

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*, AND AN
APPEAL FROM A DECISION OF THE BRITISH COLUMBIA CHICKEN MARKETING
BOARD CONCERNING THE ASSESSMENT OF AN OVERPRODUCTION LEVY FOR
PERIOD A180

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

BETWEEN:

B&L POULTRY LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board:

Pawan Joshi, Presiding Member

For the Appellant:

Bud Dykshoorn, Owner/Operator
Lynda Dykshoorn, Owner/Operator

For the Respondent:

Claire Hunter, KC

Date of Hearing:

November 15, 2023

Location:

Abbotsford, BC

INTRODUCTION

1. The Appellant, B&L Poultry Ltd. is a commercial chicken grower in Abbotsford, BC. The Appellant is appealing a decision issued by the British Columbia Chicken Marketing Board (the Chicken Board) to deny relief from an overproduction levy assessed against the Appellant for quota production period A180 (the A180 Period).
2. The Appellant received a total allotment of 78,998 kg from the Chicken Board for the A180 Period (December 18, 2022 to February 11, 2023). However, the Appellant produced a total of 91,843 kg for the A180 Period which was 114.65% of the total allotment issued to the Appellant for the period.
3. On April 14, 2023, the Appellant received their quota production update which showed a penalty of \$4,006.00 for overproduction in the A180 Period.
4. On April 27, 2023, the Appellant requested that the Chicken Board reconsider the overproduction levy applied to the Appellant for the A180 Period. The Appellant requested that the Chicken Board adjust the overproduction sleeve retroactively to the A180 Period to expand the sleeve in the same manner as was subsequently done for the A182 quota production period (the A182 Period). The Appellant submitted that:
 - *On Nov 15, 2021, our farm was one of many that was inundated with water from devastating floods that overtook Sumas Prairie. We lost 30,000 birds that was on first floor that Monday. On Thursday, our power went out for 7 hours. Because the generator was under water, we had no back up power to ventilate the barns. We lost another 5,000 birds. Needless to say, we were told that there would be no opportunity to regrow that chicken.*
 - *Less than a year later, AI took a firm grip of Sumas Prairie and South Abbotsford. With many broiler farms being either infected or forced to sit empty due to the containment zones, chicken production was once again heavily impacted in BC. Why did it take the Board until March 31 to take action and allow farms that had the ability, to grow a little extra chicken? We happened to have one of the best flocks of our 25 years in A181 and as a result shipped 112% of target. As a result, we were hit with a substantial overproduction levy. Why, when there were so many farms out of production, was there no flexibility for those that were able to fill in some of the gaps for an industry, struggling to fulfill market demand?*
 - *In the future, we would encourage the Board to develop a policy that allows producers to make up for the lost production due to circumstances beyond their control, and work with producers that are able to fill in some of the gaps during those times.*
5. On June 16, 2023, the Chicken Board issued its decision to the Appellant denying their request for relief from the overproduction levy that had been assessed against them.

6. The Chicken Board noted in its decision that overproduction levies are consistent with sound marketing policy. The Chicken Board included a SAFETI analysis of their decision to assess an overproduction levy against the Appellant for the A180 Period as follows:

Strategic

The Board has the jurisdiction to deal with the issue of overmarketing levies as per Part 27 Over-marketing and Over-placement of the August 26, 2011 General Orders. Period-by-period compliance brings more discipline to chicken production. Given that CFC can assess a penalty under the Federal Provincial Agreement (FPA) for over production in excess of 102% of a province's allocation, it is very important to ensure that growers produce their allotment in a given period. In order to manage production, the Chicken Board determined that a 6% sleeve for under and over production was necessary. By imposing this discipline, the Chicken Board lessens the risk of BC being penalized under the FPA, an agreement that is signed for the benefit of the entire industry.

Accountable

The Board is accountable to all growers with regard to consistent application of the General Orders and is accountable to the public and all other provincial boards. The Over Marketing (OM) section of the General Orders has been upheld by FIRB (see Sunset/Shiell appeal decision of November 7, 2003). FIRB has previously determined that when a grower uses due diligence and yet still overproduces as a result of circumstances beyond his control, the Chicken Board remains correct in concluding that such penalties are a cost of the overall privilege of doing business as a quota holder. The supply management system, including the FPA, confers enormous benefits on growers by way of quota and by way of stability of price and production. As quid pro quo, growers should accept the cost of production over their allotment tolerances. FIRB concluded that also as a matter of sound marketing policy, it is not correct to accept a "due diligence" defense to over production by a grower.

Fair

The General Orders apply to all registered growers. In regulating the chicken industry both within the province and nationally, it is the Chicken Board's responsibility to ensure that growers comply with policy rules and produce their allotment within certain tolerances. Penalties for over and under production play an important role in meeting this responsibility.

The Board has consistently declined requests from diligent and responsible growers for relief from monetary penalties for over and under marketings. Rarely and only in very exceptional circumstances has the Board approved request for relief from over or under marketing levies.

The grower was paid the current live price on all chicken produced in A-180 at \$1.2800/kg live weight whereas the overmarketing levy was 44 cents/kg live weight (106 -110%) or 66 cents/kg live weight (beyond 110%). In this case over production:

- *Over production from 6% -10% sleeve was 3,160 kilograms for which the grower received the Board posted live price which totaled \$4,044.80 (3,160 kg x \$1.2800/kg live weight) and*

- *Over production beyond the 10% sleeve was 3,674 kilograms for which the grower received the Board posted live price which totaled \$4,702.72 (3,674 kg x \$1.2800/kg live weight).*
- *Total monies received by the grower for the OM product was \$8,747.52 (\$4,044.80+\$4,702.72).*
- *The OM penalty assessed by the Board was \$3,815.24 plus GST for a total of \$4,006.00 and was in accordance with the Board rules.*

Effective

The overproduction penalty in supply management is an economic policy measure fundamental to ensuring that supply management, which benefits the entire industry, is effective.

Transparent

Since the 2003 FIRB decision, only minor administrative changes have occurred to Part 27 Over Marketing and Over Placement general Orders. Every grower has a copy of the complete book of General Orders and receives periodic updates from time to time.

Inclusive

The Order at Part 27 is well known throughout the industry and is applied equally to all growers. The Board has other rules to excuse growers for failure to perform an obligation under the General Orders (see Part 20 Force Majeure Event).

7. On July 13, 2023, the Appellant filed its appeal with the British Columbia Farm Industry Review Board (BCFIRB) of the June 16, 2023 decision of the Chicken Board (the Decision).

ISSUE

8. Did the Chicken Board err in its June 16, 2023 decision denying the Appellant relief from the overproduction levy applied to the A180 Period?

EVIDENCE AND SUBMISSIONS

9. In addition to the documents and written submissions provided by the Appellant and the Chicken Board (the Parties) to this appeal, the Parties provided oral evidence and submissions to the Panel at the hearing which is summarized below. The Panel has reviewed and considered all of the evidence presented by the Parties and has included in this written decision the relevant portions of that evidence that are material to the Panel's determination of the issues at stake in this appeal.

Evidence of the Appellant

Kyle Andersen

10. Mr. Andersen testified that he has worked with the Appellant as their hatchery representative for approximately the last 20 years. Mr. Andersen is involved with production co-ordination for the hatchery and processing placement for the

processor, Sunrise Farms (Sunrise). Mr. Andersen is provided with the processing allocation schedule from Sunrise which is then in turn broken down into grower allotments. He then works with the individual growers as per the schedule to ensure that Sunrise receives the product that they need.

11. Mr. Andersen placed chicks with the Appellant for the A180 Period, with a target to keep production below 100% of the allocated quota. The Appellant did not ask to place extra chicks and did not target to capture extra production.
12. Mr. Anderson confirmed that as per form BC101 for the A180 Period, which is the contract signed between the hatchery-processor and the grower (the Contract), the total allotment for the Appellant was set at 78,998 kg. As per the placement/marketing schedule, the proposal was to place a total of 39,000 chicks, with a placement date of December 12, 2022, and a shipment date of January 16, 2023 (35 days). The Appellant was to ship a total of 38,189 chicks with a target weight of 2.15 kg per chick.
13. The Contract was revised on November 24, 2022, November 28, 2022, December 2, 2022, and December 9, 2022. As per the revised placement/marketing schedule the proposal was to place a total of 34,500 chicks, with a placement date of December 16, 2022 and a shipment date of January 23, 2023 (38 days). The Appellant was to ship 33,783 chicks with a target weight of 2.34 kg per chick.
14. As per the Appellant's shipment reconciliation report for the A180 Period, the total number of chicks placed was 35,190, which was 2% more than what was proposed pursuant to the revised placement/marketing schedule. The total of 33,972 chicks were shipped with a total weight of 90,572 kg and an average weight of 2.67 kg per chick. The result was an overproduction amount of 11,574 kg.
15. There was a significant difference in the target average weight of 2.34 kg and the actual average weight of 2.67 kg. Mr. Andersen noted that it is not a standard practice to ship chicks early, and that the grower can take flock management steps to try to slow down the growing weight of the chicks.

Lynda Dykshoorn

16. Ms. Dykshoorn is co-owner of the Appellant's company and testified on behalf of the Appellant. Ms. Dykshoorn referred to a letter from the British Columbia Chicken Grower's Association (BCCGA) to the Chicken Board dated February 3, 2023. As per the letter, the BCCGA requested that the Chicken Board allow for an increased overproduction sleeve of up to 10%.
17. Ms. Dykshoorn noted that on March 30, 2023, the Chicken Board communicated to the BCCGA that a decision had been made to increase the overproduction sleeve from 6% to 10% for the A182 Period (shipment date April 9, 2023) and

going forward as per the BCCGA's request. On March 31, 2023, the Chicken Board sent a memo to the BCCGA confirming the change.

18. Ms. Dykshoorn stated that it was not reasonable for the Chicken Board to take eight weeks to make the decision on the request submitted by the BCCGA, particularly at a time when the Fraser Valley chicken growers were dealing with the effects of Avian Influenza (AI) infections.
19. On April 14, 2023, the Chicken Board communicated to the Appellant regarding the overproduction levy that had been assessed against the Appellant for the A180 Period. On April 27, 2023, the Appellant submitted its appeal to the Chicken Board. The appeal was brought by the Appellant after the Chicken Board had approved the change to the overproduction sleeve from 6% to 10% for the A182 Period and for quota periods going forward.
20. Ms. Dykshoorn noted that the Appellant has not previously appealed any of the Chicken Board's decisions to impose overproduction levies. They have paid the levies and have remained in good standing.
21. However, Ms. Dykshoorn stated that it was not reasonable to expect the Appellant to predict the target weight of a 38-day chick at time of the placement. During the A180 Period the Appellant's main concerns were to keep the chicks alive and to ship them in accordance with the Contract. Ms. Dykshoorn noted that there were rare and exceptional circumstances during the allocation periods of A179, A180 and A181.
22. Ms. Dykshoorn stated that the Appellant has held a grower license for the last twenty-five and a half years, and that she is familiar with the General Orders. She noted that they provided the chick placement information for the A180 Period to the Chicken Board, as per part 16 of the General Orders.
23. She noted that the Contract was revised due to issues with the neighbouring poultry farm having AI, the resulting challenges to bring chicks to the Appellant's neighborhood, and the overall availability of chicks for placement.
24. Ms. Dykshoorn noted that the Appellant had previously grown chicks for 29-35 days, with the approximate target weight of 2.15 kg. The Appellant noted they could not have reasonably visually confirmed that the chicks for the A180 Period were bigger than the previous allocations periods, and they also did not want to bring outsiders onto their farm to review their flock in the middle of an AI outbreak. It was determined a week after the chicks were shipped that they were larger than the target weight. It was also not possible to request the processor to ship the chicks early. She noted that the Appellant did not take any steps to manage the weight of the chicks because their focus was to keep the chicks alive due to potential AI infections.

25. The Appellant earned \$22,578.48 as a result of its overproduction in the A180 Period. The Appellant has had its production reduced by 11,574 kg for the A186 allocation period due to its equivalent overproduction in period A180. Ms. Dykshoorn stated that the reduction in the A186 allocation period will cause financial losses amounting to a potential \$26,000 reduction in revenues.
26. Ms. Dykshoorn noted that they did not want to keep the chicks for an extra period of time required by the processor during the A180 Period due to the potential for AI infections in their flock. She noted that if they had the option to grow their flock for a shorter period of time during that quota production period, they would have preferred that option.
27. Ms. Dykshoorn testified that the Appellant is not in a cash positive position and that its negative cash position is due to the overproduction levy and the reduction of the quota that it can produce in the A186 period. She noted that they were penalized for overproduction when there was underproduction and a shortage of chicken during the A180 Period.
28. Ms. Dykshoorn noted that the Appellant would not have appealed the overproduction levy if the Chicken Board had not changed their overproduction and underproduction penalty structure for the periods of A182 and onwards.

Evidence of the Respondent

Chicken Board Witness Panel: Andrew Siemens and Kevin Klippenstein

29. Mr. Siemens is the Executive Director of the Chicken Board and Mr. Klippenstein is the Chair of the Chicken Board. Mr. Siemens and Mr. Klippenstein testified for the Chicken Board as a panel (the Board Panel).
30. The Board Panel explained the provisions governing the under production and over production of chicken in the province of British Columbia as set out in Part 26 and 27 of the General Orders.
31. The Board Panel noted that there are two main reasons for under and over production penalties. First, as per the national allocation system if the Chicken Board produces more than 102% of the allocated quota for two cycles, then there is a national penalty, which affects all of the chicken growers in BC. Second, the penalties discipline the producers to provide the processors and the consumers with the product that they want. The processors request that the growers achieve a set target weight for the chicks, which reflects the market demand from the consumers.
32. In March 2023, the Chicken Board made a temporary change to the A182 Period, and for allocation periods going forward, to relieve the levies for overproduction up

to 110% of the allocated amount for any particular grower in response to a request made by the BCCGA.

33. On April 27, 2023, the Chicken Board received an appeal letter from the Appellant, regarding the overproduction levy that had been assessed against the Appellant for the A180 Period. On May 9, 2023, Mr. Siemens sent a response to the Appellant noting that he would bring the Appellant's letter before the Chicken Board at the next board meeting, scheduled for June 7, 2023.
34. On June 1, 2023, Chicken Board staff prepared a briefing note for the Chicken Board to present along with the Appellant's May 1, 2023 letter. In the briefing note options were included for the Chicken Board regarding the Appellant's request to have the overproduction levy issued against the Appellant for the A180 Period retroactively waived.
35. The Chicken Board's meeting was held on June 6, 2023. Mr. Klippenstein testified that the Appellant's May 1, 2023 letter was discussed at the board meeting. The board looked at the SAFETI principles, past practices and the Appellants particular circumstances. The main issue for the Appellant was that it had overproduced its allotted quota due to its flock being overweight. The processor had requested a certain average chick weight but the Appellant had produced chicks that on average weighed more than the targeted weight. The processor accepted the chicks despite the weight issue. The Chicken Board applied the overproduction levy as a matter of sound marketing policy and to avoid any overproduction penalties from the National Board.
36. At that same meeting the Board Panel discussed another grower that had overproduction levies assessed against it for the A180 Period. In that case, 2,000 chicks were transferred from a grower who could not keep them due to AI, and if the transfer had not occurred the chicks would have been euthanized. When the Chicken Board considered that growers potential overproduction levies for the A180 period, the total weight was calculated after taking out the 2,000 transferred chicks to account for that exceptional circumstance.
37. However, the Appellant's situation was considered to be fundamentally different by the Chicken Board. The Appellant had placed the chicks as per the allocated quota and their Contract with the processor, but then produced chicks that were simply over the target weight. The overproduction was not a result of any extraordinary circumstances but was simply a matter of the flock having been grown too heavy.
38. Mr. Klippenstein further stated that the Chicken Board was very sympathetic to growers given the circumstances of the past 4 years which included the Covid-19 pandemic, the flooding in the lower mainland in 2021, Avian Influenza outbreaks, the heat dome of 2021 etc., however the Chicken Board still had to maintain orderly marketing. The Chicken Board did not allow the Appellant's request, as to have done so, would have created a precedent that growers could benefit from

producing overweight chick's contrary to their allocated quota and their contractual obligations. The Chicken Board considered and applied the SAFETI principles for sound marketing and concluded that granting the Appellants request would not be in accordance with sound marketing.

39. The Board Panel acknowledged that the Chicken Board has the discretion to reduce or waive levies in exceptional circumstances and that in the case of the grower who accepted the transferred chicks that would have otherwise been destroyed due to AI, the Chicken Board exercised its discretion to account for those exceptional circumstances. Mr. Siemens testified that the Appellant's production of overweight chicks was not a result of any exceptional circumstances.
40. Mr. Siemen further testified that a particular grower's losses in any period cannot be re-allotted to a future period, as requested by the Appellant, as that additional allotment would have to come from other growers because the allotment for the entire provincial chicken sector is done on a period-to-period basis.

LEGISLATIVE FRAMEWORK

41. Under the *Natural Products Marketing (BC) Act, R.S.B.C. 1196, c. 30 (NPMA)* the Lieutenant Governor in Council has the power to establish boards and commissions, and to confer upon them certain powers (section 11).
42. Pursuant to this power, the Chicken Board was established by the *British Columbia Chicken Marketing Scheme, B.C. Reg. 188/61 (Scheme)*.
43. As set out at paragraph 2.01 of the Scheme:

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.
44. The Scheme grants the Chicken Board broad powers. The Chicken Board exercises these powers through its General Orders. The Scheme (Section 4.01) includes 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 any regulated product; and to determine the charges that may be made for its services by any designated agency;
 - (b) to exempt from any determination or order any person or class of persons engaged in the transportation, production, packing, storing or marketing of the regulated product or any class, variety or grade thereof...

(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; ...

(l) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and effectively regulate the production, transportation, packing, storage or marketing of the regulated product, and to amend or revoke the same.

45. The Chicken Board's General Orders include the following definitions:

- "Allotment" means federal and provincial quota allotted, in any form, to a producer for a period by the Board on behalf of CFC and pursuant to its own jurisdiction respectively;
- "Marketing" includes producing, buying, selling, disposing of and offering for sale or other disposition.
- "Market development quota (MD)" means a form of quota allocation for allotment to producers by the Board pursuant to a provincial market development program that is in accordance with a market development policy developed by CFC;
- "Production allotment" means the percentage of quota (domestic and may include Market Development quota) plus any adjustments, for the production and marketing of a quota production period specified by the number of kilograms of chicken allotted by the Board to a grower;
- "Quota" means a specified number of kilograms measured in live weight assigned by the Board to a grower and includes mainstream quota, specialty quota, pro-rata quota, or market development quota. It does not include permits issued under Part 50;
- "Quota production period" means a marketing period expressed in a number of days or weeks determined from time to time by the Board;

46. The Chicken Board's General Orders also include the following sections which are relevant to this appeal:

16.1 At the time of receipt of chicks, every grower shall complete, for each load of chicks received, the prescribed form in respect of the registered premises at which the chicks are placed. The grower shall ensure that the form is complete and accurate in all respects and shows the grower's name, the grower's license number, the date of delivery of the chicks, the location of the registered premises on which the chicks were placed, the number of chicks placed (including extras), the hatchery or chick broker's name, and the production quota period in which the chicken will be marketed.

16.2 The grower shall provide a copy of the form to the delivery personnel of the hatchery or the hatchery's agent at the time of receipt of the chicks and shall file

a copy of the form with the Board not later than seven days following the day on which the chicks were received.

...

23.1 The Board will make allotments to growers through a prescribed form for each quota production period.

...

23.3 A grower must be issued, and be in receipt of the prescribed form indicating allotment, prior to producing and marketing chicken in a quota production period.

23.4 Production will be allotted to growers on the prescribed form, on the following basis with respect to each grower's quota and cycle length, as determined by the grower in consultation with the processor:

- a. a grower producing on an 8-week cycle will be allotted 1.929 kilograms per quota unit; or
- b. if a cycle length other than 8 weeks is used, a derivative weight for the quota unit based on that cycle length would be applied as set forth in Schedule 5.

...

23.6 Notwithstanding anything contained in these General Orders to the contrary, a grower will not be allotted quota, undermarketing, or a market development quota that singly or in combination exceeds the maximum quota that may be allotted in respect of a grower's premises calculated in accordance with Schedule 6.

...

26.1 Where a grower, in the quota production period, markets fewer kilograms than indicated on the prescribed form, the grower may be allotted the amount of the undermarketing, not exceeding 6% of the grower's allotment, in the sixth quota production periods following that in which the undermarketing occurred.

26.2 Undermarketing exceeding 6% of the allotment to the grower shall be forfeited.

...

27.1 A grower shall not produce or market chicken in excess of the grower allotment in any quota production period.

27.2 Where a grower produces or markets chicken in a quota production period in excess of the grower allotment the Board shall reduce, by an amount equal to the weight of chicken marketed in excess of the allotment, the grower's allotment in the sixth quota production period following that in which the overproduction was originally marketed. The space made available by said overproduction shall be deemed eligible for the production of market development.

...

27.6 In addition, a grower who produces and markets chicken in a quota production period in excess of the allotment shall:

- a. pay to the Board overproduction levies at the rate of 44 cents per kilogram of chicken produced and marketed by the grower that is in excess of 106% but not in excess of 110% of the production allotted; and
- b. pay to the Board levies at the rate of 66 cents per kilogram of chicken produced and marketed by the grower that is in excess of 110% of the production allotted.

27.7 If the levies are not paid within 30 days of demand, the Board may recover same by suit in a court of competent jurisdiction, and the Board may reduce quota allotments to the grower until levies are paid.

- a. The grower will be invoiced for overmarketing levies due. Failure to remit within 30 days will result in a 250 kg reduction from the grower's allotment in the next unallocated period;
- b. If payment has not been received following (a), a second invoice will advise the grower that a deduction of 250 kg has occurred and advise that failure to remit outstanding levies within the next 30 days will result in a reduction equivalent to 10% of the amount of quota held by a grower in the next unallocated period;
- c. all future allotments will be similarly reduced until the account is paid in full

ANALYSIS

- 47. This appeal has been brought to determine whether the Chicken Board erred in its Decision denying the Appellant relief from the overproduction levy that was assessed against the Appellant for the A180 Period.
- 48. The Appellant argued that the Chicken Board unreasonably delayed in making its decision to approve the request of the BCCGA to increase the overproduction sleeve to 10%, and that the decision to increase the sleeve should have been applied retroactively to at least the A180 allocation period. The Appellant acknowledged that they had overproduced approximately 14% for the A180 allocation period and that the increased sleeve, if applied retroactively, would only have alleviated 10% of that overproduction.
- 49. The Chicken Board noted that if the board had applied the changes to the overproduction sleeve retroactively to the A180 allocation period the Appellant still would have incurred an overproduction levy of \$2,546.08.
- 50. It is clear from the evidence that the Appellant's overproduction in the A180 allocation period occurred because the chicks that it produced were heavier than was contemplated under their Contract. The overproduction was not a situation that arose directly due to any exceptional circumstances in the industry at the time.
- 51. The Appellant's explanation for the additional weight of the chicks was that their focus was on keeping the chicks protected from AI infections and keeping them

alive until they could be shipped. The Appellants claimed that they could not reasonably visually assess the growing weight of the chicks.

52. The Chicken Board argued that the Appellant has failed to establish that there was a direct impact of AI on the placement of the chicks, the period of time that they were kept, or the way in which the farm was managed during the A180 Period. The Appellant simply had a good flock which ultimately grew heavier than the target weight set out in the Contract. The Chicken Board acknowledges that the Appellant is a diligent grower but submits that even diligent growers can overproduce and are thereby subject, like all other growers, to the overproduction levies set out in the General Orders.
53. The Chicken Board relies on the BCFIRB decision of *Shiell Farms Ltd. and Sunset Poultry Ltd. v. British Columbia Chicken Marketing Board, November 7, 2003*, wherein that Panel stated:
 45. From time to time even diligent growers will over produce and be subject to penalty. However, in our view, the Chicken Board is correct in concluding that such penalties are a cost of the overall privilege of doing business as a quota holder. The supply management system, including the FPA, confers enormous benefits on growers by way of quota and by way of stability of price and production. As quid pro quo, growers rightly accept the costs of production over their allotment tolerances.
 46. To put the matter another way, we conclude that, as a matter of sound marketing policy, we should not accept a “due diligence” defence to over production by a grower, which is what the Appellants’ arguments amount to.
 47. In giving this answer, we emphasize that our reasons are limited to the regulator’s (in this case, the Chicken Board) administrative response to over marketing. The administrative penalties for over production, set out in the Chicken Board’s policy rules, are not offence provisions; this is not a criminal or provincial prosecution, where Charter principles might apply.
 48. The overproduction penalty in supply management is an economic policy measure fundamental to ensuring that supply management, which benefits the entire industry, is effective. The concern is not with finding “moral fault” on the part of chicken growers, but rather on ensuring that the bottom line production requirements are correct. When a federal penalty is imposed on BC as a result of the BC chicken industry breaching the FPA, the Chicken Board must pay for the over production. CFC does not waive the penalties based on the excuse that “our growers did their best”. Supply management could not operate on that basis.

...

- 54. The Chicken Board was created to regulate chicken in the public interest, and in the best interests of all the stakeholders in the industry. It was not given its powers under the British Columbia Chicken Marketing Scheme, 1961 to support any one interest over another. Similarly, Chicken Board members are appointed to take a broad view and to make decisions benefiting the industry as a whole. In regulating the industry both within the province and nationally, it is the Chicken Board’s responsibility to ensure that growers comply with policy rules and produce their allotment within certain tolerances. Penalties for over and under production play an important role in meeting this responsibility.

54. The Chicken Board also relies on the BCFIRB decision of *Neal and Natalie Tebrinke DBA Mountainview Acres v. British Columbia Chicken Marketing Board, March 1, 2016*, wherein that Panel stated;
28. With respect to the appellants' argument that this overproduction has little impact on the industry and that everyone steps out of line from time to time, we disagree. The Chicken Board argues that without effective production controls, the system of supply management would quickly unravel, undermining the entire production sector. It relies on the decision *Shiell Farms Ltd. and Sunset Poultry Ltd. v. British Columbia Chicken Marketing Board* (BCFIRB – then BC Marketing Board, November 7, 2003), an appeal related to the Chicken Board's decision in 2000 to introduce period-by-period compliance through over and underproduction penalties.
- ...
30. We agree with the finding of the panel in the Shiell decision. The responsibility for overproduction rests with the appellants. Mr. Tebrinke chose to place excess birds and failed to manage his bird weights to take into account his higher chick placement. Far from being a conscientious and diligent grower, he exhibited disrespect and disregard for the supply management system which confers upon him enormous benefits by way of quota and stability of price and production.
55. The Appellant argued that the circumstances in *Shiell* were different than the current case. In *Shiell* the Appellant over produced for three cycles, each time levies were imposed and each time they were appealed. The appellant in that case made several 'due diligence' type arguments that were ultimately rejected by the Panel.
56. In the current case, the levy was imposed for overproduction and the Appellant paid the levy. The Appellant then appealed the overproduction levy in light of the Chicken Board's decision to expand the overproduction sleeve for the A182 period, and subsequent periods to account for production issues which the Appellant claimed were also prevalent during the previous production periods. The Appellant's appeal is essentially driven by what is considers to be the failure of the Chicken Board to act in a timely manner to account for the exceptional circumstances that eventually led it to its decision to expand the overproduction sleeve for the industry as a whole.
57. The Chicken Board considered the Appellant's particular circumstances when deciding whether to waive the overproduction levy associated with the A180 Period. The Appellant was fully aware of its obligations under the Contract. The Appellant knew that it would be assessed overproduction levies for amounts in excess of the amounts set out in the Contract. The Appellant did not experience any particular exceptional circumstances in their flock for the A180 period. The Appellant had a good flock and simply let their chicks gain too much weight.
58. The general exceptional circumstances affecting the industry which informed the subsequent decision of the Chicken Board to expand the overproduction sleeve, did not directly impact the Appellant's flock during the A180 Period. For the

Appellant to rely on those exceptional circumstances to ground its appeal, it would need to provide evidence as to how those circumstances impacted its flock in the A180 Period such that it could not have reasonably avoided over producing its contracted amount.

59. The only relevant submissions made by the Appellant on the issue of its overproduction in the A180 Period, were that they could not reasonably assess the weight of their chicks on a visual basis and that they did not want to bring any outsiders onto the farm to perform that assessment due to their fears of AI transmission. That type of due diligence argument was considered and rejected by the panel in *Shiell* as set out above, and those reasons are fully adopted by the Panel in this appeal. The onus is on the grower to deliver their flock at the target weight, and the failure to do so within the overproduction sleeve set out in the General Orders necessarily results in the overproduction levies in effect at that time being assessed.
60. The Panel further notes that while the Appellant and the chicken industry as a whole have clearly suffered significant disruptions over the last several years, those disruptions should not be relied upon to undermine the legislative and regulatory framework which supports sound marketing in the province. The Scheme, and the focus that it provides the Chicken Board on the industry as a whole, can and should provide all growers with the stability over time to recover from the environmental and economic challenges that they have faced.
61. The Panel finds that the overproduction levy assessed against the Appellant for the A180 Period were appropriate in the circumstances, and that the Chicken Board's Decision not to grant the Appellant relief from those levies was properly determined.

ORDER

62. The appeal is dismissed.

Dated at Victoria, British Columbia this 9th day of February, 2024

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Pawan Joshi, Presiding Member