

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL REGARDING ON FARM FOOD SAFETY ASSURANCE
PROGRAM (OFFSAP) PENALTIES

BETWEEN

VANMAR POULTRY LTD.

APPELLANT

AND:

BC CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board

Suzanne K. Wiltshire,
Presiding Member
Dave Merz, Member
Garth Green, Member

For the Appellant

Lucas Siemens

For the Respondent

John J. L. Hunter, QC,
Counsel
Bill Vanderspek, General
Manager
Christine Rickson, Staff

Date of Hearing

April 3, 2009

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The appellant, Vanmar Poultry Ltd., appeals an October 2, 2008 decision of the British Columbia Chicken Marketing Board concerning the application in later periods of previously assessed production quota reductions (penalties) for non compliance with On Farm Food Safety Assurance Program (OFFSAP) requirements.
2. Originally, the OFFSAP penalties were to be applied in periods A83, A84 and A85. The penalty for period A83 (February 3 to March 29, 2008) was applied but the penalties for periods A84 (March 30 to May 24, 2008) and A85 (May 25 to July 19, 2008) were not applied due to administrative error of Chicken Board staff.
3. In its October 2, 2008 decision, the Chicken Board acknowledged the administrative error that had resulted in its failure to apply the OFFSAP penalties in periods A84 and A85 and advised that the penalties would be applied in periods A89 (January 4 to February 28, 2009) and A90 (March 1 to April 25, 2009).
4. In a December 10, 2008 decision respecting the respondent's application for summary dismissal of the appeal, the British Columbia Farm Industry Review Board (BCFIRB) determined the appeal could proceed but that the only issue arising out of the October 2, 2008 decision was that set out below.

ISSUE

5. Whether or not the Chicken Board had the authority under the Scheme and the General Orders to apply the previously established penalties in periods A89 and A90 and if so, whether the Chicken Board erred in doing so?

BACKGROUND

OFFSAP Non-Compliance and OFFSAP Penalty Assessment

6. The OFFSAP program came into force on December 31, 2003 and is set out in Part 33 of the General Orders of the Chicken Board. Under Part 33, growers are required to achieve and maintain OFFSAP compliance. Part 33 provides for a series of stepped notices of non-compliance and the imposition of production penalties for failure to comply.
7. Vanmar was audited for compliance with OFFSAP in August 2006. The audit noted 15 corrective actions required for compliance with OFFSAP.
8. In its first non-compliance notice to Vanmar dated March 5, 2007, the Chicken Board noted that 14 of the required corrective actions remained outstanding and that failure to comply by March 19, 2007 would result in further action by the board. Vanmar failed to comply and on March 19, 2007 the Chicken Board issued the

second notice of non-compliance. Pursuant to section 33.4(b) of the General Orders, the Chicken Board notified Vanmar that its A83 production allotment would be reduced by 250 kg. On April 11, 2007 the Chicken Board issued its third notice of non-compliance, noting that 6 corrective actions remained outstanding. The Chicken Board assessed a 10% decrease in the allotment for period A84 and advised that if OFFSAP compliance was not achieved by May 11, 2007, there would be a further 10% reduction in period A85.

9. Vanmar continued to be non-compliant and Chicken Board staff recommended that the further 10% reduction be applied. Van Mar appeared before the Chicken Board on May 25, 2007 and requested that the penalties for A83 and A84 be waived. The Chicken Board determined that Vanmar remained non-compliant under the OFFSAP program, re-affirmed the prior penalties assessed for periods A83 and A84 and imposed a further reduction of 10% for period A85. In its May 28, 2007 letter the Chicken Board advised Vanmar of its decision and confirmed the penalties assessed as follows:
 - a. Period A83 – 250 kg.
 - b. Period A84 – 10% of allotment.
 - c. Period A85 – 10% of allotment.
10. Vanmar attended to the outstanding compliance matters after the May 28, 2007 letter and achieved OFFSAP certification in June 2007.
11. On July 25, 2007, Vanmar met again with the Chicken Board to seek waiver of the accrued OFFSAP penalties because it had achieved compliance. The Chicken Board determined to re-affirm its previous decisions and so advised Vanmar in its July 31, 2007 letter.
12. Vanmar did not appeal any of the Chicken Board's determinations in 2007 respecting its non-compliance with OFFSAP or the OFFSAP penalties assessed.

Overmarketing Levy and Penalty Assessment for Failure to Pay

13. As a separate matter, Vanmar had incurred additional penalties (the overmarketing levy penalties) that were not related to OFFSAP but were related to the appellant's failure to pay an overmarketing levy invoiced in August 2007. Additional 10% reductions in allocation were assessed for periods A83, A84, A85 and A87 with respect to the non-payment of this overmarketing levy.

OFFSAP Penalty Application and Administrative Error

14. The initial 250 kg penalty assessed with respect to OFFSAP non-compliance was applied in period A83.

15. The overmarketing levy penalties were confused by Chicken Board office staff with the OFFSAP penalties to be applied in periods A84 and A85 against the same account. The confusion resulted in the OFFSAP penalties assessed to A84 and A85 not being applied in those periods.
16. Vanmar paid the overmarketing levy on June 26, 2008 and the accounting department indicated in an internal accounting department memo that Vanmar is “now in Good Standing with the Board as of June 26, 2008.”
17. Vanmar then sought reversal of the overmarketing levy penalties. In a separate letter of October 2, 2008, the Chicken Board agreed to reverse the overmarketing levy penalties assessed for periods A83, A84, A85 and A87. In that letter the Chicken Board recorded that “Vanmar is currently in good standing with the Board and was prior to the deadline of July 15, 2008. I am able to confirm that Vanmar did receive a share of the 2007 BCCMB surplus.”
18. At the same time, the Chicken Board realized the confusion in its office regarding the application of the period A84 and A85 overmarketing levy penalties and the OFFSAP penalties. On the same day, October 2, 2008, the Chicken Board sent the decision letter that is now appealed to Vanmar acknowledging the confusion, apologizing for it and advising that the OFFSAP penalties for A84 and A85 remained outstanding and the two 8,725 kg. (10%) penalties would be applied to Vanmar’s A89 and A90 allotments respectively.
19. Vanmar appealed the October 2, 2008 decision to apply the OFFSAP penalties, originally designated for periods A84 and A85, in periods A89 and A90.

STATUTORY FRAMEWORK

20. The applicable scheme is the *British Columbia Chicken Marketing Scheme, 1961*, B.C. Reg. 188/61 (Scheme) established pursuant to the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c.330 (Act). The purpose and intent of the Scheme is set out in section 2.01:

The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the powers of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

21. The Chicken Board has broad general powers under the Scheme. These powers can be found in section 4.01 of the Scheme:

4.01 Subject to section 4.02(2), the board shall have power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and

marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore or hereinafter enumerated, and without limiting the generality therefore shall have the following powers:

22. Following this general statement of broad authority, sections 4.01(a) to 4.01(p) list specific powers of the Chicken Board. Section 4.01 (c.1) in particular states:

4.01(c.1) to establish, issue, permit transfer, revoke or reduce quotas to any person as the board in its discretion may determine from time to time, whether or not the same are in use, and to establish the terms and conditions of issue, revocation, reduction and transfer of quotas, but such terms and conditions shall not confer any property interest in quotas, and such quotas shall remain at all times within the exclusive control of the board;

23. Part 33 of the General Orders addresses OFFSAP and the consequences to growers for failure to comply with OFFSAP requirements.

Section 33.4 states:

Every grower who refuses or fails to comply with OFFSAP and mandatory BC Bio-security standards found in Schedule 20 will be advised in writing by the Board staff and provided with a date to correct the identified deficiency.

- a. this initial notification in writing will be known as the first letter of non-compliance and may be issued as a corrective action request following an on-farm audit or otherwise.
- b. if the deficiency has not been satisfactorily corrected, the grower will receive a subsequent letter of non-compliance along with the imposed production penalty found at Part 54.2(a) Failure to Comply.
- c. refusal or failure to correct the identified deficiency after a subsequent letter of non-compliance will result in the Board reviewing the matter under Part 54.2(b) Failure to Comply. A grower may then be required to show cause to the Board why his quota should not be cancelled, reduced or suspended.

Section 33.6 states:

The Board, in its sole discretion, may cancel a grower's license or may take any other reasonable measures for the grower's failure to achieve OFFSAP and bio-security compliance by the effective date or maintain OFFSAP and bio-security compliance.

24. Part 54 of the General Orders provides generally that the Chicken Board may reduce, refuse to increase, or cancel quota where a grower fails to comply with or

contravenes any provision of the Act, the Scheme or the General Orders, or any order or direction of the Chicken Board.

25. Section 54.2 states:

Notwithstanding the generality of the foregoing, where a grower fails to comply with General Orders governing the submission of prescribed forms or other required documentation, the production quota allotted to the grower for the sixth quota production period following that in which the failure to comply occurred will be reduced by the Board:

- a. In the case of a second occurrence, by 250 kilograms of chicken live weight; and
- b. In the case of a third or any subsequent occurrence, by 10% reduction of the grower's next allotment until compliance is achieved to the satisfaction of the Board.

26. Section 54.2 was amended on July 11, 2007 to provide that the specified quota reductions would take place in "the next unallocated period following that in which the failure to comply occurred" rather than in the sixth quota period after failure to comply. Mr. Vanderspek, General Manager of the Chicken Board, testified that the wording of section 54.2 was changed to acknowledge a growing concern by the Chicken Board that the assessment of penalties in the sixth period following the infraction was too far removed from the infraction and lacked the requisite deterrent value.

ANALYSIS

27. Mr. Siemens, in giving his evidence and in making submissions on behalf of the appellant, referenced the OFFSAP program many times, contending that the OFFSAP program is unfair, requires excessive unnecessary documentation, is not production related and by not recognizing the production realities of "new" farms, favours established production units. The panel heard these arguments but notes that the authority of the Chicken Board to mandate and administer this program is not in question in this appeal, nor is the appellant's non-compliance with the program or the magnitude of the OFFSAP penalties assessed against Vanmar. The arguments considered by the panel in this appeal are those that pertain to whether or not the Chicken Board had the authority to apply the previously assessed OFFSAP penalties in two periods well after the periods in which the penalties were originally to be applied and, if so, whether or not they erred in doing so.

28. The appellant bases its appeal on one primary argument regarding authority and a secondary argument alleging unfair treatment by the Chicken Board. Vanmar's primary argument is that the Chicken Board does not have the authority to assess penalties for OFFSAP outside the strict dictates of its General Orders, citing a

previous BCFIRB decision, *Primary Poultry Processors Association of British Columbia v British Columbia Chicken Marketing Board*, October 10, 2008. We will address the authority argument first

29. The authority argument put forward by Vanmar centres on when penalties can be applied, not if they can. The appellant argues that the OFFSAP penalties assessed against them for periods A84 and A85 cannot be imposed in periods A89 and A90 because there are no specific provisions in Part 54 of the General Orders that permit imposition in these later periods. The appellant's position is that while the Chicken Board has the authority to assess penalties for OFFSAP non-compliance, it must do so strictly in accordance with the provisions of section 54.2 (as amended July 11, 2007). The appellant argues that at the time the Chicken Board discovered its error in October 2008 and ordered that the previously assessed penalties be applied in periods A89 and A90, section 54.2 of the General Orders provided that a penalty must be administered in the "next unallocated period following that in which the failure to comply occurred" and the period had long since passed.
30. The respondent submits that while section 33.4 cross references section 54.2 of the General Orders, it is Part 33 that specifically deals with the consequences of OFFSAP non-compliance. In particular, if an OFFSAP deficiency has not been satisfactorily corrected after imposition of the first 250 kg penalty, section 33.4(c) calls upon the Chicken Board to review the matter under section 54.2(b) but the penalty to be imposed lies within the broad residual discretion of section 33.6.
31. The respondent submits that it therefore has "the authority, both general under the Scheme and specific under section 33.6 of the General Orders to impose this penalty on the appellant in any period unless the imposition is unreasonable". The respondent says that while the original order was consistent with the provisions of section 54.2 in relation to the timing of the two 10% penalties, as a matter of authority the Chicken Board was not limited to that and could have imposed these penalties when it wanted subject to the timing being reasonable.
32. The respondent argues that "the Act and the Scheme must be given a fair and liberal interpretation so as to make effective the legislative intent as applied to the administrative scheme involved", citing *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at QL p.4 and *Hallmark Poultry Processors Ltd. v British Columbia (Marketing Board)*, 2000 BCSC 569 at para 18.
33. The respondent also cites *Lilydale Co-operative Ltd. et al v. British Columbia Chicken Marketing Board*, September 17, 2004 at para 38 as a case where BCFIRB previously rejected a narrow interpretation of the powers vested in the Chicken Board.
34. The respondent submits that confirmation of the Chicken Board's authority to impose reasonable penalties for non-compliance with its orders is particularly important in relationship to OFFSAP compliance because penalties imposed for

OFFSAP non-compliance enable the Chicken Board to fulfill its responsibility to administer the Scheme and, in doing so, protect the public interest.

35. Alternatively, the respondent argues that it flows from the discretionary nature of the powers vested in the Chicken Board under the Scheme that the General Orders ought not to be treated as binding on the Chicken Board as to do so would result in an impossible fettering of the Board's discretion to administer the Scheme.
36. The panel accepts the respondent's argument that, subject to it being a reasonable measure to take in the circumstances, the Chicken Board has authority under Part 33 of the General Orders to apply the two previously assessed 10% penalties at such time or times as it may determine. While in the initial instance the Chicken Board chose to apply these penalties in the same time periods they would have been applied under section 54.2, we agree that it was not bound to do so. Section 33.4(c) only calls for the Chicken Board to review the matter under section 54.2(b) but does not restrict the Chicken Board to imposition of a penalty only in accordance with the exact provisions of section 54.2(b) or any other provision of the General Orders. Indeed the wording of section 33.4(c) evidences the broader discretionary powers available to the Chicken Board such as possible cancellation, reduction or suspension of the quota. This is, of course, consistent with the broad discretionary wording of section 33.6 which provides for the Chicken Board in its sole discretion to cancel a grower's licence or take any other reasonable measures for failure to achieve or maintain OFFSAP compliance.
37. We conclude therefore that the Chicken Board had discretion to order that the previously assessed 10% penalties which it had failed to apply in periods A84 and A85 be applied in later periods and was not constrained by the time period referred to in section 54.2(b) either before or after its amendment.
38. This leads to consideration of whether applying the previously assessed penalties in the later periods A89 and A90 can be considered to be "any other reasonable measure" as contemplated by section 33.6. We find that the Chicken Board's decision to apply the previously assessed Vanmar OFFSAP penalties in periods A89 and A90 was a reasonable measure to take in view of the administrative error which had resulted in the failure to apply these penalties in the periods originally ordered.
39. We conclude this for the following reasons:
 - a. OFFSAP is an integral and fundamental component in the production of "regulated product" (chicken) in British Columbia that is safe for human consumption. In our view it is clearly within the purview of the Chicken Board under the broad discretionary authority conferred by the Scheme to regulate this aspect of chicken production and as a necessary corollary to its regulatory powers to assess production penalties under sections 33.4 and 33.6 of the General Orders in order to achieve and maintain grower compliance with OFFSAP.

- b. It is in the public interest that the Chicken Board be able to act to enforce compliance with OFFSAP and that it do so. The imposition of the previously assessed OFFSAP penalties, even after a time lag attributable to administrative error on the part of the Chicken Board, is a reasonable measure to take in relation to the critical importance of OFFSAP compliance. To in effect “waive” the OFFSAP penalties in question because of lax administrative practices would be to condone the appellant’s non-compliance. Such an action would inevitably result in the loss of both the specific and general deterrence effect of the previously assessed penalties to the detriment of the broader public interest. It could also lead to the Chicken Board being accused of favouritism toward a particular grower, or to repeated lobbying of the Chicken Board by other non-compliant chicken growers wanting to have their penalties waived for similar, or allegedly similar, circumstances. Going down this path would be to bring the integrity of the OFFSAP program into question and thereby undermine the public assurance of food safety it provides.
 - c. There was no increase in the amount of the penalties only a change in time of their application. In the context of section 33.6, which specifically provides for licence cancellation, the phrase “other reasonable measures” must be given a broad interpretation. A change in the time at which a penalty will be applied would in our view, in the absence of special circumstances, be a reasonable measure and be within the discretionary power of the Chicken Board under section 33.6.
40. We turn now to Vanmar’s secondary argument that it was treated unfairly or unjustly by the Chicken Board. For a better understanding of this argument and our analysis of it, we note that periods A84 and A85 represent the period of time from March 30, 2008 to July 19, 2008 and that periods A89 and A90 ran from January 4, 2009 to April 25, 2009.
41. While acknowledging the multiple communications and meetings with the Chicken Board, all of which resulted in the Chicken Board reaffirming the penalties, the appellant contends that when the Chicken Board failed to apply the penalties in A84 and A85 it “would only be fair to assume that [the Chicken Board] waived the penalties and are working with the grower instead of against them”. The appellant submitted that this was a fair assumption because the penalties were large and it was the only farm penalized to this extent.
42. The appellant also argues unfairness on the basis that after periods A84 and A85 passed without the penalties being applied, it had no knowledge the penalties would be applied at a later date until it received the October 2, 2008 letter from the Chicken Board. The appellant noted that this was coincident with the settlement of

the additional penalties assessed with respect to the late payment of the overmarketing levy. The appellant, tying these two unrelated matters together, argued that after conceding on the late payment matter, the Chicken Board “decided to penalize Vanmar for something that happened a long time ago. Which would lead me to believe that they are possibly being biased towards Vanmar, especially in today’s economy...”.

43. The appellant then expanded on its argument submitting that the decision to apply the penalties in the later periods was a decision to financially hurt the appellant given the state of the economy because it would reduce the appellant’s production in the later periods but the appellant would still need to make the mortgage payments.
44. In conclusion, the appellant stated, “I think it’s extremely unfair and unjust a year later, out of the blue, to say I’m sorry, we made a mistake, when here I’ve assumed all along that the Board has worked with Vanmar, rectifying all the situations, which I have displayed earlier and were paperwork-related...”.
45. We view the appellant’s references to the Chicken Board acting unfairly, unjustly and the allegation of potential bias, to be arguing that the Chicken Board did not act in good faith when it determined to apply the previously assessed penalties in the later A89 and A90 periods and to possibly also go to the question of reasonableness addressed above. As well, we recognize that the submissions of the appellant as to the economy in these later periods might be considered to touch upon the area of special circumstances.
46. Mr. Siemens acknowledged that the appellant was at the time aware that the Chicken Board had failed to apply the OFFSAP penalties in periods A84 and A85 but that the appellant did not raise this with the Chicken Board. The panel observes that if the appellant had raised this question with the Chicken Board when it first received notice of its allocation for periods A84 and A85, the Chicken Board would have been able to correct the error immediately so that the penalties could have been applied as originally intended. The panel can only surmise that the appellant chose not to do so in the hope that the Chicken Board would not notice the error and the appellant would escape the penalties previously assessed in relation to its non-compliance with OFFSAP.
47. The panel finds Vanmar’s contention that it would be fair to assume the Chicken Board had waived the OFFSAP penalties because it failed to apply them in periods A84 and A85 denies the context and legitimate expectations inherent in the Chicken Board’s role in administering OFFSAP. It is unfortunate that the Chicken Board did not apply the penalties in A84 and A85 but we do not accept that the administrative confusion leading to the delayed application of the penalties constitutes a waiver. The appellant argued that it would be fair to assume the penalties had been waived because of their size and the fact that other growers received smaller penalties. In the panel’s view, this demonstrates the appellant’s ongoing refusal to acknowledge its own failure to comply in a timely manner with the OFFSAP requirements and

correct deficiencies which resulted in the increased penalties. The panel's view on this matter is that the legitimate expectation of Vanmar with respect to the penalties, particularly in light of the importance of OFFSAP, should have been that the penalties had not and would not go away.

48. We find no evidence to support the appellant's allegation of possible bias on the part of the Chicken Board or its staff. The appellant argues that it had no knowledge until October 2, 2008 that the outstanding penalties would be applied in later periods. The appellant submits that the fact that the decision to assess the OFFSAP penalties was made on the same date as the settlement of the unrelated overmarketing levy penalties issue, raises the spectre of possible bias. The panel has examined in detail the chronology of events and documents leading up to the October 2, 2008 letter from the Chicken Board to Vanmar and notes that the appellant had attempted more than once to have the Chicken Board cancel the OFFSAP penalties. In each case the Chicken Board reaffirmed the penalties. There was no basis for the appellant to assume that the penalties had or would be waived or cancelled. As we have noted above, the appellant could have asked the Chicken Board at any time why the penalties were not applied as originally intended but chose not to do so. We accept Mr. Vanderspek's evidence that it was not until the administrative error came to light in late September or early October 2008 that the Chicken Board realized the OFFSAP penalties had not been applied in periods A84 and A85 as planned. He said that as soon as the Chicken Board identified this error and determined how to deal with it, the appellant was notified. In these circumstances, the fact that the appellant was notified on October 2, 2008 that the OFFSAP penalties would be applied in the later periods does not support a finding of bias on the part of the Chicken Board or its staff.
49. The appellant referred the panel to a number of documents dealing with "good standing" for the purposes of distribution of surplus funds by the Chicken Board. The appellant argued that since the Chicken Board had indicated that the appellant was in good standing for purposes of the 2007 surplus distribution and since by that time periods A84 and A85 which ended on July 19, 2008 had essentially passed without application of the OFFSAP penalties, the penalties must have been waived because otherwise the appellant would not have been in good standing and would not have received its share of the 2007 surplus distribution.
50. We have considered the documents relating to the 2007 surplus distribution. The June 25, 2008 internal memo from the Chicken Board's accounting department confirmed the appellant had that day paid the overmarketing levy and indicated that "Vanmar Poultry is now in Good Standing with the Board as of June 26/08." This was followed by the Chicken Board's July 10, 2008 letter denying the appellant's request for relief from a penalty to be applied in period A87 (September 14 to October 8, 2008) relating to "overdue accounts". While denying "relief of past penalties", the Chicken Board wrote that it understood the appellant had "rectified the situation, and is now in good standing in respect to all financial and production

matters. As such, Vanmar Poultry is eligible for a pro rata portion of the declared 2007 surplus distribution.”

51. The panel observes that the July 10, 2008 letter is consistent with Mr. Vanderspek’s evidence that by the time of the 2007 surplus distribution the Chicken Board had determined that a grower would be deemed compliant and in good standing if all matters in respect of which penalties had been assessed were corrected before the July 15, 2008 date set in respect of the surplus distribution and only penalties that had yet to be served after that date remained outstanding. The appellant having by the time of the 2007 surplus distribution achieved OFFSAP compliance and paid the outstanding overmarketing levy, the matters in respect of which penalties had been assessed were corrected in time for it to qualify for a share of the surplus. The fact that the Chicken Board had in error failed to apply the OFFSAP penalties, and had yet to discover it, meant that indeed the appellant was, as far as the Chicken Board was aware at the time, in good standing. The result was that the appellant received its share of the 2007 surplus.
52. In our view neither the June 25, 2008 memo nor the July 10, 2008 letter support the appellant’s position that these documents could or should be read as a waiver by the Chicken Board of the OFFSAP penalties. Again, we observe that the appellant was aware at the time that the Chicken Board, after repeatedly reaffirming the OFFSAP penalties, had inexplicably failed to apply the penalties in the A84 and A85 periods. Other than an oversight there was no explanation for this failure. We find the Chicken Board’s statements related to good standing in an unrelated matter cannot reasonably be relied upon as statements by the Chicken Board to the effect that the OFFSAP penalties in question had been waived.
53. Similar statements as to “good standing” in the October 2, 2008 letters to the appellant and to BCFIRB respecting the settlement of the overmarketing levy penalties issue do not advance the appellant’s argument for the same reasons. Given that the decision of the Chicken Board to apply the OFFSAP penalties in the later periods was also communicated on October 2, 2008, the appellant was clearly aware at that time that while the Chicken Board considered the appellant to be in good standing and entitled to surplus distribution, far from waiving the OFFSAP penalties the Chicken Board was exercising its discretion to apply the OFFSAP penalties in later periods.
54. The panel finds that the above documents do demonstrate some confusion at an administrative level at the Chicken Board. However, much of the confusion alluded to by the appellant was caused or compounded by its failure to address non-compliance issues related to overproduction and OFFSAP in a timely, cooperative and serious manner. The panel’s view is that upon receipt of letters from the Chicken Board stating that Vanmar was in good standing, Mr. Siemens should have contacted the Chicken Board for clarification on the status of the OFFSAP penalties. He did not do so. The panel rejects the appellant’s argument that the above documents support a finding that the OFFSAP penalties were or should be waived

nor do we find any basis for the appellant's allegation of bias on the part of the Chicken Board.

55. Finally, we turn to consideration of the appellant's submission that the Chicken Board's decision to assess penalties in a later period was an attempt to financially hurt the appellant given the general state of the economy by the time of the later periods A89 and A90 (January 4 to April 25, 2009). Other than broad references to the economy having changed substantially between the earlier and later periods and to the appellant being without production but still needing to make mortgage payments, no specific financial circumstances or impacts were provided by the appellant. We find no evidence therefore to support an argument of special circumstances which might give us reason to consider applying the OFFSAP penalties in periods other than A89 and A90 after more opportunity for economic recovery. Given the overriding importance of the public interest in food safety we find it difficult to envisage circumstances, short of bankruptcy, that would preclude the full application of the OFFSAP penalties over some period of time. As for the implication that the Chicken Board intended to financially injure the appellant, we can only observe anecdotally that at the time the Chicken Board discovered its failure to apply the OFFSAP penalties in late 2008, the economy had already deteriorated and there was no reasonable basis for it to have been able to determine that periods A89 and A90 would be better or worse periods from an economic standpoint for it to apply the previously assessed penalties than any other period or periods. The appellant adduced no evidence whatsoever to support its allegation of intent to injure and we find the allegation without foundation.
56. We conclude that the Chicken Board acted in good faith and in the public interest when it applied the previously established OFFSAP penalties in periods A89 and A90 and that the application of the penalties in those later periods was reasonable.

DECISION

57. The Chicken Board has the authority under the Scheme and the General Orders to apply the previously established OFFSAP penalties originally designated to be applied in periods A84 and A85 in later periods and the Chicken Board did not err when it determined to apply those penalties in periods A89 and A90. The appeal is dismissed.
58. There is no order as to costs.

Dated at Victoria, British Columbia this 13th day of August, 2009.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read 'Suzanne K. Wiltshire', written on a light blue background.

Suzanne K. Wiltshire, Presiding Member

A handwritten signature in black ink, appearing to read 'Garth Green', written on a white background.

Garth Green, Member

A handwritten signature in black ink, appearing to read 'Dave Merz', written on a white background.

Dave Merz, Member