

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN
MARKETING BOARD CONCERNING A PRODUCTION PENALTY

BETWEEN:

KLAAS KORTHUIS
dba TRY POULTRY FARMS

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Ms. Satwinder Bains, Member
Mr. Harley Jensen, Member

For the Appellant

Mr. Christopher Harvey, QC, Counsel

For the Respondent

Mr. Jim Beattie, Production Manager
Mr. Douglas Scullion, Counsel (by
written submission)

Place of Hearing

Abbotsford, BC

Date of Hearing

March 16, 2000

INTRODUCTION

1. The matter before the British Columbia Marketing Board (“BCMB”) is an appeal by Klaas Korthuis, doing business as Try Poultry Farms (the “Appellant”), from a letter of the British Columbia Chicken Marketing Board (the “Chicken Board”) dated December 10, 1999 requiring the Appellant to stand down production for a period of 381 days or until September 7, 2000 when chicks could again be placed as a result of unauthorised production.

FACTS

2. The Appellant purchased approximately 11,000 birds of roaster quota on Vancouver Island in 1993 with the intention of building a farm on Vancouver Island. At that time, the General Orders (1987) of the Chicken Board provided that Vancouver Island quota could not be transferred to the Lower Mainland under any circumstances.
3. In the interim, the Appellant was allowed to lease out his quota for a period of 12 months. However, as a result of an industry downturn, the Appellant's building plans were delayed. In October 1994, the Appellant applied to the Chicken Board to extend his lease arrangement. This application was turned down and resulted in an appeal to the BCMB. As a result of the appeal, the Appellant and the Chicken Board reached a mediated agreement extending the lease to April 1995.
4. In April 1995, the Appellant requested a further one-year extension to his lease arrangement. The Chicken Board denied this request and again suspended his quota from production. The Appellant appealed this decision to the BCMB. This second appeal was also settled by mediation and allowed the Appellant to continue leasing out his quota for a further twelve months to a Vancouver Island Lilydale Co-operative Ltd. (“Lilydale”) grower. The Appellant was also required to sell his quota to a Vancouver Island grower. The Chicken Board advised that it would not extend the terms of the agreement past March 31, 1996.
5. During this time period, the Appellant heard rumours in the industry that the Lilydale plant on Vancouver Island was going to close down. As a result, he put any further development plans on hold. During 1997 and 1998, the Chicken Board allowed him to continue to lease out his quota and meet his quota production obligations.
6. On January 25, 1999, the Lilydale plant closed.
7. On March 31, 1999, Amendment #7 to the Chicken Board's General Orders (1987) came into effect. Under Amending Order #7, the quota transfer prohibition was repealed and a grower who had been a registered Vancouver Island grower for at

least two years was permitted to transfer quota to the Lower Mainland provided he or she established a chicken production unit there.

8. In April 1999, the Appellant applied to transfer his quota to the Lower Mainland. Pursuant to Amending Order #7, the Chicken Board granted the Appellant's request "on the understanding that all of the Board's Orders and policies are complied with and that the necessary papers are filed at the Board Office." One of the fundamental requirements was that the quota be grown from the Production Unit of the Grower described in the Grower's licence unless the Board otherwise consents in writing: Chicken Board General Orders, s. 5(e).
9. The Appellant attempted to locate a production unit in the Lower Mainland. During this time, Lilydale tried to lease out his quota. Lilydale advised the Appellant that it did not want the quota produced on Vancouver Island. Lilydale tried to locate a Lower Mainland grower with barn space to take the birds. However, due to the high water and the threat of floods, Lilydale was unable to find a registered grower to grow out the Appellant's quota.
10. The Appellant knew of two empty barns, one located at 9390 Upper Prairie Road and the other at 9050 Ford Road in Chilliwack. He approached the property owners and arranged to rent their facilities to grow his chicken. The Appellant placed 12,000 birds on the Upper Prairie Road location and 29,000 birds at the Ford Road location in July 1999. He did this without seeking the prior approval of the Chicken Board.
11. In September 1999, Mr. Jim Beattie, Production Manager with the Chicken Board, contacted the Appellant and advised him that he was growing chicken in an unregistered facility, and therefore without authority.
12. In October, the Appellant met with Mr. Beattie at the Chicken Board office. By this time, one flock had been slaughtered and a second flock placed. Following the meeting, the Appellant agreed to not place any further birds at the Upper Prairie and Ford Road locations.
13. Sometime in the fall of 1999, the Appellant entered into an agreement to purchase a production unit at 11895 Carey Road. He currently lives at the premises but the deal does not conclude until June or July of 2000 in order to allow the current owner to meet production requirements.
14. On October 8, 1999, the Chicken Board sent a letter to the Appellant advising him that he was "to stand down for the period of time required to make up all unauthorized production." The Appellant was also advised not to place any more birds or to lease out his quota until directed by the Chicken Board.

15. The Chicken Board sent another letter to the Appellant on November 26, 1999. In this letter, the Chicken Board advised the Appellant that the total amount of production grown without authority was 142,505 kg. Accordingly, the Appellant was advised that his quota would be suspended for 381 days and as such he could not place birds until September 7, 2000.
16. On December 9, 1999, the Appellant appeared before the Chicken Board and requested leniency due to his ignorance of the Chicken Board regulations. The Chicken Board's letter dated December 10, 1999 denied the Appellant's request and affirmed the directive that the Appellant's production be suspended until September 7, 2000.

ARGUMENT OF THE APPELLANT

17. The Appellant Klaas Korthuis is a registered grower who owns quota. The purpose of quota is to ensure that regulated product is produced and the consumer receives production. In this case, the Appellant argues that the Panel should not lose sight of the fact that Mr. Korthuis was doing precisely what he is supposed to do, produce his quota.

Statutory Authority

18. The Appellant argues that the Chicken Board does not have penal power. The offence sections of the *Natural Products Marketing (BC) Act* (the "Act") are sections 15, 16, 17 and 18. These sections relate to the enforcement of the Act and Regulations, search and seizure, applying to the court for injunctive relief or fines not more than \$20,000. The *British Columbia Chicken Marketing Scheme, 1961*, BC Reg. 188/61, as amended (the "Scheme") grants certain penal powers to the Chicken Board but these relate only to search and seizure and cancellation of a license.
19. The Appellant argues that the basic principle of law is found in *R. v. Abitibi Price Inc.* (1995) 17 C.E.L.R. (NS) 75 at p. 77:

The power to impose penalties must be specifically delegated. In *Administrative Law: A Treatise*, by R. Dussault and L. Borgeat, 2d ed., Vol. 1(Toronto: Carswell, 1986), p. 448, the authors express the position as follows:

Except where an administrative authority is explicitly authorized by statute to impose penalties, it seems clear that the power to impose sanctions enforceable in court is the exclusive province of Parliament. As the *Royal Commission of Inquiry into Civil Rights in Ontario* points out: "The General rule is that power to make regulations does not include power to impose penalties or create offences, unless such power is expressly given".

20. The Appellant argues that the Chicken Board has not been given the general power to impose penalties. Thus, even if the Chicken Board had enacted a General Order that created the penalty under appeal, that Order would not be authorised.
21. The Chicken Board has been given the power to “revoke or reduce quotas” in section 4.01 (c.1) of the *Scheme*. This power can not be used for penal purposes. The Appellant argues that a distinction must be drawn between a reduction in quota to balance off over production in a previous period (an adjustment) and a penalty, which results in a further reduction on top of the adjustment. The Appellant argues that the over and under production penalties imposed by the Chicken Board are flawed to the extent they can be characterised as penalties. The Appellant argues that the case is clearer for a suspension of quota for the purpose of punishing non-compliance with the *Scheme*. In this case, the Appellant is being penalised for producing chicken from premises he did not own. This is clearly a penalty and as such is beyond the power the Chicken Board to impose.
22. The Appellant argues that the power to regulate by means of quota can be inferred from the wording of section 11(1)(b) of the *Act* which provides:
 - 11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:
 - (b) to determine the manner of distribution, the quantity and quality, grade or class of regulated product that is to be transported, produced, packed, stored or marketed by a person at any time;
23. Such general words do not support the power to reduce or revoke quota for penal purposes. This principle has been applied numerous times to strike down attempts to administratively penalise persons by reducing quotas. The Appellant refers to two snow crab fishery cases. In *Matthews v. Canada (Attorney General)*, [1997] 1F.C. 206 (T.D.), an administrative penalty was imposed on a fisherman who over-ran his quota three times in one year. In that case, the Trial Judge struck down the penalty and at p. 220 held:

Parliament, by the Act, specifically provided for a variety of penalties, including a prohibition from gaining a new licence, to be imposed by a court, where procedural safeguards associated with the judicial process are available, and it did not authorize the imposition of penalties by another administrative process. In my opinion, it is implicit that Parliament did not intend that penal powers are to be exercised by the Minister.
24. The *Matthews* decision was upheld on appeal: [1999] F.C.J. No. 830 (C.A.).
25. The Appellant argues that similarly, the BC legislature provided for broad regulatory powers to be exercised by marketing boards but it specifically provided for a variety of penalties in different sections of the *Act*. As such, the penal power cannot be inferred from the general words in section 11 of the *Act*.

26. The Appellant argues that it is not open to the Chicken Board to argue that it is too cumbersome to enforce penalties through the court process. As stated by Madame Justice Tremblay-Lamer in *Thibeault v. Canada (Minister of Fisheries & Oceans)*, [1996] 7 Admin. L.R. (3d) 70 at p.80: “If this process is unsatisfactory, it is always open to Parliament to introduce a new one by amending the Act.”

Chicken Board Process

27. The Appellant argues that the penalty imposed here results from an unstructured, inappropriate exercise of administrative discretion. When one looks at the *Scheme* and the General Orders, there is no section or order establishing the offence for which the Appellant has been penalised. In addition, the Appellant argues that there is no order establishing an entitlement to impose a penalty or the amount of the penalty. Where there is an unstructured administrative discretion, inconsistent treatment is inevitable, as there are no rules to ensure consistent treatment.
28. Even if the Chicken Board has authority to impose administrative penalties, the BCMB should set aside this exercise of the power by the Chicken Board. The manner in which this power has been exercised leaves too broad a discretion for the Chicken Board's staff to determine who shall be subjected to penalty and who shall not. Penalties cannot be based on unstructured administrative discretion, see *Thibeault* supra, at p. 80:

“[a] discretion is never absolute, regardless of the terms in which it is conferred”. The Minister accordingly exceeded his jurisdiction by using his discretion for a purpose other than that intended by Parliament.

I would also like to add that, even if the Minister did have the power to impose sanctions under section 7 of the Act, I would have to find his decision unreasonable.

To determine whether an administrative decision is reasonable, *it is necessary to consider the bases on which the decision was made and its origins* since, as Baudoin JA stated in *Thibeault v. Regie de l'assurance maladie du Quebec*, [translation] “that is what distinguishes a discretionary but lawful decision from one that is arbitrary and therefore unlawful”.

Inordinate Penalty

29. The Appellant refers to a different passage in the *Thibeault* decision to support his argument that the penalty imposed on the Appellant is inordinate, see p. 81:

Furthermore, the sanction represents a loss of income of over \$22,000.00 for the applicant, who committed only two minor offences. It can be seen from research into similar cases that have resulted in prosecutions under sections 78 *et seq.* of the Act that a fine of \$1,500.00 has been imposed on a first time offender.

30. The Appellant argues that a similar conclusion that the penalty is inordinate can be drawn here when one compares the effect of the loss of income to a fine that could be assessed. Looking at the penalty, the Appellant argues that it is inordinate; it

amounts to a \$40,000 loss to the Appellant. The penalty is approximately one full year of production. To put this in perspective, the Appellant urges the Panel to compare this penalty with what it takes in a criminal court to cause a judge to order a fine of this magnitude

ARGUMENT OF THE RESPONDENT

31. The Respondent takes the following position in response to the arguments of the Appellant:

- a) The (Chicken) Board has the requisite statutory authority, either expressly, or alternatively, by reasonable implication, to suspend a grower's quota for failing to comply with the (Chicken) Board's orders;
- b) The suspension of the Appellant's quota was not inordinate, but rather calculated to account directly for the Appellant's unauthorized production; and
- c) The Appellant was provided with the opportunity to meet with and to make submissions to the Chicken Board with respect to its decision.

Statutory Authority

32. The Chicken Board is created pursuant to the *Act* and the *Scheme*, the purpose and intent of which are broadly framed and include the express power to prohibit all or part of the production of regulated product in the province. Section 2 of the *Act* provides:

- 2(1) The purpose and intent of this Act *is to provide for the promotion, control and regulation of the production,* transportation, packing, storage and marketing of natural products in British Columbia, *including prohibition of all or part of that production, transportation, packing, storage and marketing.* [Emphasis added]

Section 2.01 of the *Scheme* provides:

- 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.* [Emphasis added]

33. In addition, s. 4.01 (c.1) of the *Scheme* grants the Chicken Board broad discretion to “establish, issue, permit transfer, revoke or reduce quotas”. Further, this section makes it clear that the Chicken Board may establish terms and conditions of quota use. These terms and conditions do not confer any property interest in quota, which remains within the exclusive control of the Chicken Board.

34. Finally, the Chicken Board receives a wide range of powers under section 11 of the *Act*, including the express power to cancel a licence for violation of a provision of the *Scheme* or order of the Chicken Board. It provides:

- 11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:
- (i) *to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;* [Emphasis added]
35. The power to cancel a licence is vested in the Chicken Board through subsection 4.01(e) of the *Scheme* which provides:
- 4.1 The board shall have the 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 the generality thereof shall have the following powers:
- (e) to cancel any licence or permit for violation of any provision of the scheme or of any order of the board or of the regulations;
36. The chicken growers of BC are well aware of the Chicken Board's power to cancel licences as they are reminded each year when they apply for their Grower Licence. The application form states:
- I/We _____ hereby agree to obey the orders and regulations of the Board and will accept the Licence on the understanding that the same may be cancelled without notice for violation of any provisions of the Scheme, the Board's Orders of (sic) the regulations, and subject to all restrictions now or hereafter placed on said permit by order of the Board.
37. This condition is repeated on the licence, which states “[t]his licence is subject to cancellation for the violation of any provision of the *Scheme*, any Order of the Board, or the regulations and is subject to all restrictions now or hereafter placed thereon by the order of the Board.”
38. Thus, it is the Respondent's argument that its authority to suspend the Appellant's production is clearly and expressly derived from the provisions set out above. Sections 2 and 11 of the *Act* and s. 2.01 and 4.01 of the *Scheme* contemplate a broad regulatory power. This power expressly includes the power to prohibit production and to reduce quotas and further to establish the terms and conditions for the issue, revocation and reduction of quotas.
39. The Respondent also points to the specific powers found in subsection 11(1)(i) of the *Act* and 4.01(e) of the *Scheme* which authorise the Chicken Board to cancel a grower's licence if he fails to comply with the Chicken Board's orders or the provisions of the *Act* or *Scheme*. The Respondent argues that the two cases cited by the Appellant in support of his argument (*R. v. Abitibi Price Inc.* and *Matthews v. Canada (Attorney General)*) can be distinguished on the basis that neither decision involves similar statutory provisions.

40. The Respondent disagrees with the Appellant's argument that these sections contemplate only an outright cancellation of a licence and do not include the power to suspend a licence. The Respondent argues that a power to suspend a licence, which is on its face temporary as it is issued annually, must also include the lesser power to suspend. The Respondent argues that this power is incidental to and not inconsistent with the Chicken Board's general power to cancel a licence.
41. The Respondent relies on the following general principles of statutory construction found in *Administrative Law*, 3rd ed. where Professor Mullen states:

The courts can also inquire whether subordinate legislation is reasonably capable of coming within the scope of the decision-maker's authority under the empowering statute, having regard to the object and intention of that legislation. The courts will uphold subordinate legislation which is reasonably incidental to the specific heads of power in the empowering section of the principal legislation, even though it provides no specific authorization for the particular matter to which the subordinate legislation relates. (at para. 513)

42. The Respondent argues that a similar principle can be found in section 41 of the *Interpretation Act* RSBC 1996, c. 238:

41(1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to

- a) *make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,*
- b) *provide for administrative and procedural matters for which no express, or only partial, provision has been made, [Emphasis added]*

43. Section 1 of the *Interpretation Act* provides that “enactment” means an Act, regulation or a portion of an Act or regulation. “Regulation” includes a regulation, order, rule or form enacted in execution of a power conferred under an Act.
44. In furtherance of this argument the Respondent relies on *Bishop v. College of Physicians and Surgeons (BC)*, 1 B.C.L.R. (2d) 36, where the BC Court of Appeal made the following comments with respect to the exercise of powers that are “incidental” to those that are granted by statute:

In reference to the issue whether the rules were incidental to the Act which was before him in the *Schumacher* case, McIntyre J. in effect asked the question whether the rules were “fairly incidental” to the things authorized by the Act with which he had to deal. After posing that question, he referred to the judgement of the House of Lords in *AG v. Great Eastern Ry.*(1880), 5 App. Cas. 473. There Lord Selborne said at p. 478:

“But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and *whatever may be fairly be regarded as incidental to*, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.” [the italics are mine]

I think the more appropriate approach to the issue whether the rule is incidental to the things authorized by statute is that taken by Lord Selbourne.

45. The Respondent argues that this approach has been adopted in subsequent decisions and cites *McPherson v. Institute of Chartered Accountants of British Columbia* (1988) 33 B.C.L.R. (2d) 348. At p. 376 of this decision, the Court held that although there was no specific power granted to the Institute to form a practice review and licensing program, the *Accountants (Chartered) Act*, R.S.B.C. 1979, c. 2 gave the Institute the mandate to “promote and increase the knowledge, skill and proficiency of its members”. The creation of the practice and license review program was held to be “necessarily incidental” to that mandate.
46. Finally the Respondent cautions against an overly narrow, technical construction of the Chicken Board's powers and suggests that the Panel should adopt the liberal and purposive approach prescribed by the Supreme Court of Canada in *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2:

In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. *In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved.* [Emphasis added]

Inordinate Penalty

47. In response to the Appellant's arguments that the suspension of his quota for 381 days was inordinate, the Respondent's maintains that the suspension was consistent with a 1995 decision made regarding the Pollon operation. In that case, Mr. Pollon who was short of space for his export production, sub-leased a building to grow his export production. After determining this was a violation of Board orders, the Chicken Board deducted the unauthorised production from his domestic quota allocation.
48. According to the evidence of Mr. Beattie, the suspension in this case was intended to account for the Appellant's unauthorised production on a kilogram per kilogram basis. The lengthy suspension results from the Appellant producing substantially in excess of his quota during the period in question. Since the Appellant holds a relatively small amount of quota, a lengthy stand down is required to make up the unauthorised production.

Chicken Board Process

49. The Appellant argues that in prescribing suspension without first notifying the Appellant and allowing him to make submissions, the Chicken Board followed a process of “unstructured administrative discretion”. The Appellant also argues that

he has been unfairly singled out as the Chicken Board has allowed other growers to produce chicken from unregistered premises. In response, the Respondent concedes that its process was not perfect. It would have been preferable to hear from the Appellant before implementing the suspension. However, the Appellant was given an opportunity to make submissions to the Chicken Board when the decision was communicated. He took advantage of the opportunity and was assisted by his hatchery representative.

50. The Respondent argues that the Appellant's submissions were duly considered and then rejected by the Chicken Board. The Respondent argues that the decision should be given deference unless the Panel concludes that it was clearly wrong.
51. Finally, with respect to the allegations of unfair treatment, the Respondent submits that this argument is without merit. The Appellant did not call any direct evidence to prove that other growers have been permitted to grow chicken on unregistered premises. Although the Chicken Board has yet to take any steps with respect to Mr. Van Hemert, another grower who produced chicken from the same unregistered facility, Mr. Beattie's evidence was that this matter was still before the Chicken Board.
52. The Respondent argues in summary that it has the requisite authority to suspend the Appellant's production, that the suspension was in the circumstances appropriate and that the Chicken Board's process provided the Appellant with a full opportunity to be heard.

REPLY OF THE APPELLANT

53. In Reply, the Appellant first takes issue with certain facts relied on by the Respondent in argument. He states that it is unfair to link the production penalty to unauthorised production. In this case, a penalty was imposed not for over quota production but rather failure to notify the Chicken Board of a barn lease situation.
54. In response to the Respondent's arguments about the Chicken Board's power to cancel a licence for violation of a board order and the Appellant's knowledge of this power, the Appellant argues that this is an irrelevant consideration, as the Appellant's licence was not cancelled.
55. The Appellant argues that there is no historical precedent for this type of penalty, the Pollon case cited dealt with non-quota production for export and not in quota production from a non-approved barn.
56. Finally, the Appellant takes issue with the Respondent pointing to the Van Hemert situation to support consistency in treatment when the Chicken Board did not choose to act until after the inconsistency was brought to their attention.

Statutory Authority

57. The Appellant argues that the Respondent has not pointed to any express power in the legislative scheme, which support the direct imposition of administrative penalties and instead relies on general wording and the power to cancel a licence. The Respondent relies on reasonable implication by reference to the *Interpretation Act* and common law presumptions and principles of statutory interpretation. The Appellant argues that neither the *Interpretation Act* nor the common law assists the Respondent.
58. First, the *Interpretation Act* does not apply where “a contrary intention appears in this Act or in the enactment” (s. 2(1)). In this case, there is a three-tier legislative scheme comprised of the *Act*, the *Scheme* and the orders passed by the Chicken Board. There is a contrary intention in the first two tiers of this legislative scheme that penalties may be created in the third tier by Chicken Board order. The *Act* specifically deals with enforcement and penalties leaving no room for the Chicken Board to devise other means of enforcement and penalties. The *Act* does not support an intention to sub-delegate this power to the third-tier Chicken Board.
59. The *Act* does provide for limited delegation of the penalty power to the second tier; the Lieutenant Governor in Council may pass regulations for the imposition of penalties (s. 22(3)(g)). This incorporates by reference the power found in s. 41(1)(e) and (f) of the *Interpretation Act*, which allows the Lieutenant Governor in Council to provide for offences and penalties.
60. The Appellant argues that s. 41 of the *Interpretation Act* distinguishes between the second and third tiers. Regulations allowing for penalties are allowed in the second tier but not the third. The opening words of section 41(1) refer to regulations in any tier (“the Lieutenant Governor in Council or any other person may make regulations”). However, subsections (e) and (f), which deal with the creation of offences are restricted to regulations made or approved in the second tier (a “regulation made by or with the approval of the Lieutenant Governor in Council”).
61. Thus, the Appellant argues that as the Chicken Board has not passed an order, which has been approved by the Lieutenant Governor in Council by regulation or Order-in-Council, there is a contrary intent in the legislative scheme that the Chicken Board has power on its own to establish penalties. The Lieutenant Governor in Council has chosen not to exercise the power to “make regulations for...the imposition of penalties” (s. 22(3)(g)) with the sole exception of the power granted to the Chicken Board to cancel a licence for violations of the scheme or orders. However, the Appellant argues that the legislative provisions are exhaustive and no further penalties were intended.
62. The Respondent also relies on the “liberal and purposive” approach to statutory interpretation and on the proposition that the penal powers are necessarily

incidental to the powers expressly given to the Chicken Board. However, the Appellant argues that such common law principles do not apply to support penal provisions. The power to impose penalties must be expressly given or else it does not exist. The “necessarily incidental” doctrine cannot be used to make up for an absence of specific statutory wording in this area. The Respondent cites Mullan's *Administrative Law*, supra at section 514 which states:

These [common law] presumptions require specific rather than general authority to support subordinate legislation affecting certain subject matters or interests, including...creation of offences and penalties.

63. The Appellant argues that the *Bishop* and *McPherson* cases relied on by the Respondent are distinguishable as neither case deals with the imposition of a penalty.
64. The Appellant argues that the power to impose penalties is not “necessarily incidental” to the powers granted to the Chicken Board when the penalties available to the Chicken Board are found in the *Act* and where power has been expressly delegated to the Lieutenant Governor in Council to enact further penal provisions and where the only penal regulation enacted is the power to cancel a licence.
65. The Appellant reiterates the passage from the *Matthews* case relied on his original submissions (see para. 23 above) and maintains that the Respondent has not effectively distinguished this decision. The Respondent argues that *Matthews* can be distinguished, as there was no similar provision allowing for cancellation of a licence for failure to comply with the particular legislation. The Appellant argues that the power to cancel a licence is irrelevant to the power to impose an administrative production penalty. Our *Act* is as clear as the *Fisheries Act* considered in *Matthews*, neither disclosed an intention to exercise penal powers by administrative action.
66. The Appellant argues that the Respondent has failed to rebut the propositions of law set out in his original submissions. Since no power in law exists in the Chicken Board to enact penal provisions or to impose penalties inconsistent with the legislative scheme, the penalty imposed on the Appellant should be set aside.

DECISION

Statutory Authority

67. A “penalty” is an action taken not for the purpose of compensating for losses or damages occasioned by a violation of its provisions, but rather to discourage certain conduct: *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, [1987] A.J. No. 313 (C.A.). In that context, the Appellant submits as follows:

... a distinction must be drawn between a reduction of quota to balance off overproduction in a previous period, which would be characterized as an adjustment, not a penalty, and a penalty in the sense of a further reduction on top of the “adjustment” in order to enforce compliance with the quota amounts....[t]his would be characterized as a penalty...[s]imilarly, and even more clearly, a suspension of quota for the purpose of punishing non-compliance with a provision requiring production from owned premises would be characterized as a penalty and, thus, beyond the power of the Chicken Board.

68. We reject the submission that the Chicken Board is powerless to take reasonable and independent administrative action designed to discourage unauthorised production by licenced growers. To demonstrate the reasons for our conclusion, it is necessary to review the relevant legislation.
69. The governing statute is the *Act*, an omnibus enactment designed to govern all aspects of the “marketing” of “regulated product” in British Columbia: s. 1. The *Act*, which is part of a complex, long-standing and deeply rooted fabric of federal-provincial marketing legislation across Canada, represents a significant departure from the common law. At common law, farmers traded “freely”. This meant that purely market forces dictated matters such as price and production, a reality which, in the Canadian agricultural sector, provided little stability and drove many farmers into bankruptcy.
70. Amid competing philosophical views about whether Canadian agriculture should be left to the vagaries of “free” market forces, the democratic will was to replace the common law, and to introduce a fundamentally different approach. Just as labour legislation had purported to create an entirely different statutory regime from that which prevailed at common law, so Canadian legislators chose to comprehensively occupy the field of agricultural products marketing, and mark out a very different approach to reconcile the complex and competing interests at play. That intention is made plain in section 2(1) of the *Act*:

2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.
71. In achieving that purpose, the Legislature declined to proceed by legislating the “rules of conduct” in the body of the statute itself. Instead, the statutory regime empowers the Lieutenant Governor in Council to create a series of specific regulatory codes, called “schemes”, specific to particular agricultural sectors and commodities. Each scheme would create a specialised “marketing board”, whose exercise of authority was in turn subject to supervision by the BCMB. Section 2(2) of the *Act* outlines the legislature’s approach:

- 2(2) The Lieutenant Governor in Council may
 - (a) establish, amend and revoke schemes for the promotion, control and regulation in British Columbia of the production, transportation, packing, storage and marketing of regulated products,

- (b) constitute marketing boards and commissions to administer the schemes, and
- (c) vest in those boards and commissions powers considered necessary or advisable to enable them effectively to promote, control and regulate the production, transportation, packing, storage and marketing of regulated products in British Columbia, and to prohibit all or part of the production, transportation, packing, storage and marketing.

72. As a matter of principle, any tribunal or court interpreting this language is obliged to do so in such fair, large and liberal manner as best ensures the attainment of its objects: *Interpretation Act*, s. 8. Because the interpreter's task is to demonstrate fidelity to legislative purpose rather than the interpreter's own preferences or the pre-existing common law, it is inappropriate to interpret such sweeping reform legislation in a presumptively narrow or hostile fashion. With regulatory reform legislation, the imperative purpose principle should be applied even more forcefully.

73. Rather than interpreting a commodity board's statutory authority narrowly, the proper approach is that directed by the Supreme Court of Canada in *Maple Lodge Farms v. Canada*, supra:

In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. *In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved.* [Emphasis added]

74. Further, in any case concerning the powers of a regulatory board, consideration must be given to the Supreme Court of Canada's statement in *Bell Canada v. CRTC*, [1989] 1 S.C.R. 1722 at p. 1756:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory bodies through judicial law making, they must also avoid sterilizing these powers through technical interpretations of enabling statutes.... The fact that [a] power is expressly provided for in other statutes cannot modify this conclusion as it is based on the interpretation of these two statutes as a whole...

75. As a matter of common sense and principle, any regulatory body whose control of an industry is to be "effective", as that word is used both in the *Act* and in *Maple Lodge Farms*, must have authority to do more than simply articulate a set of rules and hope they will not be infringed. Unless the legislation clearly provides to the contrary, it must have authority to take fair but effective administrative action to ensure that its lawfully created rules will be respected.

76. It is also a matter of common sense and principle that an agricultural products marketing scheme whose integrity relied exclusively on enforcement through

prosecutions and applications to the court would be severely impaired. In provincial administrative statutes, it is both essential and common for administrative remedies to exist alongside judicial ones. Administrative and judicial remedies have different purposes and different uses. Those differences have repeatedly been recognised by the Courts, which have held that administrative and judicial “penalties” may not only co-exist, but may be exercised simultaneously.

77. It follows from this that simply because the legislature has provided for judicial remedies in ss. 15 to 18 of the *Act*, no necessary inference arises that administrative remedies, including actions taken for a “deterrence” purpose, are excluded from the *Act*. Given the larger purposes of the *Act*, it is equally reasonable to infer that ss. 15 to 18 of the *Act* were intended to supplement the independent authority of commodity boards, thus affording them a comprehensive choice of options in deciding how to most effectively address a particular contravention.

78. The authority of a commodity board to take independent administrative enforcement action cannot turn on the powers given to the Court. The key focus should be on the language and intent of the legislature in conferring authority on the commodity board itself.

79. As described above, s. 2(2) of the *Act* authorises the Lieutenant Governor in Council to vest in commodity boards those powers considered necessary or advisable to “enable” them to “effectively” promote, control and regulate the marketing of natural products. This same message is repeated in s. 22(2) and 22(3) of the *Act*:

22(2) The Lieutenant Governor in Council may, by regulation, vest in the Provincial board or any marketing board or commission the authorities and powers considered necessary or advisable with reference to the marketing of a natural product so far as it is within Provincial jurisdiction, and *to enable the Provincial board or a marketing board or commission, either alone or in co-operation with the federal board, to exercise effective control of the marketing of a natural product to the full extent intended by this Act and the federal Act.* [Emphasis added]

22(3) Without limiting subsections (1) and (2), the Lieutenant Governor in Council may make regulations for the following:

(g) the imposition of penalties for enforcing a provision of the regulation.

80. From this language, the Legislature intended that commodity boards themselves be granted the power – independently of the powers conferred on the Courts - to exercise effective control over the marketing of natural products. In our view, “effective control” would in practical terms be crippled if the Chicken Board could not exercise key powers with the purpose of deterring future contraventions. The proposition that deterrent “purposes” are within the scope of s. 22(2) is reinforced by the fact that “effective control” includes the Cabinet’s ability to vest a specific

power to impose penalties for enforcing a provision of “the regulation”: s. 22(3)(g). The same intent is reflected in s. 11(1)(i) of the *Act*, which allows Cabinet to grant a marketing board power to cancel a licence for violation of a provision of the scheme, or of a board order. Within the larger statutory context, it is clear that these provisions are not limiting provisions, but are rather illustrative of the larger legislative intent to empower commodity boards to take effective enforcement action.

81. This brings us to the *Scheme*, which establishes the Chicken Board and its authority. Consistent with the purpose of the *Act*, the Lieutenant Governor in Council has defined the *Scheme*’s purpose broadly and comprehensively:

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.

82. Following our obligation to interpret legislation in accordance with its purpose, the *Scheme* itself tells us that its purpose is to provide for the “effective...control and regulation”, “in any and all respects” of the production and marketing of chicken. These words are not superfluous. They are not words of limitation.

83. What specific powers do the Chicken Board have to achieve these purposes? The answer to this is found in s. 4.01 of the *Scheme*, relevant portions of which are quoted below:

4.01 The board shall have the power within the Province to promote, regulate and control in any respect and in all respects, to the extent of the powers of the Province, the production, transportation, packing, storage 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 heretofore or hereinafter enumerated, and without the generality thereof shall have the following powers:

- (a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be packed, stored or marketed; to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be produced, transported, packed, stored or marketed by any person at any time; to prohibit the production, transportation, packing, storage or marketing of any grade, quality or class of the regulated product....
- (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;
- ...
- (e) to cancel any licence or permit for violation of any provision of the scheme or of any order of the board or of the regulations;

84. As the preliminary words of section 4.01 plainly state, subsections (a) – (p) only illustrate the more general authority granted to the Chicken Board to regulate chicken marketing in any and all respects. They are not discrete provisions, but are to be read together, working in harmony with the overall legislative objective of ensuring effective control over regulated marketing by the Chicken Board.
85. Within this context, the Appellant’s call for a narrow reading of the *Scheme*, which would fetter the Chicken Board’s ability to exercise its specific powers to discourage certain conduct, cannot stand.
86. The power exercised by the Chicken Board in this case was specifically authorised by the *Scheme*. The Chicken Board has the specific authority to determine the quantity of the regulated product that shall be produced by any person at any time. It has the power to prohibit production. It has the power to revoke or reduce quota. Production and quota depend on having a licence to produce. The Chicken Board has the express power to cancel a licence for violating board orders. We agree with the Respondent that this power - especially in the context of the opening words of s. 4.01 and the purpose of the *Scheme* in s. 2.01 - necessarily implies the authority to impose terms and conditions suspending quota production under an existing licence for such breach. This authority comes as no surprise to licensees, as reflected in the both the application for a licence and the licence document itself:

This licence is subject to cancellation for the violation of any provision of the Scheme, an Order of the Board or the regulations and is subject to all restrictions now or hereinafter placed thereon by the order of the Board.

87. The Appellant made this submission: “like the power to tax, the power to impose penalties must be expressly given or it does not exist. No liberal principle of interpretation or “necessarily incidental” doctrine can make up for an absence of specific statutory wording in this area.” The Panel disagrees. First, the legislation is, for the reasons already given, very clear. Secondly, even in taxation statutes, the old “strict construction” principles no longer apply: Driedger, *Construction of Statutes* (3rd ed.), p. 405.
88. The paramount principle is that of achieving legislative intent, which is also the foundation for the ancillary powers doctrine. To the extent that the Chicken Board is relying on this doctrine, it is doing so not to introduce a foreign notion into the *Scheme*, but instead to support the proposition that, where there is an express power to cancel a licence for breach of a Board order, licensing action can also include the suspension of quota production in light of the other specific powers listed in s. 4.01, and the language and purpose of s. 2.01.
89. As noted earlier, the Appellant’s case relies on two recent Federal Court of Canada decisions concerning actions taken by the federal Fisheries Minister respecting snow crab fisheries licences: *Matthews v. Canada*, (TD), supra; app. dismiss. [1999]

FCJ No. 830 (CA); leave to appeal to S.C.C. dismissed April 20, 2000; *Thibeault v. Canada*, supra. These decisions are not binding in British Columbia. The Supreme Court of Canada's decision to refuse leave to appeal does not necessarily imply approval of their results. Nevertheless, we have considered whether these decisions alter our analysis of the Chicken Board's authority. They do not.

90. *Matthews* and *Thibeault* bear superficial similarities to the case on appeal. Both involve statutes which make mention of "licences" and "quota". Both involve statutory decision-makers that can exercise discretion. Both confer an "enforcement" role on the Courts. In this context, both decisions contain strong language upon which the Appellant has relied:

Matthews (TD) supra, para. 28:

Parliament, by the Act, specifically provided for a variety of penalties, including a prohibition from gaining a new licence, to be imposed by a court, where procedural safeguards associated with the judicial process are available, and it did not authorize the imposition of penalties by another administrative process. In my opinion, it is implicit that Parliament did not intend that penal powers are to be exercised by the Minister. Thus, in exercising his or her authority to issue or not to issue a licence pursuant to section 7, the Minister may not do so for the purpose of imposing penalties or sanctions for past licence violations. It may be that past compliance with terms of a licence by an applicant can be a relevant factor for the Minister's consideration as an aspect of conservation when deciding whether to issue a licence, as it was in *Everett*, but section 7 (the general licensing authority) may not be exercised for the primary purpose of penalizing an applicant. If the Minister wishes to impose a penalty against a person who has reportedly violated the Act, the Regulations, or the terms of his or her licence, Parliament, by providing the penal provisions of the Act, has directed how that purpose is to be met, by prosecution under the Act.

Thibeault, supra, at para. 33:

...The Minister's general power to issue or refuse to issue a licence cannot be exercised primarily for punishment purposes. On the pretext that an offence undermines conservation, the Minister has developed a new scheme distinct from that provided for in the Act that permits him to deal ruthlessly with an offender without having to offer the offender all the safeguards available in a court of law.

This initiative by the Department originates in an internal policy that provides for sanctions pursuant to section 7 of the Act for conservation-related violations, which are defined as "involv[ing] violations of conditions of the licence and of the Act and regulations". Thus, any violation of the Act and regulations is considered a conservation-related violation that can result in the imposition of a sanction pursuant to section 7 of the Act. That was surely not Parliament's intention, as it had already expressly set out a full range of sanctions for offences in the Act. If this process is unsatisfactory, it is always open to Parliament to introduce a new one by amending the Act. However, this cannot be done using the existing provisions, which were not enacted for this purpose...

91. *Matthews* and *Thibeault* do not stand for any general proposition of law that the existence of judicial remedies in a statute implicitly excludes the ability of regulators to take administrative action to discourage contravention of the

legislation. As noted above, in provincial regulatory legislation, the reality is very much the opposite. Moreover, each statutory context must be interpreted on its own terms. In both the *Act* and the *Scheme*, there is a patent legislative intention to confer on the Chicken Board power to effectively control and regulate marketing “in any and all respects”, which clearly and necessarily includes the power to limit production of a licensed grower for contravention of the Chicken Board’s orders.

92. We observe that *Matthews* and *Thibeault* do not even stand for the narrower proposition that the federal Fisheries Minister cannot take action to suspend or cancel an issued fishing licence for breach of licence conditions, something which is expressly provided for in the *Fisheries Act*: *Thibeault*, para. 9. The sole finding in *Matthews* and *Thibeault* is that the Minister’s discretion to refuse to “issue” a fishing licence under s. 7 of the federal *Fisheries Act* may not be used as a punishment for past misconduct, especially since that very remedy is one of the many “sentencing” options available to a Court after prosecution for an offence.
93. The appeal before us has nothing to do with the issuance of licences. The plain words and intent of the legislation as it pertains to the Chicken Board’s authority to take action for contraventions by licence holders are clear. There is no judicial remedy in the *Act* that contemplates the specific type of administrative action taken here, and even if it did, the overlap in the context of this statute would be entirely appropriate. Further, while we find that this legislative scheme authorises the Chicken Board to exercise administrative powers that have a “penalty” character, it is open to serious question whether, on the facts of this case, the Chicken Board’s action is truly “penal” in nature. More will be said on that issue further below.
94. We do not find apt the suggestion that permitting the Chicken Board to take independent administrative action is akin to authorising it “to deal ruthlessly with an offender without having to offer the offender all the safeguards available in a court of law”: *Thibeault*, supra. While it may be the intent of the federal *Fisheries Act* that contraventions be processed primarily or exclusively through the *Criminal Code* with all that entails, provincial enactments like the *Act* and *Scheme* which provide for co-existing administrative sanctions are based on the legislative wisdom that decision-makers can and should be assumed to act in the public interest, according to civil standards of proof. The criminal process is appropriate for “offence” proceedings; administrative proceedings are not meant to be a prosecution.
95. Under the *Act* and *Scheme*, the Chicken Board has a much more central and all-encompassing legislative and enforcement role than does the federal Minister under the *Fisheries Act*. The Chicken Board’s accountability for erroneous decisions is also subject to the full and independent review by the BCMB, something, which has no counterpart in the federal fisheries statute.

96. The Appellant also made reference in argument to *R. v. Abitibi Price Inc.* supra. That case holds that the power to make regulations does not include the power to impose penalties or create offences, unless such power is expressly given. Here, the Chicken Board was not creating an offence, or making regulations. It was exercising powers specifically given to it by the *Scheme*, and was doing so in accordance with the specific purpose of the *Scheme*. Whether the exercise of its authority was appropriate is a question we will come to below.
97. For the reasons we have given above, we conclude that the Chicken Board has the clear statutory authority to take reasonable administrative action to reduce production under a licence, which action is taken not only to compensate but to discourage conduct in contravention of the Chicken Board's orders.

Propriety of Chicken Board's Actions

98. In coming to a decision on this question - which addresses the Appellant's submissions on both the "process" and the "penalty" - it is first necessary to understand the real nature of the action taken by the Chicken Board in this case.
99. First, as to process, the Appellant argues that the Chicken Board's decision should be set aside because there was no specific "order establishing the penalty for the offence", resulting in "unstructured administrative discretion" and "inconsistent treatment".
100. This submission appears to be predicated on the notion that the Appellant was being punished for an offence. This is incorrect. The Chicken Board was not prosecuting the Appellant. It was exercising an administrative discretion. Such discretion does not require a "rule book" which dictates the outcome of any particular "contravention". While it is open to the Chicken Board to articulate a policy on how it might ordinarily exercise its discretion, such a policy is not required and could not be binding.
101. Nor are we persuaded – even if there were appropriate evidence before us on this issue – that the way the discretion has been exercised in the past should be conclusive in this case. The merits of past exercises of discretion are not before us and we are not prepared to assume they were correct or incorrect. The real issue, in our view, is whether the exercise of that discretion was appropriate in these circumstances, a question to which we now turn.
102. The Appellant was the holder of 11,000 roaster birds (20,935 kg) of quota per cycle. That quota is not an absolute right to produce "quota" whenever and wherever a grower wants. Quota is a privilege, within the exclusive control of the Chicken Board. Quota production is authorised only when it accords with the terms and conditions established by the Chicken Board in the lawful exercise of its discretion: *Scheme*, s. 4.01(c.1).

103. In this case, the Appellant applied for and received approval to transfer his quota production to the Lower Mainland. In April 1999, he received that approval subject to compliance with Chicken Board Orders, one fundamental aspect of which is that production be grown at a production unit approved by the Chicken Board: General Orders (1987), s. 5(e).
104. On July 5, 1999, the Appellant first placed chicken in unauthorised premises. At that time, he was “under produced” by 44,723 kg (according to the October Quota Production Order). However, Mr. Beattie in his cross-examination of the Appellant thought this may be in error and in actual fact the real figure may be closer to 52,000 kg (A-24 under production 31,468 + 20,935 = 52,403). Being “under produced” meant that the Appellant needed to bring production into some degree of balance by September 1999 or potentially face an under production penalty, subject to the discretion of the Chicken Board. The operation and rationale for the Chicken Board’s over and under production requirements have been described in previous decisions of the BCMB.
105. Starting in the spring of 1999, the Appellant faced a dilemma because he could not find a Lower Mainland production unit in which to grow chicken. Rather than approach the Chicken Board for a solution to the issue – whether by way of approval for alternate premises or comfort on the under production issue on the grounds that he could not find an approved facility to grow quota - the Appellant proceeded instead to grow chicken in unauthorised premises. In two cycles, he grew 142,505 kg of chicken, which amounted to just over his annual production. Having discovered the Appellant’s unauthorised production, the Chicken Board purported to “penalise” the Appellant by directing him to stand down for 381 days of production, in a direct kilogram for kilogram “accounting” of the unauthorised production. The Appellant’s quota of 20,935 kg per cycle is the equivalent of 373.84 kg per day. Thus, to account for the unauthorised production, the Chicken Board determined that the Appellant should be suspended from August 23, 1999 until September 7, 2000.
106. What is the real effect of this “suspension” on the Appellant? Leaving aside the previous “under production”, in two cycles the Appellant unlawfully grew in excess of one year’s production. Thus, by the time the Chicken Board discovered him, he had grown what he might have lawfully produced in an entire year. In that light, the Chicken Board’s action to require the Appellant to stand down until September 2000 is not a penalty. Had this chicken been grown under quota in a registered premises, the Appellant would have been required to stand down until his production was in line with his quota in any event, or face the risk of over production penalties. Apart from the issue of the under production which is discussed below, the effect of standing down has no net effect at all, and places the Appellant roughly in the position he would have been had he lawfully produced his quota and avoided over production.

107. In fact, to be accurate, given that the Chicken Board started its “stand down” from August 23, 1999, the 381 days does not set off all the unauthorised production. The Appellant grew 66,173 kg of unauthorised chicken between August 23 and October 18, 1999. To count this period as part of the 381-day “stand down” does not result in a kilogram for kilogram offset. How can part of the period of unauthorised production be used to off set that very same unauthorised production? To accurately offset the unauthorised production, the Chicken Board should have required the Appellant to stand down 381 days commencing after he stopped his unauthorised production. Using October 19, 1999 as a start date, the Appellant should have been required to stand down until November 3, 2000. Allowing the Appellant to start production on September 7, 2000 results in a two month (or one cycle) benefit over a lawful producer.
108. It follows that the kilogram for kilogram accounting of the type required in this case does not, by itself, amount to a penalty. Nor is it even “compensatory”. As seen above, it in fact results in a benefit to the Appellant in that he can start production earlier than he lawfully could have.
109. The effect of equivalent action would be different in a situation where a grower produced his chicken at a more measured pace from an unauthorised premises but in accordance with his quota. In that situation, if the grower, who holds 20,000 kg of quota, grows all the quota for a particular cycle in an unauthorised premises, a decision to require him to account on a kilogram for kilogram basis means that in the next cycle he does not produce any chicken. The effect of that decision is that the grower loses one cycle of production. He never regains that lost production and at year-end he would have produced one less cycle of chicken. In this circumstance, the grower has effectively compensated on a kilogram for kilogram basis for his unauthorised production. Compensatory action of this type is difficult to call a “penalty”, although for the reasons given above, the label attached to such action makes no legal difference given the Chicken Board’s authority.
110. This is not, however, the situation for the Appellant. He has profited from what amounts to a year of production up front. Contrary to the Appellant’s argument, the effect of standing down for less than a year on this Appellant is nothing. There is no penalty. To truly compensate on a kilogram for kilogram basis for the unauthorised production, the Appellant would in fact have to stand down production for a further year.
111. Having this understanding of the effect of the “penalty” on the Appellant, it is necessary now to consider the issue of his under production. It appears that the Chicken Board intends the Appellant to start production in September 2000 at “zero”. It is unclear based on the evidence called and the arguments made by the Chicken Board whether in starting at “zero”, the issue of the under production was specifically considered. We note however that we have the authority to consider the result of the Chicken Board’s action on the Appellant, and if we regard it as inordinate, can make an order we consider appropriate in the circumstances.

112. Given the Panel's finding that the "stand down" action directed by the Chicken Board is, on its own, neither a penalty nor even compensatory, what is the disincentive for growers who opt for the course taken by the Appellant? He has contravened Chicken Board orders. This contravention is not merely technical as seems to be implicit in the Appellant's submission. In order to regulate, control, and manage production, the Chicken Board needs to know where and when the production is grown. The mischiefs associated with unauthorised production are many and obvious. The Chicken Board's legal right to issue quota includes the right to specify where quota may lawfully be grown. Quota grown somewhere other than a place authorised by the Chicken Board is not quota production and as such should be discouraged.
113. Appropriate action flowing from growth in unauthorised premises will depend on the circumstances, and so the Panel is mindful of the Appellant's particular circumstances. He experienced difficulty purchasing a Lower Mainland production unit. His processor, Lilydale, requested that he lease his quota on the Lower Mainland, as they did not want any more Vancouver Island production. Unfortunately, due to the high water experienced in the Fraser Valley in the summer of 1999, Lilydale did not have any growers with available barn space to lease the Appellant's quota. No doubt this placed the Appellant in a difficult situation. However, he chose not to approach the Chicken Board for assistance and instead proceeded to rent a facility to grow his chicken. This Panel cannot second-guess the decision of the Chicken Board had the Appellant sought approval of this barn rental arrangement.
114. Instead, the Appellant went ahead and began producing chicken without authority. By doing so, he placed himself in a better financial position than if he had either leased his quota or lawfully produced chicken. He did not advise the Chicken Board of the fact that he would be growing his quota at these two Lower Mainland locations nor did he seek their approval of the rental arrangement. Production at this location was unauthorised quota production. Contrary to his counsel's submission, he was not "doing what he's meant to do, according to the most fundamental mandate of the Board". In our view, the most fundamental mandate of the Chicken Board is to ensure that growers engage in lawful production of their quota.
115. The Panel is of the opinion that that some form of action to discourage the contravention of Chicken Board orders and encourage supply management principles is appropriate in these circumstances. If the Appellant is allowed to commence production on September 7, 2000 (two months early) with his under production of approximately 52,000 kg intact, he is placed in a better position than had he proceeded lawfully. He has produced, when he likely would not otherwise have produced, in circumstances where his cost of production was likely lower. Due to a recent drop in the price of chicken, the Appellant received more for chicken produced in 1999 than he would otherwise have received. He has not been

subjected to under production penalties, which arguably could have been levied by the Chicken Board.

116. Accordingly, the Panel is of the opinion that the Appellant's under production should be cancelled, as that appeared to be the end result of the Chicken Board's action. This result at least provides some compensatory effect for the unauthorised production in the unique circumstances of this appeal, although not on the 1:1 basis reflected in the Chicken Board's stated rationale.
117. The Panel is not prepared to revise the Chicken Board's direction that the Appellant can commence placements on September 7, 2000 even though as noted above, a more appropriate start date would be November 3, 2000. As a result, the Appellant is being permitted to grow 20,935 kgs of production he otherwise would not have.
118. We wish to make it clear that although the disincentive to this Appellant is small, (approximately 31,000 kg or 1.5 cycles lost production) we see this result as appropriate in the unique circumstances of this appeal. However, we want to be equally clear that we are in no way questioning the ability or appropriateness of the Chicken Board imposing over and under production penalties in accordance with its existing orders. Nor are we interfering with the Chicken Board's ability to eliminate a grower's under production amount in addition to requiring the grower to account for his unlawful production. While all action taken by the Chicken Board must reflect a reasonable exercise of authority, we underline that in our view a vigorous and credible enforcement system is a cornerstone of effective supply management.

ORDER

119. The appeal is dismissed.
120. The BCMB directs that the Appellant may commence placements, under the terms of his licence and in accordance with the Chicken Board's letter of December 10, 1999, as of September 7, 2000.
121. The BCMB directs that the Chicken Board cancel the Appellant's under production.
122. There will be no order as to costs.

RECOMMENDATION

123. The Panel recommends that the Chicken Board review its approach to dealing with this type of unauthorised production. As seen in this case, a straight application of the kilogram for kilogram principle does not, by itself, result in any disincentive to this Appellant (compensatory or penal). In other scenarios, application of this approach may have very different results depending on the amount, pace or type of

the unauthorised production. Any policy developed by the Chicken Board should also incorporate some discretion to consider the individual circumstances and avoid extreme consequences.

Dated at Victoria, British Columbia, this 26th day of June, 2000.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Satwinder Bains, Member

Harley Jensen, Member