

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS OF DECISIONS CONCERNING OVER PRODUCTION PENALTIES

BETWEEN:

SHIELL FARMS LTD. and
SUNSET POULTRY LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES BY:

For the British Columbia
Farm Industry Review Board

Ms. Christine J. Elsaesser, Vice Chair
Ms. Karen Webster, Member
Mr. Richard Bullock, Member

For the Appellants

Shiell Farms Ltd

Mr. Jim Shiell Sr.
Mr. Jim Shiell Jr.

Sunset Poultry Ltd.

Mr. Al Fauchon, President

For the Respondent

Ms. Sarah P. Pike, Counsel

Place of Hearing

Abbotsford, British Columbia

Date of Hearing

January 21, 2003

INTRODUCTION

1. In August 2000, the British Columbia Chicken Marketing Board (the “Chicken Board”) issued new policy rules repealing its General Orders (1987) as amended and all previous Chicken Board policies and guidelines invoked thereunder. As part of these policy rules, the Chicken Board included new enforcement rules for under and over marketing or production of chicken from quota period A-39 (commencing April 6, 2001) onwards: (Part 23-24).
2. On February 7, 2002, the Chicken Board notified the industry that it had exercised its discretion and established a transition period of graduated under and over penalties for A-39 to A-44.¹ From A-44 onwards, growers were expected to comply fully or else be penalised to the full extent of Part 23 and Part 24 of the policy rules.
3. By letter dated April 26, 2002, Shiell Farms Ltd. (“Shiell Farms”) filed an appeal to the British Columbia Marketing Board, now the British Columbia Farm Industry Review Board (“FIRB”), from a Chicken Board decision to impose over production penalties for A-42 (October 21 - December 15, 2001) and A-43 (December 16, 2001 - February 9, 2002). Specifically, Shiell Farms appealed ss. 101, 103 a) and b), and s. 104 (Part 24) and ss. 51 and 52 (Part 12, Fees and Levies) of the policy rules.
4. By letter dated May 13, 2002, Shiell Farms filed a similar appeal as a result of a further decision of the Chicken Board to impose over production penalties for A-44 (February 10 - April 6, 2002). Shiell Farms took issue with what it described as the arbitrary manner in which the Chicken Board rejected its explanation for the over production, as the Chicken Board did not state reasons for its decision.
5. In a letter dated December 21, 2001, Sunset Poultry Ltd. (“Sunset”) appealed a Chicken Board decision to impose over production penalties for A-40 (July 1 - August 25, 2001). Specifically, Sunset appealed the failure of the Chicken Board to consider the impact of a revised shipment date by Sunset’s processor as the cause of its over production.
6. At a pre-hearing conference held June 17, 2002, the Appellants agreed to have the three appeals heard at the same time. The Chicken Board reserved the right to raise a preliminary issue regarding whether some or all of the appeals were out of time.

¹ Growers received graduated over and under production penalties for periods A-39 through A-43 by limiting the penalty for each period to a percentage of the original penalty as follows: A-39 16.67%, A-40 33.34%, A-41 50.01%, A-42 66.68%, A-43 83.35%, A-44 100%.

PRELIMINARY ISSUES

7. One preliminary issue arose when, prior to the commencement of the hearing, Sunset advised that it also wished to appeal the Chicken Board decision to impose over production penalties for A-41 (August 26 - October 20, 2001).
8. Counsel for the Chicken Board argued that as no appeal had been filed in regards to period A-41, it was improper for the matter to be heard in these proceedings. However, in the event that the FIRB found in favour of Sunset in its appeal of A-40, it would have a good case to appear before the Chicken Board and ask for relief for A-41. Sunset agreed to this approach.
9. A second preliminary issue was raised by the Chicken Board regarding Shiell Farms' appeal of ss. 51 and 52 (Part 12, Fees and Levies) of the policy rules. Counsel argued that as the policy rules have been in place since August 2000, it was long past the 30-day time limit for appeal, and the present appeals should be limited to the Chicken Board's decisions to impose over production penalties.
10. Shiell Farms argued that while it could "live with" the present appeals being limited to the discretion of the Chicken Board to waive over production penalties, it was concerned that farmers do not have the resources to appeal "farmer by farmer". Shiell Farms argued that farmers have been largely left out of the current review of the policy rules undertaken by the Chicken Board and the broader context of the impact of the policy rules at the farm level must be considered.
11. The Panel ruled that it would limit its consideration in the present appeals to the Chicken Board decisions to impose over production penalties for A-42, A-43 and A-44 (Shiell Farms) and A-40 (Sunset). The Panel agreed with the Chicken Board that it is long past time for a broadside appeal of specific policy rules. However, in hearing the issues under appeal, the Panel gave latitude to the Appellants in presenting their cases in order to provide a broad perspective for consideration.

ISSUES

12. Should the Chicken Board have waived over production penalties imposed on Shiell Farms for quota periods A-42, A-43 and A-44?
13. Should the Chicken Board have considered the changed placement date for Sunset as a special circumstance and waived over production penalties imposed on Sunset for quota period A-40?

FACTS

14. Section 64 of the policy rules (Part 19, Quota Production Periods, Cycles) requires growers to produce their quota allotment within stated tolerances in each quota production period. This is termed "period by period compliance". A standard

quota production period is 8 weeks or 56 days in length; however the Chicken Board may also permit cycles of 63 days (9 weeks), 70 days (10 weeks) or 84 days (12 weeks) or other cycle lengths at its discretion. Growers apply to the Chicken Board for an allotment in each quota production period, and file, after consultation with the processor, a signed BC101 contract for each registered premises indicating cycle length and home week. Revised cycle lengths or home weeks for any quota production period must be filed with the Chicken Board by the date agreed to by the processor and grower.

15. Sections 96-100 of the policy rules (Part 23, Undermarketing) deal with the situation where growers market fewer kilograms than indicated on the BC101 contract. Sections 101-106 of the policy rules (Part 24, Overmarketing and Overplacement) deal with the situation where growers produce or market more kilograms than their allotment, or place more chicks than required to produce the allotment indicated on the quota production order at the weight specified, during a quota production period.
16. Under and over production is carried forward but there are restrictions and penalties. As the present appeals concern Chicken Board decisions regarding over production, it is unnecessary to review the restrictions and penalties for under production (Part 23). In the sixth quota production period following any over production, the Chicken Board reduces a grower's allotment by an amount equal to the weight of the chicken over marketed.² The Chicken Board levies over production penalties at the rate of \$0.44/kg of chicken over produced in excess of 105% (the 5% tolerance), and at \$0.66/kg of chicken over produced in excess of 110% in each quota production period in which over production occurs.
17. British Columbia is a signatory to the Federal Provincial Agreement (the "FPA") for chicken, and the Chicken Board is a member of the national agency, the Chicken Farmers of Canada (the "CFC"). The CFC regulates chicken production across Canada. In what is called a "bottom up" approach, processors through participation in the "huddle", advise the Chicken Board of their future consumer market requirements on a period by period basis. After calculating national demand and subtracting imports (Tariff Rate Quota) required by Canadian trade commitments, CFC allocates production to the ten member provinces for each quota period. The Chicken Board allots the provincial allocation to growers based on their quota holdings and the processors' total requirements. Provinces are expected to produce their allocation. The CFC levies penalties against a province for under and over production.
18. Since the policy rules were put in place in August 2000, the Chicken Board has amended various Parts, Sections and Schedules. Currently the Chicken Board is conducting a review of the policy rules, including Part 23 and Part 24.

² It is worth noting that a grower who has his allotment reduced to correct over production six cycles earlier remains eligible to grow export birds in place of that reduction.

ARGUMENT OF THE APPELLANT, SHIELL FARMS

19. Shiell Farms is a father and son operation in the business of producing chicken in BC for over 30 years. In A-44, it held 136,098 kg of primary quota, 9,644 kg of secondary quota and 14,159 kg of transitional quota. Shiell Farms has developed, over time, a detailed computer program to predict future growth rates based on historical data including kilograms produced, age of flock, mortality and condemnation rates and average bird weight from past quota periods. Shiell Farms uses this data along with its processor's requirements as to the number and age of birds to be shipped to estimate chick placements to target its production (0.1% below the allotted kgs for the farm) each quota period. In each of periods A-42, A-43 and A-44, Shiell Farms used its spreadsheet to estimate chick placements to produce just under its allotted kgs. In each quota period, however, Shiell Farms over produced and was levied penalties by the Chicken Board. In total, Shiell Farms was levied \$5,469.60, including GST.
20. Shiell Farms argues that for A-42, its flock management methods, feed supplies and feed formulations were the same as for previous periods, yet the farm saw its highest daily rate of growth in the four years previously analysed. This high rate of growth resulted in Shiell Farms being 12.5% above its allocation in spite of the birds being shipped at an average shipping age of 39.7 days (earlier than 12 out of the 28 previous periods). Given that the only difference in this period was chick quality, which varies for reasons unknown to the farm and beyond its control, the unprecedented growth rate was not predictable.
21. As a result of the quality of chicks received in A-42, Shiell Farms reduced its placement for A-43 by 2000 chicks, in spite of the hatchery representative's recommendation to the contrary. Good chick quality and a new feed resulted in a combined mortality and condemnation rate of 5.33%, below the previous six period average of 7.94% and the lowest experienced by the farm in the previous 24 cycles (3 ½ years). Shiell Farms argues that for reasons beyond its control (a flock's reaction to a new feed, below average mortality and condemnations rates), it produced 5.1% over its allotment.
22. For A-44, Shiell Farms argued that it was 6.4% above its allotment for the period as a result of receiving 501 more chicks than requested and again experiencing unexpectedly low mortality and condemnation rates. Had these events not occurred, Shiell Farms calculated that it would have been over produced by 4.9% and therefore not subject to penalty.
23. Shiell Farms agrees with the Chicken Board that over production is a concern and that growers have a responsibility not to over produce. However, few growers intentionally do so. Shiell Farms has not been in a penalty situation since A-44 or prior to A-42. However, raising live chickens is different than manufacturing widgets; it is impossible to meet shipping weight specifications exactly, period by

period; there are too many determinants over which the grower has no control. Shiell Farms argues:

- Estimating chick numbers is an educated guess at best. Hatchery management influences the number of chicks delivered to the farm. Automated chick counters may be out of adjustment and the number of chicks delivered may not be accurate. It is not possible to complete accurate hand counts of chicks placed on the farm.
 - Breed, age and condition of the breeder flocks supplying eggs to the hatchery affect productivity.
 - Weight and quality of the chicks delivered to the farm also affect productivity.
 - Feed also affects productivity. Feed companies may change rations or energy densities without notice. Errors may be made in mixing feed rations.
 - It is not possible to accurately estimate mortality and condemnation rates for a given quota period.
24. To deal with over production resulting from unexpectedly rapid growth and/or low mortality and condemnation rates, the Chicken Board has suggested using a low energy feed or a light program. A low energy feed is a starvation diet and Shiell Farms adamantly refuses to starve its flocks. Shiell Farms also disagrees that a light program (reducing the hours of light during a day) alters growth rates. In its experience reducing light makes chickens more rested and as result they are *more* active and eat more during periods of light.
25. Shiell Farms argues that the Chicken Board abandons its growers when it maintains that the solution for quality issues with feed or chicks is for growers to take their hatchery or feed company to Small Claims Court for redress. The Chicken Board was formed to support farmers in a collective manner – to balance the power between the allied industries and individual farmers. Growers do not have the resources to legally challenge large companies and to do so would poison any working business relationship.
26. Finally, Shiell Farms argues that previous Chicken Board general orders were flexible, allowing a grower that under or over produced two subsequent periods to correct; recognition of the inherent variability of producing chicken allowed growers to return to a tolerable production level without penalty. Currently over or under production is carried forward and corrected six periods later. The Chicken Board blindly enforces period by period compliance with little recognition that chickens grow according to biological determinants not bureaucratic rules. Further, its expectation that, as a part of doing business, growers should pay penalties for over or under production is unreasonably burdensome. Currently cost recovery for a grower is below 90% of the formula derived cost of production. If growers are unable to cover their on-going costs, many will be driven out of business.

ARGUMENT OF THE APPELLANT, SUNSET

27. Mr. Fauchon, president of Sunset, has 35 years experience in the chicken industry and has been growing chicken in BC since 1985. In A-40, Sunset held 119,591 kg of primary quota, 9,644 kg of secondary quota and 15,201 kg of transitional quota. However, as a result of circumstances beyond its control it was over produced by 3,914 kg (over the 5% tolerance) for A-40 and was assessed a penalty, with GST, of \$574.12³.
28. The basis for Sunset's appeal is that the BC101 contract for A-40 was not executed as signed. Sunset did all it could to prevent over production including obtaining a written addendum to the contract from a hatchery representative confirming "these birds will be killed between 38-42 days – no penalty to grower". Despite that assurance, the processor left the birds on the farm longer than 42 days. As a result of the extended pick up date and subsequent increase in the weight of the birds, Sunset was over produced. Given that the processor's actions caused the over production, Sunset argues that it is an error for the Chicken Board to penalise Sunset for a problem not of its making.
29. Sunset argues that it does everything in its power to avoid over production. Mr. Fauchon attended at the hatchery to count and inspect the chicks destined for his farm and added similar addenda to the contracts for A-41, 42, 44 and 45 to ensure pick up dates which would avoid over production. If growers are going to be penalised for over or under production, they must know when their birds will be shipped and as such the BC101 contract must be enforceable. Growers need to be protected and processors have to be held accountable so that growers are not penalised for over production resulting from circumstances beyond their control.
30. Sunset points to cycles A-41, A-45 and A-49 as further examples of over production resulting from circumstances beyond its control. In A-41, Sunset found out at about day 33 or 34 that shipment would be delayed beyond 38-42 days. That late in the cycle, little could be done to adjust feed or light to slow the weight gain of the birds to avoid over production. In A-45, as Sunset was given a nine day spread (38-47 days) in its pick up schedule, it was not possible to plan production to be within over and under production tolerances. Finally, in A-49, despite taking steps to insure that all chicks ordered were received on the farm and shipped to the processor at the appropriate time, Sunset was over produced. Although the reason for over production was different, over production again resulted from circumstances beyond Sunset's control. Production was much better, weights were higher, and mortality and condemnation rates were both lower. Sunset cannot account for these results; the fact that some of the bird pick up forms had "test" on them may be a clue to the better production rates. Although Sunset provided this

³ The original penalty was \$1842.55 including GST but was reduced to 33.34% in accordance with the Chicken Board's February 7, 2002 policy.

evidence to the Chicken Board, a further penalty was assessed against Sunset for A-49.

ARGUMENT OF THE RESPONDENT

31. The Chicken Board argues that over production is a national concern. Growers in British Columbia are, as are all growers in provinces which are part of the FPA, responsible to grow their allotment in order that the province does not over produce its allocation beyond the 2% sleeve and incur penalties from CFC. The Chicken Board implemented period by period compliance in order to bring discipline to production. Growers were however, given time, from August 15, 2000 to April 6, 2001, before full period by period compliance came into effect. By A-39, growers were expected to produce their allotment within the sleeve (10% below or 5% above).
32. When it appeared growers required more time to adjust to a “disciplined production regime”, the Chicken Board used its discretion to impose a series of graduated over and under production penalties for A-39 to A-43 before full penalties were imposed in A-44. Gradually there has been improvement and the Chicken Board observes that the total penalty paid by growers is falling.
33. Since the implementation of the policy rules, the Chicken Board has granted relief from over or under production penalties on two occasions – where there was a disease outbreak and when a processing plant broke down. However, it has not granted relief for over production resulting from chick quality, feed anomalies and revised shipping dates.
34. The Chicken Board recognises that period by period compliance is more an art than a science. Growers are not always able to achieve the correct bird weight by pick up dates but growers should be aware of all the factors which cause over production and manage them as best as possible to avoid over production. At one time or another most growers are penalised. Generally growers who over produce accept a penalty as a “necessary evil”, the “price of doing business”, and do not appeal. There is recognition that over production is detrimental to the market. Generally growers have been going a good job in producing their allotment; in A-39 and A-40, BC slightly under produced its provincial allocation. On average only 35 out of over 300 growers are penalised each period and generally, growers are penalised only once. There are no chronic over producers. The average penalty per grower from A-39 to A-47 has also gradually fallen.
35. The Chicken Board points out that despite receiving a penalty, growers are paid for *all* their production. In Sunset’s case, in A-40, it would have made money from the over production even though penalised. (Using a \$0.35/kg net return for kilograms shipped to the processor and the adjusted over production penalty for A-40 of approximately \$0.15/kg). In Shiell Farms’ case, if penalties for A-42 and A-43 were averaged, it would not have lost money on its over production. Using

\$0.35/kg net return, in A-42 Shiell Farms paid penalties of approximately \$0.32/kg and in A-43 approximately \$0.37/kg). In A-44, as per the policy rules, Shiell Farms paid the full penalty (\$912.73 including GST).

36. With respect to the reduction in quota allocation in the sixth cycle following over production, the Chicken Board argues that this “is a wash”. As a grower is only entitled to grow 100% of his quota allotment (within the over and under production tolerances), he is subject to a rolling correction for over production in excess of 105%. Six cycles later, an over produced grower’s allotment is reduced to offset the earlier over production. That grower can however, still produce his reduced allotment within the over production tolerance of 5%.
37. The Chicken Board argues that growers can control growth through the use of a light program or feed composition. By weighing chickens at various growth stages, growers can track growth rates and be aware of the potential for over production. The Chicken Farmers of Ontario initiated a project where chickens were weighed daily throughout a trial growth cycle; from the collected weights processors worked with farmers to ensure the desired weight on pick up. The Chicken Board does concede however, that if processors change pick up dates late in a cycle there is not much a grower can do. As indicated in the Ontario project, processors should co-operate with growers to establish shipping dates.
38. The Chicken Board does not expect growers to count every chick placed on the farm but does expect random counts to determine whether the correct number of chicks has been delivered. Growers must do whatever possible to ensure birds are at the right weight at the end of the period, and to avoid over production.
39. Prior to its February 7, 2002 policy, the Chicken Board heard many complaints regarding over production penalties. Growers gave the same or similar reasons as advanced in the present appeals (over placement of chicks, low condemnments, low mortality, high feed conversion ratios and delayed bird pick up). As a result of these complaints, the Chicken Board responded with a transitional period for penalties. In the Chicken Board’s view, growers have been given adequate time to adjust and penalties will no longer be reduced or waived for what it sees as “vagaries” common to all growers. The challenge is for growers to be familiar with the vagaries and to control them in order to produce their allocation.
40. In Sunset’s case, the reason for its over production results not from a vagary of production but rather a delayed pick up date resulting from a contractual dispute with its processor. The Chicken Board acknowledges that period by period compliance is difficult when processors fail to adhere to the contract; however, the remedy is to pursue the processor for breach of contract in Small Claims Court. The reasons leading to the establishment of the February 7, 2002 policy are faced by all, or nearly all, growers from time to time and are not sufficient to cause the Chicken Board to use its discretion on these facts and waive the Appellant’s penalties.

41. The Chicken Board recognises that sometimes a grower does not get it right and as a result over produces. The Chicken Board's preference would be to not penalise when this happens. However, if BC over produces as a province it will be subject to a penalty from CFC. It is only right that those growers in the province who contribute to over production are responsible for the provincial over production penalties to CFC.

DECISION

42. The Chicken Board implemented period by period compliance in order to bring more discipline to chicken production. Given that CFC can assess a penalty under the 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 10% sleeve for under production and a 5% sleeve for over production were necessary. By imposing this discipline, the Chicken Board lessens the risk of BC being penalised for over or under production under the FPA, an agreement that it signed for the benefit of the entire industry.
43. The parties all agree that given the threat of a provincial penalty, over production is a concern. However, neither Appellant believes it is fair for penalties to be assessed when a grower uses due diligence and yet still over produces as a result of circumstances beyond his control. In such circumstances, they argue that the Chicken Board should use its discretion and waive the penalties. The question we must decide is whether, as we view sound marketing policy in the unique context and circumstances of this industry, the Chicken Board should have done so.
44. It is evident that the Appellants are both conscientious growers, very involved in their operations. Despite their efforts to manage their production, in some periods, things did not proceed as planned. The Chicken Board is cognisant of the difficulties associated with managing a broiler operation to the required tolerances. When it imposed its new system, it gave growers significant lead time (between August 2000 and the start of A-39 in April 2001). It then exercised further discretion to impose graduated penalties for quota periods A-39 to A-43 to allow more time for the transition to period by period compliance.
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 emphasise 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 over production 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.
49. The question then becomes who should bear the impact of over production. Should it be the grower who overmarketed (despite best efforts) or should it be the entire industry? We agree with the Chicken Board that, as a matter of sound marketing policy, the cost of a grower’s over production should not have to be paid by compliant growers who also did their best and were duly diligent, unless growers collectively express a desire for pooling of provincial penalties (for example, by way of levy).
50. Failing such an expressed intent, it must fall to each grower – as part of the privilege of holding quota and being part of a supply managed system – to be aware of the factors that can lead to over production and to manage his allotment within the set tolerances. The Appellants have been successfully growing chicken for many years. Recognising that chicken production is part art and part science, it is not contrary to sound marketing policy for the Appellants to accept the responsibility of producing their allotment according to the policy tolerances in place under the Chicken Board’s policy rules.
51. Shiell Farms and Sunset are both considerably larger than the average BC farm of 40,000 birds/cycle. In the case of Shiell Farms, its total penalty for three over produced cycles was \$5469. After allowing for the money received for its over production, Shiell Farms penalty appears closer to \$800. Sunset’s penalty was \$574.12, but after taking into account the money received for its over production, it would appear that Sunset actually made money. On these facts, it is apparent that the Appellants have received almost trivial penalty amounts in relation to their overall quota value. We see no undue or unfair burden on the Appellants that

would warrant special relief from the Chicken Board's policy rules, which they did not appeal at the time they were issued.

52. As was mentioned by the Chicken Board, an over produced grower will lose, on a one-time basis, the equivalent of his penalised over production six cycles later. It is significant to note that the over produced grower will still have produced 100% of his annual allotment. Further, that grower is still eligible to grow export production in place of the reduced penalty allotment and as such can fill empty barn space. Further, not all over production results in a penalty; monetary over production penalties are not imposed until production exceeds 105% of a grower's allotment.
53. In reaching the conclusions above, we recognise that the penalties under appeal were assessed during the transition period and as such Shiell Farms and Sunset received the benefit of a reduced penalty. We acknowledge that had the penalties been assessed today, they would be higher. Also, at the time this appeal was heard growers were in a period of reduced returns. According to Mr. Shiell, the Joint Committee of the Chicken Board has determined that cost recovery for growers is below 90% of the formula derived cost of production. He argued that any penalty jeopardises a grower's bottom line. Even bearing in mind these two factors, the Panel is not convinced that the penalties assessed against the Appellants were unfair and contrary to sound marketing policy. Had the Appellants not had the benefit of a graduated penalty, the Panel would still have upheld the penalty as originally assessed by the Chicken Board.
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.
55. The Panel has considered whether Sunset's situation is sufficiently special as to justify a policy exception to the rationale above on the basis that the over production was solely due to the processor's breach of contract rather than any factor caused by the grower. However, if we were to carve out an exception for cases where the processor did not pick up the product on time, we would further have to consider who should pay for the over production: should it be the other growers, or should it be the processor? If it is the latter, what if the processor was duly diligent and was unable to pick up the product for reasons beyond *its* control? Should the Chicken Board, whose fundamental role is to ensure that supply management limits are respected, have to become a mini Small Claims Court for the purpose of deciding those issues?

56. If growers believe that there are more effective means of ensuring that Chicken Board penalty policies are fair and appropriate either by sharing over marketing penalties by way of levies unrelated to any particular grower's compliance, or visiting responsibility on processors for overmarketing caused by their breach of the BC101 with a particular grower, the chicken industry has the benefit of debating that point in the Chicken Board's current regulation review. Following such a process that issue could come before the FIRB in its supervisory capacity or on appeal, with benefit of full argument and all affected parties present. Pending that discussion, should it ever be necessary, the Panel finds the existing policy to be consistent with sound marketing policy, and further finds that it does not result in any significant injustice on the facts here.
57. All this having been said, we emphasise again that the FIRB would be prepared to consider any modified policy that has wide support among growers. However, this would be a matter best addressed following the industry review being undertaken by the Chicken Board.
58. Accordingly, the appeals are denied.
59. As for the issue of costs, the Panel gave a great deal of consideration as to whether it would be appropriate to assess costs against the Appellants. We have decided not to do so. However, given our finding that the Chicken Board's penalties are valid and given the almost trivial impact of the penalties on the average chicken grower, should there be future appeals of over or under production penalties imposed in cases such as this, the issue of costs may be dealt with differently.
60. There will be no order as to costs.

Dated at Victoria, British Columbia, this 7th day of November 2003.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Richard Bullock, Member