volume. Further, and as the Chicken Board pointed out, retail box chicken is a small proportion of the total chicken sold in BC with the majority of chicken sold in the fresh category. The survey provides no information about where retail box chicken sold in BC grocery stores was produced or primary processed as the SKU on retail box chicken only shows the location of further processing but not the source of the chicken.
91. Data on the relative percentages of primary processing versus further processing, and to what degree the BC processors are carrying out further processing elsewhere in the prairie provinces or in Ontario would have been helpful, as would information on wholesale prices and their relationship with retail prices. Perhaps Ontario processor data is not available but that does not explain why regional data on processor competitiveness is not accessible given BC processors' participation in those markets.
92. The reality is that the volume of chicken produced in Canada is controlled. The national allocation process is intended to match production and demand to avoid the over and

underproduction cycles that took place prior to development of the national system for supply management. BC processors have access to BC production. This is an important element to the success of the processing sector in the province. Since the panel was unable to draw any firm conclusions from the evidence that the Processors provided, we are unable to make any findings regarding the competitive position of BC processors generally.

93. We reject the Processors' argument that the Chicken Board focused on grower issues alone. As we found above, the Chicken Board is comprised of appointed and elected members with significant backgrounds in processing. They have experienced staff and have retained experts to assist them in their decision-making. It is clear from the evidence heard in this appeal that the Chicken Board understands the chicken industry and did not prefer the interests of growers over processors. It requested more information from the Processors in respect of their competitiveness and, in the absence of receiving fact-based and transparent data, the Chicken Board relied on the available data which included wholesale, retail and gross margin data, EMI market research data all of which indicated that BC processors were doing well.
94. While we accept the Processors' arguments that there may be limits to the usefulness of such data, in the absence of the Processors providing more meaningful comparative data, the Chicken Board must rely on information that is readily available. Further, if the Processors want better data, it is open to them to provide gross margin data to CPEPC or contribute data to the weekly EMI Canadian wholesale price data set, or develop another mechanism to disclose this data.
95. All the experts we heard from agreed that their analysis was limited by the failure of the Processors to disclose full financial information. The need for transparency was highlighted by Mr. Burden:

A. ... So I do think there -- there needs to be some consideration for the good of the industry in B.C. on a long term basis, what's going on in other provinces, but again as I said earlier, it's totally dependent on everybody disclosing in a -- in a transparent manner how exactly they are -- what their costs are and what their revenues are.

And I -- and I struggle, I do to be honest, I do struggle a little bit with the arguments I was hearing yesterday about confidentiality because somehow or other the hatcheries in Ontario have solved that problem. And so I don't know how they did it, I don't profess to be an expert in this, but it is a source of frustration for everybody around this table.

96. Mr. Burden also testified about how aggregating data and disclosing ranges in the data could be used as measures to protect confidentiality and how other jurisdictions have resolved these types of confidentiality concerns. The Processors' own witness Mr. Egan gave evidence that PWC had used measures to protect client information from disclosure and could aggregate the data something routinely done in his industry. While the panel recognizes what appear to be genuine concerns from the Processors that they are "falling

behind” or the “competitiveness gap is widening”, we are unable to establish a means to measure the alleged decline and are unable to make a finding in this regard.

97. In our view, all stakeholders in the chicken industry must cooperate if there is ever going to be a stable pricing formula. The system will not work if the live price is skewed too much in favour of either growers or processors. The notion of a reasonable return to growers and maintaining processor competitiveness must be supported by transparent and verifiable data to ensure that an appropriate balance is struck. At the very least, if a party wants to challenge the underpinnings of the pricing formula and demonstrate it is skewed in favour of one side at the expense of the other, such a challenge needs an evidentiary foundation. It is not enough to criticize the formula and seek relief without demonstrating a basis for that relief as the Processors have done here.
98. Often the biggest challenges to establishing a formula are external (e.g., what Ontario is doing, changing consumer demands, trade agreements, disease management). In-fighting creates additional risk for the entire BC industry making it less able to compete. It is the obligation of growers and processors to assist the Chicken Board with developing and maintaining relevant information.
99. Decisions are made daily by regulators that require the use of sensitive data, yet somehow that information is collected and protected. This is nothing new. On this point, we would observe that, in the absence of cooperation to establish appropriate mechanisms to ensure adequate information is disclosed to support a satisfactory pricing formula, the Chicken Board has the authority in section 4.01 (f) of the Scheme:

to require full information relating to the production, transportation, packing, storing and marketing of the regulated product from all persons engaged therein; and to require periodic returns to be made by such persons; and to inspect the books and premises of such persons.
100. To date, the Chicken Board has been reluctant to use this power, preferring to encourage the growers and processors to bring relevant data into the consultation process for price setting. However, in the absence of cooperation, it may be in the best interests of all concerned for the Chicken Board to use the authority provided by the Scheme to compel the parties as necessary, to disclose in a confidential manner the information the Chicken Board requires.
101. Finally, the panel cannot leave this discussion without commenting on loyalty premiums. We heard much about these premiums during the hearing and what we should take from the fact these premiums are paid. The history of payment of loyalty premiums by processors to growers is well understood by the panel. Processors adopted the practice of payment of a loyalty premium to growers after the Chicken Board’s elimination of assurance of supply for processors, shortly after the release of the 2010 supervisory decision. The purpose of the payment is to encourage growers to continue supplying chicken to one particular processor and remain loyal to that processor. Processors report that the certainty of supply

enables them to better manage their business. The actual amount of the premium is not incorporated into the live price and the amount each processor pays to each grower is not transparent. Based on the evidence of both the Chicken Board, as acknowledged by the Processors, the premium had been set at 2 cents per kg and has recently risen to 3 cents. It is not clear if the smaller processors not represented in the appeal have also increased the premium. The panel accepts that including the value of these premium payments in the pricing formula could not only prove to complicate the formula, especially because Ontario does not include premium payments in its pricing formula, but it could distort the formula for some growers who do not receive the reported premium. Despite these complications it is important that the payment of premiums be documented and disclosed. The Chicken Board may consider reporting premium payments as a note to its pricing orders.

Alleged Errors

Finding The panel does not accept the Processors submission that the Chicken Board erred in establishing the pricing formula.

102. The Processors argued that the Chicken Board made three errors in their pricing formula related to the weight category used, guardrails and a disproportionate feed/chick differential.
103. The Processors say the Chicken Board used the wrong Ontario weight category (2.45 to 2.65 kg) as the data shows that close to the majority of production in BC fell within the Ontario weight category of 2.15-2.45kg. There are different economics for different sized birds, such as different costs for feed and chick and different feed conversation rates. The Processors suggest that the Chicken Board massaged the formula to maintain a 2 cent per kg benefit for growers rather than develop a transparent and fact-based formula that compares similar sized birds in the respective provinces.
104. The Processors also say that the Chicken Board incorrectly calculated the guardrails by first overstating the guardrails by 0.91 cents per kg as a result of applying the increase in the feed and chick differential to the catching cost component of the guardrail and then understating the guardrails (increasing them by 25% rather than 50%). While these errors essentially cancel each other out, the Processors argue that this illustrates the Chicken Board's poor implementation of its complex formula.
105. The Processors also argue that the Chicken Board used a disproportionate feed and chick differential as the differential varies across weight categories with the result that the actual differential paid by BC processors is closer to 82% (as opposed to 75%) according to their calculations.
106. The Processors say these mistakes are not trivial and have added many cents to the price differential, costing the BC processors millions of dollars. The Processors argue that the Chicken Board either does not understand the implications of its decisions or mistakes, or simply does not care as long as the end result increases grower returns.

107. For its part, the Chicken Board denies that the foregoing were errors. With respect to the weight category, it relies on its SAFETI analysis in its decision which states;

The PPPABC has long recommended the use of a weight category that more accurately reflects BC's position. The new formula takes this into account. The shift in weight class has no net effect on the BC Pricing Formula at this time as the Ontario minimum farm-gate live price currently is the same for both weight classes (1.84 to 1.95 kg and 2.45 to 2.65 kg). Again this is a matter for discussion at PPAC, and it is the expectation of the Board that the PPAC will be requested to examine this issue and bring forward a recommendation to the Board once the Ontario COPF2; BCCMB/BCBHEC Pricing Linkage; and updated costs for BC chicken production is complete.

108. With respect to the guardrails, it points out that there was no suggestion made in the hearing that the live price had approached either the ceiling or floor guardrail since implementation of the 2018 interim live price formula.
109. With respect to the disproportionate feed and chick ratio, the Chicken Board points to Mr. Ference's testimony on this argument. His evidence was that the Processors' calculations were in error as they left out the crucial step of calculating the proportion of Ontario chicken produced in each of Ontario's weight categories resulting in the percentage moving upwards. Significantly, this Ontario weight category data is not available.
110. The panel is satisfied that there is a rational basis for the selection of the weight category of chicken used by Chicken Board in its June 27, 2018 price and accordingly finds that the Chicken Board did not err in making this selection. With respect to any error regarding the establishment of the guardrails, the panel shares the same view as the Chicken Board that the price to date has not approached either "rail", suggesting that if there were errors in establishing the "rails" they are of little or no consequence. On this basis, the panel finds that their establishment does not amount to an error. With regard to the selection of the feed and chick differential, the Chicken Board has provided the factual basis that its consultant Mr. Ference relied on in making his recommendation to the Chicken Board which the Chicken Board accepted. Further Mr. Ference pointed out an error in the Processors' submission supporting a lowering of this component. For these reasons, the panel accepts the Chicken Board's calculation of this differential and finds that the Chicken Board did not err in establishing this component of the pricing formula.

Finding The interim pricing formula for periods of A-151 through A-156 is consistent with sound marketing policy.

111. As we have rejected the Processors' arguments that the Chicken Board strikes the wrong balance between processor competitiveness and fair returns to growers and that the Chicken Board erred in its choice of weight category, calculation of guardrails or its feed/chick differential, we conclude that the Pricing Decision implements an appropriate interim pricing model.

Concluding Observations

112. As noted earlier there has been a long history of pricing disputes within the chicken industry. There are essentially three ways prices can be established – through negotiation amongst the parties (a method apparently relied on by some of the prairie provinces), through the application of an agreed-to formula based on contemporary data, and by a third party establishing the formula and /or the price.
113. The panel favours the second approach because it meets the test for transparency. The formula can be made public eliminating secrecy behind the setting of the live price. When based on relevant and current data, the adoption of a formulaic approach enables the Chicken Board to be accountable, fair, and effective. The Chicken Board has adopted a formulaic approach for periods A-151 to A-156, but the Processors reject the formula on the basis of too many errors and too much fluctuation which results in uncertainty. Processors want certainty and consistency where possible in order to make long term contracts with wholesalers and retailers. They supported the formula directed by the 2010 supervisory review and have proposed a similar one in their appeal.
114. Ultimately, the decision as to a multi-year formula will be the Chicken Board's to make once it has collected the necessary information, undertaken appropriate analysis and consulted with the parties. It is incumbent on the Chicken Board, with the assistance of growers and processors, to use a data-based approach to establish the elements of any long term pricing formula.
115. One of the important purposes of a multi-year formula is to provide processors certainty of cost as a basis for negotiating longer term sales contracts. There is always, however, the need for a "safety valve" on such an approach so that if one of the key costs, such as for feed, either spikes or dips beyond a certain norm, either the growers or processors can seek relief through an adjustment based on exceptional circumstances and request that the Chicken Board re-evaluate the formula. The panel is confident that the authority found in the *NPMA* and Scheme as well as the General Orders of the Chicken Board provide this safety valve.
116. If the current process established by the Scheme (as set out in section 3.2) and supported by the Chicken Board does not meet the needs of the processors or growers, then it is incumbent on them to cooperate with the Chicken Board to establish a new process that will meet their needs while at the same time allowing the Chicken Board to meet the requirements for the PPAC set out in the Scheme. Simply criticizing a process is not enough, there is too much at stake. Each party shares in the obligation to establish a process that will work.

117. Appeals can be useful, and are the right of an aggrieved party. They can, however, result in damage to existing relationships which cannot be fixed or remedied by an order from BCFIRB. When parties have concerns about human and information resources relied on by a commodity board or for that matter have concerns with the board itself, which lead to questions about trust, waiting to air those concerns in a hearing is not particularly effective. While it is the obligation of the commodity board to ensure it is effective in undertaking its duties, it cannot make adjustments to address the concerns of its constituents, unless it is made aware of and understands those concerns in a timely manner. Open and ongoing communication is essential.

ORDER

118. The appeals are dismissed. The Chicken Board is directed to issue its decision regarding a long term pricing formula not later than period A-161.

119. There is no order as to costs.

Dated at Victoria, British Columbia this 16th day of May, 2019

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Al Sakalauskas, Vice Chair and
Presiding Member



Peter Donkers, Chair



Daphne Stancil, Member