

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM DECISIONS
CONCERNING QUOTA COMPLIANCE

BETWEEN:

HIGH PLAINS POULTRY FARM LTD.
AND GREENBELT ESTATES LTD.

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Ms. Satwinder Bains, Member
Mr. Richard Bullock, Member

For the Appellants
High Plains Poultry Farm Ltd.
and Greenbelt Estates Ltd.

Mr. Christopher Harvey, QC, Counsel

For the Respondent

Mr. Douglas Scullion, Counsel

Date of Hearing

January 11 and 12, 2000

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. On December 18, 1997, the British Columbia Chicken Marketing Board (the "Chicken Board") passed an amended version of Interim Order 313, a quota compliance order. Order 313 creates "penalties" for over production beyond a 15% tolerance sleeve in the spring and under production beyond a 15% tolerance sleeve in the fall.
2. By letter dated June 7, 1999, Mr. Ken Hoschka on behalf of High Plains Poultry Farm Ltd. ("High Plains") appealed the under production penalties imposed on his farm pursuant to Order 313.
3. By letter dated July 22, 1999, Mr. Dean Rochon, the owner of Greenbelt Estates Ltd. ("Greenbelt"), appealed the under production penalties imposed on his farm pursuant to Order 313.
4. By agreement, the appeals were heard together.

ISSUES

5. The Appellants have raised the following issues. Does Interim Order 313 fail to meet its intended policy objectives because it:
 - a) results in chicken production not being synchronous with market demand; and
 - b) does not just penalise chronic over/under producers?
6. Did the process used by the Chicken Board to assess these penalties treat the Appellants, Greenbelt and High Plains, in the same manner as other growers?
7. Was the Chicken Board's penalising of the Appellants biased because the Appellants used their barns for export production?
8. Did the Chicken Board, in penalising the Appellants, err in not recognising that special circumstances existed to account for the under production?
9. Can the Chicken Board impose under production penalties?
10. Are the Appellants entitled to their costs in this appeal?

FACTS

11. In the summer of 1997, the Chicken Board began developing new policies on issues concerning the industry. On September 25, 1997, the first version of Interim Order 313 was enacted. The purpose of Order 313 was to create a system whereby under and over produced growers were brought into compliance with their quota holdings, measured in kilograms of allowable production.
12. As a result of an appeal by Hallmark Poultry Processors Ltd. and Sunrise Poultry Processors Ltd. and after negotiations, the Chicken Board revised Order 313. On December 18, 1997, amended interim Order 313 was issued. It is this version of Order 313 that is being appealed. The significant change to the Order were fixed dates (February 15, 1998 and September 27, 1998) beyond which penalties would be assessed.
13. The amended Interim Order 313 penalises growers, who at a certain time, had produced and shipped either more than 15% by weight (February 15, 1998 for over production) or less than 15% by weight (September 27, 1998 for under production) of their allowed production. The Order requires growers to bring their production into line and penalises under or over production beyond a 15% tolerance. A grower who over produces in the penalty cycle is required to cut back in the next broiler production cycle the amount that he was overproduced over the 15% tolerance. In addition, the grower is penalised the same amount and as a result loses that production. A grower who is under produced in the penalty cycle has the amount of his under production over the 15% tolerance deducted from their next cycle; as a result, the grower loses that production.
14. The operation of amended Interim Order 313 can best be explained by example. For instance, if a grower was permitted to produce 100,000 kg and produced 125,000 (10,000 over the 15% "sleeve"), in the next cycle he would have to cut back 10,000 kg of production (the amount over produced over the 15% sleeve) and forego an equal amount as a "production penalty". Thus, in the next cycle, the grower must produce $100,000 - 10,000$ (the amount overproduced) – another 10,000 (the penalty) = 80,000kg. If a grower was permitted to produce 100,000 kg and produced 75,000 (10,000 less than the 15% sleeve), in the next cycle he will have 10,000 kg deducted from his quota production. Thus, the grower must produce $100,000 - 10,000 = 90,000$ kg.
15. Given the foregoing, in most cases the "penalty" is really quite minimal if one considers the 15% "sleeve" as free over or under production. The 15% sleeve is an area of grace, which is over production not authorised but is also not enforced even though it is not part of the quota.

16. Order 313 states as follows regarding under production situations:

(iv) **UNDER PRODUCTION PENALTY**

- (1) The under production penalty will be calculated and assessed when a registered grower has marketed their 1st shipments on or after Sept. 27, 1998. (***NO UNDER PRODUCTION BEYOND THE 15% TOLERANCE SLEEVE CAN BE CARRIED INTO THE FALL-WINTER PERIODS***)
- (2) Registered growers who have under marketed their 1st shipments on or after Sept. 27, 1998 in kilograms live weight below the 15% tolerance, will have this amount of kilograms deducted from their Quota Production Order (A-22).

...

- (vii) The Board will consider "extenuating circumstances" in writing prior to penalizing growers on an individual basis if the circumstances warrant.

17. The "Under Over" Committee of the Chicken Board met on March 2, 1999 and approved a list of nine "extenuating circumstances". The Committee identified 68 under produced growers, half of which had sent letters to the Chicken Board explaining their under production. The Committee decided to review the penalty cycle and the two preceding cycles for each of the 68 growers to determine the appropriateness of the under production penalty.

18. The over production penalties under Order 313 as well as the merits of Order 313 itself were the subject of an earlier appeal by several chicken producers. In its March 26, 1999 *Luck of the Draw et. al. Decision*, the British Columbia Marketing Board (the "BCMB") made the following findings:

103. ... The *Scheme* very clearly grants the Chicken Board the power to regulate and control the production of chicken within the Province and to establish the terms on which quota can be granted and revoked or reduced.
104. The fact that the penalties imposed under Order 313 have a monetary impact on growers does not take the Order outside the jurisdiction of the Chicken Board. Order 313 does not purport to fine growers for over-producing. Rather, growers who over-produce beyond a 15% sleeve are required to reduce their production back to their allotted quota and are penalised based on the amount of over-production.
105. The Chicken Board has drafted a number of compliance orders. Unfortunately, the predecessors were difficult to enforce. In response to pressure by both processors and growers, the Chicken Board created a new compliance order in September 1997. Further fine-tuning occurred following the appeal by the processors in the fall of 1997. This led to a revised Order 313, which, with the exception of the Appellants, appears to have industry support.
106. The Panel heard from Mr. Frank Flokstra, President of the British Columbia Chicken Growers' Association. The Association is strongly in favour of the Order and believes it is necessary to deal with the problem of chronic over and under-producers. The Panel also heard from the representatives of the three major hatcheries in the Province. Although these gentlemen had serious concerns about the procedure followed by the Chicken Board in implementing the Order, they did not take issue with the intent and substance of Order itself.

107. The Panel finds that Order 313 is within the authority of the Chicken Board to enact. It has broad support within the industry and is a good attempt at solving the compliance problem. The Chicken Board has recognised that Order 313 is a "work in progress" and as time goes on there may be need for further fine-tuning. However, the Chicken Board should note the process concerns raised by the Appellants. It is important that all growers feel they have been dealt with fairly. The Chicken Board must design processes that are perceived by all to be unbiased, transparent and properly published and recorded.
19. The BCMB upheld Order 313. However after concluding there were a number of procedural irregularities in implementing the Order, the BCMB on a one time basis suspended the over production penalties.
 20. The Under Over Committee met again on March 31, 1999, shortly after the release of the above decision. The Committee discussed the impact of the decision and decided that as the under production penalties had not been suspended, they would be assessed for first shipments after September 27, 1998. The Committee also agreed that once they made their recommendations to the Chicken Board and a policy had been approved, staff should administer the policy. Aggrieved growers could then apply to the members of the Chicken Board to review their penalty.
 21. On April 16, 1999, the Chicken Board issued a notice to all registered growers setting out the criteria developed by the Under Over Committee for determining the "extenuating circumstances" referred to in s. (vii) of Order 313.
 22. On April 29, 1999, High Plains wrote to the Chicken Board and set out the extenuating circumstances for its under production. According to its letter, the farm had a long history of very high condemnations and extremely high mortality. Fraser Valley Chick Sales Ltd. ("FVCS") had shorted High Plains on chicks as a result of a poor hatch and High Plains had been asked to ship at other than scheduled times. In addition, High Plains purchased a second location on July 31, 1998 and as such was unable to place its quota for the correction period.
 23. On May 18, 1999, the Chicken Board sent a letter to High Plains advising that its first shipments on or after September 27, 1998 in kilograms live weight were below the 15% tolerance and thus, High Plains was subject to a penalty of 57,253 kg. Green Belt received a similar notification on May 18 advising that its first shipment on or after September 27, 1998 was subject to under production penalties in the amount of 25,988 kg.
 24. By letter dated June 7, 1999, High Plains appealed its under production penalties to the BCMB.
 25. On June 7, 1999, Mr. Rochon wrote to the Chicken Board explaining his reason for Greenbelt's under production. His hatchery had delayed placement and as such, his first shipment after September 27, 1998 (on November 27, 1998) was clearly a winter batch.

26. On June 8, 1999, High Plains wrote to the Chicken Board and advised of the further "extenuating circumstance" that FVCS was extremely short of hatching eggs in the period July through October 1998. These shortages affected High Plains' chick placements and shipments.
27. On July 27, 1999, the Chicken Board reviewed the High Plains under production penalty and reaffirmed the penalty.
28. By letter dated July 22, 1999, Greenbelt appealed its under production penalties to the BCMB.
29. As a result of its own investigations and not at the request of Greenbelt, on August 13, 1999, the Chicken Board determined that as a result of chick placement dates and chick mortality, a portion of Greenbelt's under production was due to extenuating circumstances. Thus, Greenbelt's under production penalty was reduced from 25,988 kg to 19,912 kg.
30. On August 24, 1999, Mr. Thor Spencer of Western Hatchery Ltd. wrote to the Chicken Board on behalf of Greenbelt. A portion of his letter is set out below:

In March of 1998 I met with Mr. Rochon, and together we scheduled his farms placements and chick placement numbers for the rest of the 1998 calendar year, including export placements. During the summer, the Hatcheries experienced extreme egg and chick shortages due to the "J" virus, and we were forced to extend the pre-arranged placement dates twice, each by one week (August and October placements). These delays amounted to 30,621 kg. of quota production in cycle length adjustments that he ordinarily would not be under-produced had there not been an egg shortage. In addition to this, the Hatchery did not alter his export placements, as they had also been planned well in advance, and the processing plants were expecting this product.

It was assumed that this would not be a problem, as meetings and conversations with Mr. Mykle and Mr. Krahn led one to assume that if a grower was shorted chicks, or had his cycles prolonged due to egg shortage, would not be held against the grower. This in fact has been the case in many instances for the same period of time. Many growers were under-produced during this penalty correction cycle, but were seemingly excused for the very reasons stated above.

In Mr. Rochons case, it seems at issue is the export placements, which were not changed as the processor had planned these into their requirements.

ARGUMENT OF THE APPELLANTS

31. The Appellants raised the issue of the validity of Order 313. They are of the view that the Order is outside the jurisdiction of the Chicken Board to enact in that it creates a monetary penalty. However, given the evidence, the Appellants felt it was unnecessary to make any arguments with respect to this issue and reserved their right to argue the legal invalidity of the Order on appeal to the Supreme Court of British Columbia.
32. The Appellants' main argument is that Order 313 is not sufficiently clear to support the imposition of under production penalties and as such is defective. In the alternative, the

Appellants argue that if the Order is in fact clear, it is still defective in that the Order does not set out the complete law with respect to the imposition of a penalty.

33. The Appellants argue that s. (iv) is unclear on its face and subject to more than one interpretation:

(iv) **UNDER PRODUCTION PENALTY**

- (1) The under production penalty will be calculated and assessed when a registered grower has marketed their 1st shipments on or after Sept. 27, 1998. (***NO UNDER PRODUCTION BEYOND THE 15% TOLERANCE SLEEVE CAN BE CARRIED INTO THE FALL-WINTER PERIODS***).
 - (2) Registered growers who have under marketed their 1st shipments on or after Sept. 27, 1998 in kilograms live weight below the 15% tolerance, will have this amount of kilograms deducted from their Quota Production Order (A-22).
34. Mr. Hoschka testified that his first shipment after September 27, 1998 was September 30, 1998. In that cycle, he produced 54, 686 chickens, having shipped birds on September 16, 21, and 30. In that period, (A-20), he was over produced by 26,802 kg. Thus, in his opinion, he was not caught by the under production penalty and could under produce his domestic allocation (or rather allocate more of his production to export) in the next period. He did not interpret this Order to mean that his November shipments would be his "first shipments" after September 27, 1998 as historically, under production in the fall has been encouraged by both the processors and the Chicken Board.
35. It was his understanding that the Order was trying to penalise growers who under produced during high demand times (summer) and over produced in low demand times (winter). He clearly was not doing this as his under production was in November, a period of historically lower demand.
36. In addition, Mr. Hoshka states that his hatchery delayed his placement for cycle A-20 by 10 days. Had he received his chicks in a timely fashion, his entire flock would have been shipped before September 27, 1998. There would not then be any ambiguity as to which were his first shipments after September 27, 1998.
37. Mr. Rochon also misinterpreted Order 313. He too argues that historically, the processors asked for over production during the high consumption summer months and lower production during the winter. The cut-off date between over production and under production has always been the end of August or September. Mr. Rochon did not understand that Order 313 changed the historical cut-off period. He assumed that as long as he did not under produce in the summer, he would avoid penalty. Not carrying under production into the fall has been an approach he has followed for as long as he can remember and was the approach recommended by the Under Over Committee when he was a member.

38. Mr. Rochon shipped all the production for cycle A-20 on September 21 and 22, 1998. As a result of delays by his hatchery, his next chick placement did not occur until October 16, 1998. This flock (A-21) was shipped on November 27, 1998. Mr. Rochon's evidence was that he did not appreciate that a penalty would be imposed on under production in November, clearly a winter batch, as historically this is a time of less demand and desired under production.
39. Like Mr. Hoschka, Mr. Rochon also grew export production during A-21. Had his production been allocated differently, he could have avoided any under production penalty. However, he did not appreciate that because his September shipments went out on September 21 and 22, 1998, his next shipment, a winter shipment, would be considered to be his first shipments after September 27, 1998 and thus, subject to under production penalties.
40. Mr. Frank Flokstra, President of the BC Chicken Grower's Association from 1992 through 1999, testified as to the rationale behind Order 313. During his time on the executive of the Grower Association, Mr. Flokstra sat on the Under Over Committee. His recollection is that Order 313 was intended to target growers who were chronically over or under produced. The intention was not to set a date and determine who was over or under produced and penalise them. Rather, the Order was to bring into line those producers who were producing heavily in the winter and spring and shutting their barns down in the summer. There was a desire to regularise the stream of product so as to avoid peaks and valleys. Mr. Flokstra was of the view that a cut-off period between over and under production extending into November does not make sense as it encourages over production in a time of lower market demand.
41. Mr. Fred Krahn, then Chair of the Chicken Board, agreed with Mr. Flokstra's explanation for the rationale behind over and under production penalties and dividing the year into summer and winter periods. While Mr. Krahn was not sure that demand for chicken still decreased in the winter months, he agreed that was the rationale at the time Order 313 was drafted.
42. As to his interpretation of Order 313, Mr. Krahn understood "first shipments" to mean shipments based on chicks placed before September 27 rather than after. With respect to shipment of a flock over several days between September 21, 1998 and September 30, 1998, Mr. Krahn agreed that the September 30, 1998 shipment could be a "first shipment after September 27, 1998". However, as to the exact implementation of the Order, he deferred to staff.
43. The Appellants argue that the Order is not clear. Both Appellants produce the same amount of chicken cycle after cycle. It is a judgement call how they apportion between domestic and export production in any given cycle. Had the Order been clear, both Appellants argue that they could have avoided the penalties by apportioning more of their production to domestic in the penalty cycle. The Appellants argue that it is unreasonable to enforce a penalty against a judgement call on an unclear Order.

44. A further ambiguity is created by the reference at the bottom of Order 313 to period A-21 as (Aug. 2 - Sept. 26). On the Appellants' Quota Production Orders, A-21 refers to a different period. For Greenbelt, A-21 is from October 16, 1998 to November 27, 1998. For High Plains, A-21 is from October 16, 1998 to November 23, 1998. The Appellants argue that Quota Production Orders are an administrative act and as such cannot change Order 313. It should prevail and as such period A-21 should be read as the period between August 2 and September 26.
45. The Appellants argue that it is the time period between August 2 - September 26 which is important and not the period on a grower's Quota Production Order that is defined as A-21. Section (iv)(2) of Order 313 states:
- Registered growers who have under marketed their 1st shipments on or after Sept. 27, 1998 in kilograms live weight below the 15% tolerance, will have this amount of kilograms deducted from their Quota Production Order (A-22).
46. Thus, the Appellants argue that Order 313 was not intended to apply to chicks placed after September 27, 1998. Chicks placed before September 27 are being placed for the summer period, while chicks placed after September 27 are being placed for the winter period. Thus, where a grower is under produced on chicks placed before September 27 and shipped after September 27, he should be subject to a penalty if he is beyond the 15% tolerance because he is under produced in the summer period. However, if a grower is under produced on chicks placed and shipped after September 27, he should not be subject to a penalty if he is beyond the 15% tolerance because this is winter production.
47. The Appellants' second argument is that even if Order 313 is clear and unambiguous, the Order is defective, as it does not disclose the whole law. The term "extenuating circumstances" is not defined in the Order. It was not until April 16, 1999 that the Chicken Board sent a notice to all growers advising them as to what would be considered to be extenuating circumstances. In addition, the Appellants argue that in some cases only partial penalties were assessed. There is no mention of partial penalties in the Order nor does it explain how a partial penalty could be achieved.
48. The Appellants argue that it is clear that the Order does not contain all the essential ingredients. This is best illustrated by the fact that of the 68 identified under produced growers only 18 ultimately received a penalty. The effective criteria for assessing a penalty is not contained within the Order. Rather the assessment of the penalty is left to an administrative decision made by a Committee, Board staff and the Chicken Board acting in its administrative capacity. The manner in which growers could dispute their penalties was wholly irregular, as the criteria for extenuating circumstances were not published in advance. The Appellants argue that it was a "fluke" if the grower happened on the appropriate criteria in his letter. Growers were not given notice of the law that would be applied and they were not given an effective opportunity to address the relevant considerations.

49. It is the Appellants' position that the Order is inadequate on its face. It does not disclose the criteria that an administrator will apply in enforcing the Order and the administrator cannot look to the Order and determine who will be penalised and who won't.

Costs

50. Although the Appellants raised the issues of unequal treatment and bias due to their participation in the export program, these issues were not argued independently but rather formed part of the Appellants' argument for costs. The Appellants argue that they are entitled to costs for the following reasons.
- a) The Appellants pay for the Chicken Board's costs of operation through levies. Thus, they are already paying a portion of the Board's costs on the appeal.
 - b) The amount of the appealed penalties is comparable to the cost of preparing and presenting the Appellants' case. If costs are not awarded, there is a real disincentive for growers to appeal an invalid order.
 - c) As the appeal is based on a confusing order, it has been caused by the actions of the Chicken Board.
 - d) The Appellants explained their positions to the Chicken Board prior to the hearing and yet the Chicken Board stuck obstinately to what amounts to an indefensible position.
 - e) The Appellants made a request for documentation relating to the issue of inequality of treatment of the 68 growers. The Appellants argue that there was a wilful non-production of documents necessary to build the case of inconsistent treatment between growers.

ARGUMENT OF THE RESPONDENT

51. The Respondent takes the position that the Appellants are not looking at the entire picture when they argue that Order 313 is not complete as it does not contain the entire law with respect to under production penalties. The Respondent argues that the Order is not defective. The Appellants fail to consider the entire process followed by the Chicken Board both before March 31, 1999 and after. Long before the list of extenuating circumstances was published in April 1999, the Chicken Board had been publishing warnings in its Board Reports. Growers were advised that if they were shorted chicks, had placement or mortality problems, they should contact the Chicken Board. While the Respondent concedes that the list in the Board Report is not complete, it should be noted that the Chicken Board has been very clear that the April 16, 1999 list is not meant to be exhaustive. The Chicken Board retains the discretion to consider individual grower circumstances.
52. The Respondent argues that while the process followed by the Chicken Board in implementing the under production penalties under Order 313 was not perfect, it did give both Appellants a reasonable opportunity to make submissions to the Chicken Board. Both Appellants made submissions to the Chicken Board and were treated equitably and fairly.

53. But more significantly, the Chicken Board never contemplated that the list was intended to be exhaustive as under production situations could arise that were not foreseen at the time the Order was drafted. Thus, the Respondent argues that it is not valid or proper to set aside this Order simply because it does not contain an exhaustive list of extenuating circumstances. Such a task would have been impossible.
54. In reviewing the evidence presented in the hearing and the Appellants' arguments, it is clear that neither Greenbelt nor High Plains fit within any of the extenuating circumstances set out in the April 16, 1999 notice. Their under production does not relate to high mortality, chick shortages or placement problems. Rather, both farms produced well in excess of their quota on a yearly basis. The problem for both farms was that both made incorrect judgement calls when apportioning production between domestic and export. This, in the opinion of the Respondent, is not what is contemplated by extenuating circumstances.
55. Thus, the only real issue on this appeal is whether Order 313 is unclear and ought to be set aside or alternatively, whether the Appellants ought to be relieved of their penalties?
56. The Respondent is of the opinion that Counsel for the Appellant is incorrect in his interpretation of Mr. Krahn's evidence with respect to whether the Order was intended to apply to chick placements before or after September 27, 1999. If the Appellants accurately stated Mr. Krahn's evidence, then the Respondent argues that Mr. Krahn made an unintentional slip. Order 313 does not say anything about chick placements; it talks only of shipments. That is the relevant consideration.
57. Neither Mr. Peter nor Mr. Flokstra, both past members of the Under Over Committee which penalised the Appellants, gave evidence about chick placements being significant in interpreting Order 313. In fact, if one looks at the meeting of the Under Over Committee on March 31, 1999, there is absolutely no suggestion that chick placement before or after September 27, 1999 was a consideration. The Respondent argues that Mr. Krahn's evidence is inconsistent with the Order and as such it cannot form the basis for a finding that the Order is inconsistent or unclear.
58. Looking then to the Order, the Respondent argues that it is clear. The Order states that it applies to first shipments on or after September 27, 1998. There is no mention of placements. The Respondent concedes that in applying this Order to High Plains, there is a potential ambiguity as High Plains shipped chicken on September 16, 21 and 30. Thus, it had one shipment after September 27, 1998, which could arguably be a first shipment. However, according to the evidence of Mr. Jim Beattie, Production Manager of the Chicken Board, first shipments has a specific meaning in the chicken industry. Chicken growers with larger flocks often ship their flock over several days in order to meet their processor's requirements. First shipments means the first shipment of any given flock. The use of "shipments" plural is no accident; it is reflective of industry practices; it is not a typo. If High Plains read the Order so as to mean first shipment as opposed to first shipments after September 27, 1998, then it was

the only grower out of 300 who did so. If Mr. Hoschka had a question about the interpretation of the Order, he should have sought clarification from the Chicken Board.

59. Both Appellants raise the issue that Order 313 is ambiguous when read in conjunction with the earlier version of Order 313 and the industry's understanding of the particular mischief Order 313 was attempting to prevent. The Respondent disagrees with this position. The amendment to Order 313 was intended to remove the ambiguity of referring to both Period A-21 and a specific date range (August 2 - September 27). This ambiguity is demonstrated by Mr. Beattie's evidence that for some growers, like the Appellants, A-21 may occur on significantly different dates than August 2 - September 27 due to their production schedules and cycle lengths. The Respondent argues that the amended version of Order 313 removes any ambiguity by using a specific date (September 27, 1998) instead of a period and a date range.
60. The Respondent argues that the mischief the Order attempts to prevent is growers not producing what they are allotted. In this case, neither Greenbelt nor High Plains was producing their allotted quota in a given cycle. Rather both growers consistently over produced or under produced their quota. While this is not blameworthy conduct, it is conduct which risks having an under or over production penalty imposed.

Costs

61. The Respondent argues that the Appellants are not entitled to their costs on appeal. With respect to document production, the Chicken Board has a responsibility to growers to protect confidential information. Had the Appellants wanted disclosure of documents, the proper approach was to apply to the Panel of the BCMB for an order protecting the confidentiality of the growers and yet satisfying the Appellants' need for disclosure. This was not done. Counsel for the Appellants was not retained at the pre-hearing conference so this issue was not dealt with at that time. Instead a letter was sent a week prior to the hearing demanding certain documents be disclosed. The Respondent disclosed the non-contentious documents and maintained confidentiality on others. The Respondent argues that it is inappropriate for the Appellants to characterise this as wilful non-disclosure justifying an award of costs.
62. The Respondent disagrees that simply because the Appellants pay a portion of the Chicken Board's costs through levies, this entitles them to costs. If that were a valid consideration, every appellant would be entitled to costs. Given that the Chicken Board is a legislative body empowered to make orders and enforce them, payment of levies simply can not be a factor to consider.
63. Likewise the Respondent disagrees that the fact that the penalty is less than the Appellants' costs of appeal is a factor to consider in awarding costs. In fact, it is more in accord with the practices of courts in British Columbia to deny a party costs where the amount involved is small. However, given that many of the issues before the Chicken Board do not involve large penalties, the Respondent suggests that this factor does not support an award of costs for either party.

64. The grounds that the BCMB should consider in awarding costs should be related to the nature of the appeal. Is it fallacious? Was there any likelihood of success? The Respondent argues that applying that test, an award of costs is not justified for either party.

DECISION

65. Although the Appellants raised several issues on appeal, the appeal centred on two main issues. Is Order 313 so ambiguous that it would not be fair for the Chicken Board to take action for underproduction in these circumstances? If not, is it defective for failing to set out the whole law which is to be applied?
66. Dealing with the latter issue first, the Appellants have argued that Order 313 is defective in that it does not contain the whole law to be applied. The Panel does not agree. The Order provides for penalties for under production in excess of a 15% tolerance during a specific time frame, unless there are extenuating circumstances. The Panel agrees that what constitutes extenuating circumstances may not be finite. The published list is meant to be a guideline but it is not exhaustive. The Chicken Board must be able to consider the individual circumstances of a grower and offer relief where appropriate. In this case, the Chicken Board's list of extenuating circumstances was not circulated until April 16, 1999, well after the penalty period. However, given that the Appellants did have an opportunity to consider the list and make submissions to the Chicken Board, the Panel finds that the Appellants were treated fairly.
67. The real issue is whether, in these circumstances, the Order was sufficiently ambiguous in relation to underproduction as to make it unfair to take action under it. Historically, action was taken in relation to under production to prevent growers from under producing during the time of high demand, the summer. Some growers would over produce through the winter and spring, in order to take time off in the summer. While this might suit the grower as summer is a nice time for a holiday and the cost of production may be higher; it does not suit processors who are trying to meet market demands. Thus, over and under production penalties were rightly introduced to bring some discipline to the system.
68. The nub of the problem for the Appellants is that both are being penalised for under production on shipments that occurred in late November 1998. The Appellants and the two former Under Over Committee members who testified (Mr. Flokstra and Mr. Peter) are of the opinion that it was never contemplated that under production penalties would be applied for production during the winter period. After all, this is the time period in which under production is, or at least historically was, desirable. Thus, the penalty that is being imposed does not appear to fit with its historical justification given the particular degree of underproduction present on these facts.
69. Mr. Rochon stated that he conducted himself the same in 1998 as he had in the 20 previous years, not thinking that winter under production would be penalised. Unfortunately, he ran afoul of Order 313 as his first shipment after September 27, 1998 (in November 1998) was

significantly under produced. Mr. Hoshka argues two-fold. Either his first shipment after September 27 was September 30 (the last of shipment of his flock) and as he was then over produced he should not be penalised or alternatively, he is the same position as Mr. Rochon. He is being penalised for under production in November, the winter period.

70. The Panel does not accept Mr. Hoshka's first argument that his September 30, 1998 shipment, the last shipment of his flock, should be interpreted as his "first shipments on or after September 27, 1998". We accept Mr. Beattie's evidence that "first shipments" is understood in the chicken industry to mean the first shipment of a particular flock. Mr. Hoshka has been in the chicken industry a very long time and the Panel believes that he should be aware of the special meaning attached to that particular phrase.
71. The better argument is that Order 313 does not direct itself to what was generally understood to be the mischief of under producing in the summer period. If it was the Chicken Board's intent to broaden the scope of the under production penalty when it revised Order 313, the Panel would have anticipated some notice to the industry of this intent. However, the Chicken Board never provided any such notice nor did the Under Over Committee members understand that there had been any fundamental change in the rationale behind Order 313.
72. The Panel finds that the method of assessing penalties in the particular circumstances of the Appellants did not reflect the underlying purpose of the Order. The Panel agrees that the application of the Order to their particular circumstances was a sufficiently unclear and ambiguous that the appeals should be granted and the under-production penalties for Greenbelt and High Plains be set aside.

Costs

73. The Appellants have requested their costs of this appeal. The Panel is not prepared to make an award of costs to either party. The Panel disagrees with the Appellants' argument that there was misconduct on the part of the Respondent.

ORDER

74. The BCMB orders that the under production penalties assessed against the Appellants be set aside.
75. There will be no costs awarded to either party.

RECOMMENDATIONS

76. The Panel is aware that the revised procedure in implementing penalties under Order 313 has at least in part resulted from directions of the BCMB in the earlier appeal of Order 313. The BCMB upheld the Order and suggested refinements to its implementation. Some of the Chicken Board's delay in developing procedures around the under production penalty may

have been due to its reluctance to take any steps with respect to Order 313 until the BCMB's appeal decision was released. We do not fault the Chicken Board for the delay.

77. However, as a result of our findings in this appeal with respect to the under production penalties created by Order 313, the Chicken Board will need to review Order 313 and ensure that the Order as worded meets its desired objectives. It is our understanding that this review is already under way. If a change is necessary, the policy reasons for such a change as well as any amendment to the Order should be clearly communicated to all growers, processors and hatcheries in sufficient time to allow affected persons to alter their conduct if necessary to avoid a penalty. We do not want to be taken as saying that winter under production can never be penalised. However, if the Chicken Board decides to implement such a penalty, we would expect the Chicken Board to clearly state why and in what circumstances such a penalty would be imposed.
78. In conducting this review, the Panel recommends that if the Chicken Board intends to maintain an under production penalty, that some thought be given to chick placement date. If the historical objective is to create a disincentive to over producing during low demand times and under producing in high demand times, linking chick placement dates with shipment dates may create a better defined cut-off period. The risk of a grower being penalised on winter production is minimised if the latest shipment is from chicks placed on or before the cut-off date.
79. The Chicken Board referred to the fact that British Columbia has the most flexible penalty system in Canada, requiring growers to "get it right " only twice per year. Other provinces require more rigour in their systems on a period by period basis. As there appears to be a strong desire in the industry to deal with chronic over and under producers, it may be necessary for the Chicken Board to implement a more rigorous system.
80. This appeal also focussed attention on export chicken production. It is very apparent that quota does not really limit a growers' production. Providing a grower has an agreeable processor, they can run their facility at full capacity cycle after cycle and treat the need to be in quota compliance as a simple exercise in accounting. There is a real risk that uncontrolled production could compromise the regulated marketing system.
81. The BCMB supports strengthening the regulated marketing system. It is the responsibility of the Chicken Board to balance the desire to participate in an export program with the need for stability within the domestic market. It is critical for the Chicken Board to bear this in mind when conducting their review of Order 313 and the quota compliance system.

Dated at Victoria, British Columbia this 12th day of June, 2000.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Satwinder Bains, Member

Richard Bullock, Member