

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 OVERMARKETING
LEVY AND LICENCE SUSPENSION FOR PERIOD A-136

BETWEEN:

NEAL AND NATALIE TEBRINKE DBA MOUNTAINVIEW ACRES

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

John Les, Chair and Presiding Member
Diane Fillmore, Member
Brenda Locke, Member

For the Appellants

Neal teBrinke

For the Respondent

Claire E. Hunter, Counsel

Date of Hearing

February 9, 2016

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The appellants, Neal and Natalie teBrinke dba Mountain View Acres (Mountain View), are registered chicken growers; they own and operate a chicken farm in Agassiz, BC.
2. On November 23, 2015, after concluding that Mountain View had overproduced its broiler quota (measured in kilograms of live weight) for the period A-132, the British Columbia Chicken Marketing Board (Chicken Board) issued a decision imposing a monetary penalty for overproduction and a one-period licence suspension.
3. The appellants appealed the Chicken Board's decision to the British Columbia Farm Industry Review Board (BCFIRB). On January 11, 2016, the appellants applied for a stay of the Chicken Board's decision, which was denied.¹
4. The appellants argue that the overproduction penalty and license suspension assessed by the Chicken Board (which they say has an economic impact of \$20,974 to their operation) is out of proportion to the offence committed and the Chicken Board has other, less severe options available to it.
5. In response, the Chicken Board argues that the appellants violated the General Orders, this is a repeat offence and the penalty imposed is consistent with sound marketing policy.

ISSUE

6. Did the Chicken Board err in its November 23, 2015 decision to suspend the appellants' licence to produce regulated product in period A-136?

ANALYSIS

7. The appellants do not take issue with the Chicken Board's statutory authority to assess penalties for over and underproduction, and we agree that the power exercised by the Chicken Board in this case was specifically authorized by the *British Columbia Chicken Marketing Scheme, 1961*. 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. In our view, as the first instance regulator, the Chicken Board is required to take reasonable and independent administrative action designed to discourage unauthorized production by licenced growers.

¹ Decision dated January 21, 2016

8. Instead, the issue for the appellants is the penalty imposed by the Chicken Board which they say was excessive in the circumstances and disproportionate to the offence committed.
9. To consider this argument, we must place this appeal into context. The teBrinkes became registered chicken growers in 2010 operating as Mountain View. In the beginning, Mr. teBrinke had a steep learning curve and struggled with high mortality rates. He is understandably proud of his farm which he describes as immaculate, meeting all program requirements. His paperwork is in order, his farm is rodent-free, his birds are in good health, and he obtains better-than-average growth rates. He takes pride in the quality of birds he produces and finds it discouraging to be penalized for doing so.

The First Offence

10. Mr. teBrinke admits to a prior instance where Mountain View was penalized for overproduction and non-compliance with the General Orders. During period A-115, concerned that he was going to be in an overproduction situation, Mr. teBrinke encouraged his son to apply for a permit from the Chicken Board to produce 2000 broiler chickens. Upon that permit being issued, he combined this permit production with his quota production. Instead of reporting his overproduction as required by the General Orders, the “permit” production was reported as production from a separate production unit. Mr. teBrinke says he was unaware of the Chicken Board’s prohibition against growing both permit production and regulated production on the same production unit.
11. The Chicken Board assessed a monetary overproduction penalty and reduced Mountain View’s quota allotment in a subsequent period. In its letter of August 14, 2013, the Chicken Board issued a strong warning to the appellants that this type of offence was not to be repeated and that severe sanctions were available to penalize growers who failed to comply with the General Orders. Mr. teBrinke did not appeal the penalty levied and his son’s permit was revoked.

The Second Offence

12. Mr. teBrinke admits to overproducing chicken again in period A-132. The Grower Chick Placement Report of July 11, 2015 indicated 25,000 chicks were to be placed on the Mountain View farm; this was crossed out and replaced with 25,500 chicks. That number was, in turn, crossed out and replaced with 26,010 chicks. The changes were initialed by Mrs. teBrinke and the report was signed by Mr. teBrinke. Even though his BC 101 contract with his processor, Sunrise Poultry Processors Ltd. (Sunrise), was for 25,000 birds, Mr. teBrinke says he was expecting 25,500 to cover mortalities. However, his supplier offered him excess chicks which he accepted, thinking he could deal with 26,010 chicks within overproduction tolerance levels.

13. Mr. teBrinke says he intends to produce his allotment during each period and he relies on the hatchery that supplies his chicks to determine the number of chicks required to produce his quota. His supplier was aware of the performance of his birds and the supplier could also make adjustments to the number of days required to grow the birds to the target weight. The BC 101 contract was completed with the supplier and processor agreeing to the number of broilers to be delivered (24,480), the target weight (2.16 kilos), and the shipment date (Aug. 7, 2015). Mr. teBrinke was aware of the penalties for over or underproduction of quota. Near the end of the period, Mr. teBrinke became aware that his birds were heavier than expected (2.32 kilos per bird as compared to the targeted 2.16 kilos per bird) resulting in production levels up to 115% of his quota allotment. This would have resulted in a significant overproduction penalty.
14. Mr. teBrinke admits that he shipped 882 birds to another processor (K&R Poultry Ltd. dba Farm Fed) two days prior to shipping the balance (23,903 birds) to his processor, Sunrise. This resulted in 577 fewer birds being shipped to Sunrise than were indicated on the BC 101 contract. As the birds were heavier than expected, Sunrise received somewhat more than the contracted volume of chicken by weight. On this basis, Mr. teBrinke asserts that Mountain View fulfilled its contract with Sunrise and Sunrise did not consider it to be in breach of its contract. Mr. teBrinke thought that Sunrise would simply assume that Mountain View had experienced an 8% mortality rate. Mr. teBrinke admits that he shipped the overproduction to another processor to avoid paying overproduction penalties.
15. Mr. teBrinke acknowledges his obligation to be familiar with the General Orders. He agrees that the supply management system confers responsibilities to comply with authorized production levels but gives a grower rights such as a guaranteed minimum live price for chicken produced. He is familiar with the BC 101 contract which sets out the number of birds that a grower is to ship, the target weights of birds at shipping, and the processor to which all birds are to be shipped.

Excessive Penalty

16. Mr. teBrinke says he is sorry for the appellants' actions and he realizes a penalty is in order but, in his view, the one period suspension ordered by the Chicken Board was excessive and disproportionate to the offence. He believes there is a discrepancy between how the Chicken Board deals with overproduction as compared to underproduction. He says "everyone steps out of line from time to time" without such severe consequences and that excessive penalties reduce respect for the Chicken Board. His assessment is that the penalty as levied represents an economic impact of \$20,974 and the Chicken Board has less severe options available to it. He does not believe that this overproduction had an impact on the industry.
17. With respect to the amount of his overproduction, Mr. teBrinke says he had been unaware that a grower could claim an annual personal exemption (which could have had

the result of mitigating his penalty) and that it is difficult to find the rules on claiming the personal exemption in the General Orders. Further, he says there are no guidelines for overproduction penalties beyond Schedule 13 which sets the levy for “out of market” production for first, second and third offences.

18. The Chicken Board argues that production management is a crucial underpinning of the supply management system. Provincial quota allocations are set by the Chicken Farmers of Canada (CFC) and the Chicken Board is responsible for regulating that production within the province. CFC audits provincial production and, where the province produces more than 2% over its provincial quota allocation, assesses significant financial penalties borne by all growers in the province. The Chicken Board says that compliance with production allocations is absolutely necessary to maintain the integrity of the system.
19. Chicken Board Executive Director Bill Vanderspek explained that individual chicken growers in B.C. are permitted to produce up to 106% of their quota without penalty. Production between 106% and 110% of quota attracts a penalty of \$.44 per kilo of chicken produced, and production beyond 110% of quota is penalized at a rate of \$.66 per kilo. He explained that production up to a level of 106% of quota allocation without penalty is allowable as those who underproduce offset those who overproduce, thus achieving allowable provincial production levels within the 2% overproduction tolerance. Production as low as 94% of individual quota allotment is also allowed without underproduction penalties.
20. Mr. Vanderspek indicated that this is a very delicate balancing act but production has generally been managed in a way that almost exactly matches the provincial quota allocation. Both the number and total weight of chickens produced are important production measurements. While quotas are set by weight of chicken produced, processors are also interested in obtaining a certain number of components of chicken such as breasts, drumsticks and wings at a particular size.
21. Chicken Board member, Mark Driediger pointed out that compliance with production regulations is absolutely necessary to maintain the integrity of the system. It is important for the Chicken Board’s regulations to have teeth, as those who “play fast and loose” with the rules threaten the entire supply management system to the detriment of all chicken growers. As a grower since 1989, Mr. Driediger has never been penalized for overproduction.
22. With respect to the specific circumstances here, the Chicken Board says that it only became aware of the appellants’ shipment of 882 birds to Farm Fed when an audit was conducted of Farm Fed’s slaughter reports. This unauthorized shipment of chicken was brought to the attention of the Chicken Board members, with staff recommending that 1995.9 kilos of production be charged to Mountain View’s account and the applicable

levies and taxes be paid to the Chicken Board. Given that this was a second offence, staff also recommended that the appellant's license to produce be suspended for one period.

23. The Chicken Board deferred imposition of the penalties to give Mr. teBrinke an opportunity to be heard by its board members. The Chicken Board says that an offence of this kind was extremely rare and it wanted Mr. teBrinke to speak to the matter given the significant consequences involved. The Chicken Board considered its options with respect to this offence, taking into account that this appeared to be a deliberate circumnavigation of the regulations, that this was a second offence, and that the penalty for the first offence had apparently not been effective. The Chicken Board also considered other, more severe penalties, such as suspension of production for multiple production periods or outright cancellation of the grower's license.
24. The Chicken Board also engaged in an analysis to determine whether the sanction applied against Mountain View reflected the SAFETI principles and concluded:

Strategic: it applied established precedents and the penalty imposed was sufficiently serious to act as a deterrent against future contraventions of this kind.

Accountable: it was accountable to all industry participants, provincially as well as nationally, in its application of the General Orders.

Fair: it gave the grower a full and fair opportunity to explain his actions.

Effective: it assessed an effective penalty for over and underproduction to ensure that growers produce their allotment within certain tolerances.

Transparent: it was transparent in that its decision was consistent with the General Orders, which are provided to all producers and with which all producers are to be familiar.

Inclusive: it was inclusive in applying its rules and regulations to maintain a level playing field for all producers.

25. The panel acknowledges Mr. teBrinke's candour. He readily admits to his contravention of the General Orders. He admits to circumventing the rules in order to avoid overproduction penalties. He admits this is his second offence and that he was duly warned at the time of the first offence that more serious sanctions were available to the Chicken Board. His real issue appears to be that the penalty does not fit the crime.
26. Despite these admissions, we find it troubling that Mr. teBrinke purported to rely on his chick supplier and processor for production decisions regarding the number of birds to be placed and when those birds should be shipped. Growers have the primary responsibility to manage their operations and produce within their quota allotments. This includes placing the correct number of chicks initially, managing the flock's feed intake and health, and determining, in consultation with their contracted processor, the timing of shipment for slaughter. Should overproduction occur, a grower is responsible

for advising the Chicken Board in a timely fashion. In these circumstances, had Mr. teBrinke been candid with the Chicken Board, he may have been able to take advantage of personal exemptions to reduce his overproduction.

27. We find that, when Mr. teBrinke realized he was in an overproduction situation, he acted in a deliberate and calculated fashion to conceal his overproduction just as he had done before. He shipped 882 birds to a processor other than his contracted processor. He hoped that Sunrise would simply assume that he had higher than expected mortality rates and that the Chicken Board would not become aware of the full extent of the overproduction. In the face of this calculated and deliberate attempt to mislead both his contracted processor and the Chicken Board, the panel does not place much weight on Mr. teBrinke's apparent confusion regarding the rules concerning personal exemptions. It was his decision to act outside the General Orders and he cannot now avail himself of the very General Orders he sought to avoid.
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.
29. The facts of the *Shiell* decision are a marked contrast to the facts here. There the appellants were found to be conscientious growers who, despite due diligence, still overproduced as a result of circumstances beyond their control. They argued that the Chicken Board should, as a matter of sound marketing policy, use its discretion and waive the overproduction penalties. In its decision, the panel disagreed:
 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 Federal Provincial Agreement, 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 ...

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 overproduction. 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 overproduction. 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 overproduction 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 overproduction 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.
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.
31. In these circumstances, we agree with the Chicken Board that the penalty imposed was consistent with sound marketing policy. It sends a strong message to the appellants and industry that period-by-period compliance is both important and necessary to ensure that all B.C. chicken growers produce within the allowable tolerances. We do not agree that the penalty was excessive. The fact that this was a second offence in circumstances where the appellants again actively concealed overproduction to avoid penalties is troubling and, in our view, necessitated a strong sanction from the Chicken Board.
32. We agree with the Chicken Board that the overmarketing levy and licence suspension were a measured response, appropriate and warranted in these circumstances. This is especially so given that, should there be a third offence, the penalty prescribed by the General Orders would include seizure of the flock and revocation of quota.

ORDER

33. The appeal is dismissed.

Dated at Victoria, British Columbia this 1st day of March, 2016.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



John Les, Chair and Presiding Member



Diane Fillmore, Member



Brenda Locke, Member