

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 CHICKEN BOARD'S FUNDING OF THE
BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

BETWEEN:

RAINBOW POULTRY LTD.,
STAM'S EGG & POULTRY LTD. AND
V&H JOINT VENTURE

APPELLANTS

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION
BRITISH COLUMBIA POULTRY ASSOCIATION
BRITISH COLUMBIA DAIRY ASSOCIATION

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Suzanne K. Wiltshire, Presiding Member
Diane Fillmore, Member
Andreas Dolberg, Member

For the Appellants

Wendy A. Baker, Q.C., Counsel

For the Respondent

John J. L. Hunter, Q.C., and Claire E. Hunter, Counsel

For the Interveners
BC Chicken Growers' Association

Paul D. McLean, Counsel

BC Poultry Association

Allen James, Director

BC Dairy Association

Dave Eto, Executive Director

Date of Hearing
Place of Hearing

November 16, 2012
Abbotsford, British Columbia

INTRODUCTION

1. The BC Chicken Growers' Association (Association) is incorporated under the *Society Act* with a mandate to unite the 330 provincially registered chicken growers for the betterment of the industry. The Association receives funding from the British Columbia Chicken Marketing Board (Chicken Board); this funding is the subject of this appeal.
2. All licensed chicken growers are obliged to pay a levy of 1.60 cents per kilogram live weight on chicken grown in the province, which accounts for most of the Chicken Board's annual revenue. In 2011, approximately 60% of these levy funds were used by the Chicken Board in its operations, 27% were remitted to the national agency (Chicken Farmers of Canada) for services provided and 13% (just under \$400,000) were allocated to fund activities of the Association.
3. The appellants are three chicken growers (Rainbow Poultry Ltd., Stam's Egg & Poultry Ltd. and V&H Joint Venture) that supply Farm Fed, a poultry processing company located in Abbotsford that is a division of K&R Poultry Ltd. Ken Huttema and Rob Vane are principals, either independently or jointly, in the three appellants and K&R Poultry.
4. On October 11, 2011, Mr. Huttema and Mr. Vane wrote to the Association advising that the three growers would no longer be members as they did not believe that the Association looked after the interests of all members or respected the processes of the Chicken Board. In their view, the three growers got no benefit or support from the Association's annual budget of \$400,000.
5. The Association, in its November 19, 2011 response, offered to meet and discuss grower related issues but stated regardless of the three growers' participation, they would still be required to pay the Chicken Board levy which, in part, funds the Association. In a March 30, 2012 letter from counsel for the Association, the three growers were encouraged to participate in the Association and to meet and discuss any grower related issues. Counsel for the Association also advised that as the Association is not a private society but an industry association funded by statutory authority, the growers could not simply elect to leave the Association and remain on the Chicken Board register of growers.
6. On February 22, 2012, counsel for the appellants notified the Chicken Board that the three growers had withdrawn from the Association and requested that their levies not be used to fund the activities of the Association.
7. On May 15, 2012, the Chicken Board responded to the request, indicating that as levies collected from growers are pooled and spent by the Chicken Board consistent with the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (*Act*) and the *British Columbia*

Chicken Marketing Scheme, 1961 (Scheme), the Chicken Board would not be complying with the request.

8. On May 29, 2012, counsel for the appellants requested particulars from the Chicken Board regarding which expenses of the Association are incurred with the authority of the Chicken Board in carrying out the purposes of the *Scheme*, how those expenses are authorized and what accounting is received by the Chicken Board to justify the expenses. The letter requested that until this information was provided, no levies collected from the appellants be disbursed to the Association.
9. Counsel for the Chicken Board responded on June 6, 2012, indicating that the levies collected by the Chicken Board are spent consistent with the *Act* and *Scheme* and as levies are not segregated by grower, the Chicken Board could not provide assurance that levies collected from the appellants have not been disbursed to the Association.
10. On June 14, 2012, counsel for the appellants again requested information from the Chicken Board¹:
 - 1) Will the Board provide ...the following information:
 - details as to which expenses of the BCCGA are incurred with the authority of the Board in carrying out the purposes of the *Scheme*,
 - details as to how those expenses are authorized by the Board,
 - copies of all decisions of the Board in relation to payment of the BCCGA's expenses over the last 4 years,
 - copies of written authorizations for payment of the BCCGA's expenses over the past two years,
 - details as to the accounting received by the Board to justify the expenses of the BCCGA,
 - copies of all accounting documents, including receipts, statements and other such documents, upon which reimbursements to the BCCGA have been made over the past four years, and
 - any other documents not expressly referred to above which relate in any way to decisions of the Board to pay the BCCGA's expenses, or to payment of the Association's expenses?
 - 2) Will the Chicken Board continue to fund the BCCGA in 2012 on the same basis that it funded the Association in previous years?
11. The Chicken Board responded to these requests on July 4, 2012. It did not provide the detailed information requested but did provide certain additional information about its process in approving funds paid to the Association and referenced the authority to collect and spend levies found in s. 11(1)(o) of the *Act* and s. 4.01(p) of the *Scheme*. The Chicken

¹ The appellants' counsel completed a Form A Application for Board Decision or Determination (Schedule 14 of Part 55.1 in the Chicken Board General Orders)

Board indicated that the Association served an important function in working on behalf of growers and the industry and set out a list of Association activities which, in its view, would have to be staffed by Chicken Board nominees if they were not undertaken by the Association. The list of activities included participation at regional grower meetings and educational activities, representing the industry at events or on government or industry committees, acting as a liaison between growers and processors, providing ongoing verification of WorkSafe clearance status for poultry subcontractors and providing information to industry stakeholders.

12. The three growers took issue with the Chicken Board's July 4, 2012 response and filed an appeal on August 3, 2012 with BCFIRB. They noted the Chicken Board's refusal to produce information on the funding of the Association and opposed the continued funding of the Association until it had been determined that the funding was in strict accordance with the *Scheme*. The appellants' position was that Association activities beyond the scope of the *Scheme* should be funded directly from the Association's membership and not the operating grant from the Chicken Board.
13. The Association was granted full intervener status in the appeal. The appellants applied for an order prohibiting the Association from using funds from the Chicken Board to pay its legal fees and expenses associated with this appeal. In a decision dated October 12, 2013, the panel chair dismissed this application finding that the requested remedy was subsumed in the larger question on appeal and could only be appropriately determined after considering the evidence and argument advanced on hearing the appeal.
14. The BC Poultry Association (BCPA) and the BC Dairy Association (BCDA) were granted limited intervener status to make written and/or oral submissions at the hearing.
15. The appeal was heard on November 16, 2012.

ISSUE

16. Is funding of the Association as currently implemented by the Chicken Board authorized within the scope of the *Scheme*?

LEGISLATIVE FRAMEWORK

17. The applicable legislative framework for the Chicken Board's power to raise and allocate funds is found in the *Act* and the *Scheme*.

18. Section 11 of the *Act* gives the Chicken Board power to set and collect levies:

Powers of boards and commissions

11 (1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

...

(o) to set and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission

(i) to carry out the purposes of the scheme,

(ii) to pay the expenses of the marketing board or commission,

(iii) to pay costs and losses incurred in marketing a regulated product,

(iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and

(v) to set aside reserves for the purposes referred to in this paragraph;

...

(v) to require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission. **[emphasis added]**

19. Section 2.01 of the *Scheme* sets out its purpose:

Purpose of scheme

2.01 The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the powers of the Province, of the production,

transportation, processing, packing, storage and marketing of the regulated product within the Province, including the prohibition of such transportation, packing, storage and marketing in whole or in part.

20. Section 4.01 of the *Scheme* grants the Chicken Board the powers over raising and allocating funds:

Powers of board

4.01 Subject to section 4.02 (2), the board shall have power within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing, or any of them, in whole or in part, and shall have all powers necessary or useful in the exercise of the powers hereinbefore or hereinafter enumerated, and without limiting the generality thereof shall have the following powers:

k) to use any moneys received by the board in carrying out the purposes of the scheme, and in paying the expenses of the board, and in paying to the British Columbia Broiler Growers' Association² any portion or all of the expenses incurred by the said association with the authority of the board in carrying out the purposes of the scheme;

(p) the powers set out in section 11 (1) (o) (i), (ii), (iv) and (v) and (1) (v) of the *Natural Products Marketing (BC) Act*.
[emphasis added]

APPELLANTS' CASE

21. Mr. Vane, a principal with both Stam's Egg & Poultry and V&H, testified that the appellants' farms produce about 350,000 kg per cycle, which is expected to increase to 490,000 kg next year. They paid well over \$30,000 in levies in 2012 which will increase to about \$50,000 in 2013 as a result of expected production increases. Approximately 13% of these levies will be transferred directly to the Association by the Chicken Board, even though the appellants have served notice of their withdrawal from the Association. Mr. Vane was of the view that the Association was not doing him any good; it represents the interests of 80% of growers but does not represent the appellants' interests and is wasteful. He says the Chicken Board should represent the industry and under the current situation the Chicken Board and Association are really one and the same, doubling up on work and costs. It is unreasonable that the Association is funded through levies when the Primary Poultry Processors Association of BC is not.

² The British Columbia Broiler Growers' Association subsequently changed its name to the BC Chicken Growers' Association.

22. In argument, the appellants say that while many of the Association activities identified in the July 2012 Chicken Board letter (paragraph 11 above) are beneficial to the industry, they are not “required” for the purposes of the *Scheme* and serve only the interests of growers. These activities should not be funded by the Chicken Board through grower levies but rather through funds collected directly from the Association’s members.
23. The appellants argue that the Chicken Board’s power to allocate funds to the Association is limited by the *Scheme* and the requirement in the *Act* that the funds be used “to carry out the purposes of the scheme” (s. 11(1)(o)(i)). This power cannot be read so broadly as to allow the Chicken Board to fund in whole all the expenses incurred by the Association. Further, s. 4.01(k) of the *Scheme* grants the Chicken Board the power to pay any or all of the expenses of the Association, but this power is restricted to expenses incurred in “carrying out the purposes of the scheme”.
24. The appellants argue that s. 4.01(k) is not a blanket power to fund all of the Association’s expenses without careful review by the Chicken Board as to which of those expenses are actually required by the *Scheme*. The appellants disagree with the Chicken Board’s and Association’s positions that the *Scheme* permits 100% of the Association’s expenses to be funded. To the extent the Chicken Board is funding expenses not expressly tied to the purposes of the *Scheme*, it is acting outside its powers.
25. The appellants further argue that in exercising its broad powers, the Chicken Board is accountable to BCFIRB as its supervisory body, to the members of the industry and the general public by way of appeals to BCFIRB, and to the general public itself. The Chicken Board is funded almost entirely through mandatory grower levies and there is a greater requirement for accountability in the expenditure of “public”³ monies than in the spending of private monies. The heightened accountability expected of the Chicken Board as a public body does not apply to the Association. Under the current budgetary system, the Association is not accountable in any meaningful way to the Chicken Board and it is not accountable to BCFIRB at all.
26. The appellants argue that the use of public money in funding the expenses of the Association can only be justified if there are reasonable accountability measures in place to ensure that the Chicken Board has meaningfully and appropriately considered the expenses and authorized them as “necessary for the implementation of the *Scheme*”. The appellants say

that if the activity is not “necessary for the implementation of the *Scheme*” it should not be funded.

³ We take the use of public here to mean monies collected using legislated power to levy chicken growers.

27. The appellants identified the following as examples of Association expenses that duplicate Chicken Board expenses, are incurred solely to advance the interests of growers, and are not “necessary for the implementation of the *Scheme*”:
- 1) Legal expenses – the Chicken Board is capable of defending and advancing the purposes of the *Scheme* in proceedings. It is not necessary for the purposes of the *Scheme* for the Chicken Board to fund the Association’s legal expenses to duplicate Chicken Board legal work or advance adverse legal positions.
 - 2) Travel and entertainment – travel to and attendance at meetings where the Chicken Board is already represented or which are not necessary to advance the purposes of the *Scheme*.
 - 3) Biosecurity and animal care program – these are duplicative as the Chicken Board already deals with these issues on behalf of the industry.
 - 4) Training in relation to lobbying – query raised as to whether this was to learn how to lobby government against processors.
 - 5) Negotiation of price premium – to advance interests of growers rather than industry as a whole and not necessary for purposes of the *Scheme*.
 - 6) Funding of secondary organizations – the Association does not have power under the *Scheme* to allocate public monies to secondary organizations such as the BC Sustainable Poultry Farming Group or the BC Poultry Association.
 - 7) Payment of all daily rates for directors – per diems paid with public monies must be restricted to activities necessary for the purposes of the *Scheme* where Chicken Board members are not in attendance.
28. The appellants argue that establishing measures whereby the Chicken Board would only approve certain activities would increase the Association’s accountability. With voluntary membership and direct receipt of revenue from members for those activities not approved by the Chicken Board, the Association would have an increased incentive to control costs and operate efficiently in order to satisfy its members that their money was well spent. The appellants argue that such discipline is currently absent as the Association receives all its funding from the Chicken Board whether or not Association members agree with the expenditures.
29. On the issue of the meaning of the phrase “incurred for the purposes of the *Scheme*”, the appellants rely on *Global Greenhouse Produce et al v. B.C. Marketing Board et al*, 2003 BCSC 1508. This case addressed the issue of whether a vegetable marketing agency could be reimbursed for legal expenses incurred defending an anti-dumping claim against the provincial tomato industry through a British Columbia Vegetable Marketing Commission levy order. While the agency was not a board or commission, the Court approved the

payment of the expenses finding that they were “incurred for the purposes of the *Scheme*”. Mr. Justice Drost held at paragraph 128:

In light of those facts and the circumstances of this case, I have concluded that the expenses, although incurred by Hot House, were incurred for the purposes of the [Vegetable Commission], and that the broad grant of authority contained in s. 3 of the British Columbia Vegetable Order, when combined with the powers conferred on it by the Scheme and the Act, clothes the [Vegetable Commission] with authority to impose and collect the levies in issue in these proceedings.

30. The appellants argue that the power given to the Chicken Board to fund Association expenses must be limited to only those expenses “necessarily” incurred in furtherance of the purposes of the *Scheme*. While there is nothing wrong with the Association advancing the interests of its members, it is wrong to use public money to fund the advocacy position of one part of the industry. The Chicken Board is a statutory body and the manner in which it currently funds the Association is not consistent with sound marketing policy.

31. The appellants argue that in order to increase Chicken Board accountability in the transfer of public money to the Association, to ensure that public funds are spent only for the purposes of the *Scheme*, to increase the credibility and accountability of the Association and to benefit the industry as a whole, BCFIRB should direct the following funding mechanism for the 2013 production year:
 - 1) The Chicken Board must identify specific deliverables for the Association, which deliverables benefit the industry as a whole and do not simply advance the position of the growers, and which are necessary in the implementation of the Scheme.
 - 2) The Chicken Board must receive a costing proposal or detailed budget from the Association for the stated deliverables, with appropriate back up information, and the Chicken Board must review and approve the proposal or budget.
 - 3) The Chicken Board must receive from the Association a report describing how the proposal was completed, and invoices for all expenses in accordance with the budget.
 - 4) The Chicken Board must review the invoices and satisfy itself that the charges were properly incurred in accordance with the approved budget before approving payment.
 - 5) All proposals by the Chicken Board to the Association must be published to the industry (growers and processors).
 - 6) All approved budgets, and approvals of payment must be made available to members of the industry either on request or in the same way as the proposals to the Association are published.

32. The appellants also seek an order that the Association’s legal expenses incurred as a result of its participation in this appeal not be funded by the Chicken Board.

RESPONDENT’S CASE

33. The respondent's position is that it is in the interests of the Chicken Board and the provincial chicken industry to have a strong, effective grower association. To this end, the Chicken Board has the discretion to fund the Association, as long as it is done for the purposes of the *Scheme*. The Chicken Board maintains that it has taken the necessary steps to ensure that the funding provided to the Association is consistent with the purposes of the *Act* and *Scheme*.
34. The respondent points first to the broad purpose of the *Scheme* to provide for the effective promotion, control and regulation, in any and all respects, of the production, transportation, processing, packing, storage and marketing of the regulated product: (section 2.01). More specifically, s. 4.01(k) contemplates the Chicken Board paying "any or all" of the Association expenses and this taken with the grant of power in s. 4.01(p) of the *Scheme* to raise and allocate funds gives the Chicken Board explicit powers to use discretion in providing funds to the Association.
35. In support of the position that the Association is funded in a manner consistent with the *Act* and *Scheme*, the respondent relied on the testimony of Bill Vanderspek, General Manager; Greg Gauthier, Vice-Chair of the Chicken Board and Chair of the Finance and Audit Committee (a standing committee of the Chicken Board comprised of three Board Members); and Rick Thiessen, Member.
36. Mr. Thiessen testified that the Association's roles and activities set out in the July 4, 2012 letter are important from the perspective of the Chicken Board and would be required to be performed by some person or organization if not carried out by the Association. If the Chicken Board were to fill that void, either full time Board members or additional staff would be required and this would be funded directly through Chicken Board levies. Mr. Thiessen also testified that the Chicken Board was fully aware of the Association's activities as various members and staff of the Chicken Board meet with the Association directors monthly and also have ongoing informal dialogue with them. He says the role of the Association has gained in prominence since 2000 when it began advising the Chicken Board through the Pricing and Production Advisory Committee (PPAC). The Chicken Board and Association are not always on the same page on issues and this helps to provide the necessary checks and balances leading to more informed and well thought out decisions by the Chicken Board.
37. Mr. Vanderspek testified that, as General Manager, he prepares the draft Chicken Board budget, which includes the draft budget submitted by the Association, for consideration by the Finance and Audit Committee. The draft Association budget is reviewed and discussed by the Committee as part of its review and recommendations to the Chicken Board regarding the overall Chicken Board budget. Mr. Vanderspek indicated that once the overall Chicken

Board budget is approved, one twelfth of the approved Association budget amount is advanced to the Association each month. If the Association is under budget at year end, any monies in excess of accrued budget expenditures are returned to the Chicken Board.

38. Finance and Audit Committee chair Mr. Gauthier testified that major Association budget items are reviewed and the Committee identifies and makes enquiries respecting anything out of the ordinary. As an example, Mr. Gauthier pointed to the December 8, 2011 Minutes of the Committee:

The committee discussed the budget of the BCCGA. [Sustainable Poultry Farmers Group] has been rolled into the [BC Poultry Association] at an increased cost. The committee questioned the benefit as the cost is increasing. The Chair noted he will meet with R Bathe of the Association later today to discuss this issue and will report back to the committee by e-mail. The committee expressed concern about the number of [Chicken Farmers of Canada] meetings to be attended by the BCCGA President (increasing to 3 meetings per year) when he no longer represents the province at the [Canadian Broiler Council] meetings.

Mr. Gauthier testified that the issues identified by the Committee on December 8, 2011 were discussed with the Association chair and the concerns were resolved to the satisfaction of the Committee. Following resolution of the Committee's issues with the Association draft budget, the budget (with any revisions) is incorporated into the draft Chicken Board budget. Upon recommendation of the Committee, the 2012 Chicken Board budget was approved and later published as part of the 2011 Chicken Board Annual Report.

39. Mr. Gauthier also testified that that there are follow-up meetings with the Association during the year to look at any variances between actual expenditures and what was approved in the budget. Although these meetings are intended to be quarterly, in 2012 there were just two meetings.
40. In response to the argument of the appellant, the respondent argues that the *Global Greenhouse Produce* decision does not support the contention that the Chicken Board's funding of Association expenses must be limited to those expenses "necessarily incurred" in furtherance of the purposes of the *Scheme*. Rather, this case is authority for the proposition that the *Act* and *Scheme* confer a very broad grant of authority on a board or commission to impose and collect levies.
41. The respondent also relies on *Ponich Poultry Farm Ltd. v. British Columbia Marketing Board*, 2002, BCSC 1369,⁴ where Mr. Justice Vickers described the British Columbia Marketing Board⁵ and the role of its members:

⁴ <http://www.courts.gov.bc.ca/jdb-txt/sc/02/13/2002bcsc1369.htm>

⁵ In 2003, the British Columbia Marketing Board amalgamated with the Farm Practices Board to create BCFIRB.

The Provincial Board is a specialized administrative tribunal given wide discretionary powers to carry out its mandate and the policy of the Act...

[T]he Legislature clearly intended the members of the Provincial Board to have significant knowledge and experience in the complex realm of regulated marketing. The members of the Provincial Board are required to be aware of the intricacies of the subject area, the economic principles that lie at the core of regulated marketing, and the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest. [emphasis added]

42. The respondent argues that it is this delicate balance within the chicken industry that the Chicken Board attains through its funding of the Association, and which is consistent with the purposes of the *Scheme*.
43. The respondent also argues that if the appellants' position were to be accepted, the Chicken Board would be required to "micro-manage" the Association by assigning tasks and in effect performing an audit function prior to expenses being incurred. It says this is inconsistent with sound marketing policy. There is a demonstrated need to have a strong grower association in place and the Chicken Board has satisfied itself that the activities undertaken by the Association are consistent with the *Scheme*. Having done so, the Chicken Board has the authority to provide the funding that has been approved.
44. The respondent argues that contrary to the views of the appellants, there is in fact a high level of accountability and transparency in the budget approval process for the Association which it summarized as follows:
 - 1) Ongoing dialogue and communication between the Chicken Board and Association addressing chicken industry issues throughout the year.
 - 2) Association budget prepared by elected directors, acting as representatives of all chicken growers, provides accountability to the growers who pay the levy.
 - 3) Proposed Association budget is reviewed year over year by the Chicken Board as part of its overall budget approval process providing the opportunity to highlight concerns within the draft budget. For the 2012 budget, the two issues raised were resolved.
 - 4) Budget update is reviewed at least once over the course of the year with the Association.
 - 5) Within the Association, expense reports are required, financial statements are prepared and a full audit of the financial statements for the year is performed by an independent external auditor.
 - 6) At the Association AGM, the audited financial statements are reviewed by members and an opportunity to ask questions and raise concerns is provided. Recommended changes to Association director per diems must be approved by members at the AGM.

7) Association audited financial statements are published by the Chicken Board as part of its Annual Report to provide for transparency.

45. The respondent argues that the above procedures provide the necessary transparency and accountability. The relief sought by the appellants would impose extra costs as well as an additional layer of review that is neither contemplated nor required by the *Scheme*.

SUBMISSION OF BC CHICKEN GROWERS' ASSOCIATION

46. Ravi Bathe testified on behalf of the Association. He has served as chair since 2009. He says that the Association unites growers for the benefit of the industry and acts as a liaison between chicken growers, other branches of the chicken industry, the Chicken Board and government. The 10 directors are elected for two-year terms and represent the three provincial chicken producing regions. Mr. Bathe noted that the Association directorship currently includes one new entrant and one specialty grower to provide a wide cross section of grower interests in addition to regional representation. Association directors meet monthly and hold regular meetings in each region to keep growers informed and to receive input on industry issues. Directors are accessible on an informal basis, and members frequently call to raise and discuss issues or concerns.
47. Mr. Bathe testified regarding the activities of the Association referenced in the Chicken Board's July 2012 letter to the appellants. In his view, the Chicken Board does not get directly involved in most of these activities. Association directors have frequent informal interactions with the Chicken Board as part of their responsibility to deal with industry issues as they arise. The Association may support the positions of the Chicken Board but has from time to time advocated for a different approach. Mr. Bathe testified regarding the importance of having a central growers' association to get input from different types of farms across the province to develop positions on issues in the growers' collective interests.
48. With respect to the budget setting process, Mr. Bathe testified that the Association executive develops an initial draft, which is discussed, amended and then approved by all the directors. Individual members may raise budgetary issues which are brought to the directors' table. After approval by the Association directors, the draft budget is forwarded to the Chicken Board and there is a full discussion on any questions or issues identified. The Association has on occasion reduced line items after concerns raised by the Finance and Audit Committee. There are also formal meetings once or twice over the course of the year to compare actual expenditures with the budget and address variances. The director per diem rates are reviewed annually by a grower committee and any changes are put forward for consideration by growers at the Association AGM.

49. Mr. Bathe said he did speak directly with the appellants following their October 2011 letter terminating their membership in the Association. He tried to communicate the good work undertaken by the Association but the appellants did not appear too interested. No other growers have expressed similar concerns with respect to the Association's funding. He states that while the Association represents growers, on every decision the directors ask themselves whether their decision is for the betterment of the growers and the BC chicken industry overall.
50. Turning to the legal argument of the appellants, the Association states that the Chicken Board is directed to pay to the Association all or a portion of its operating expenses incurred in carrying out the purposes of the *Scheme* and that, under the *Scheme*, the Association is the only entity identified to represent registered growers in BC. The Association argues that the Chicken Board has the jurisdiction to assess what is in the best interests of the industry; section 2.01 emphasizes that the purpose of the *Scheme* is to provide for the effective promotion, control and regulation, "in any and all respects", not "some respects" and not "necessary respects". As for the remedy sought by the appellants, the Association says the funding process cannot realistically be carried out on a day to day basis.

SUBMISSIONS OF INTERVENERS

51. The BC Poultry Association (BCPA) appeared as an intervener through its Director, Allen James. The BCPA is partially funded by the Association and supports the current funding mechanism. It is an umbrella group of the four commercial poultry associations (broiler hatching eggs, chicken, table eggs and turkey) which deals with a range of common issues. It came together informally primarily to coordinate input to the BC Agriculture Council (BCAC), which only has one poultry director. The BCPA has grown in importance and is now incorporated under the *Society Act* with two directors from each of the four poultry groups. The BCPA deals with a wide range of issues including the Environmental Farm Plan Program and environmental issues generally, biosecurity, animal care and all issues dealt with at the BCAC level. The BCPA says it is important for poultry producers to take a leadership role in their industry and joint effort is more efficient than dealing with issues separately. The reality of associations is that members will not always be fully satisfied but that does not mean that the association is not working for the good of its membership. The appellants, like all growers, have the opportunity to voice concerns and promote change within the Association. However, the BCPA observes that the fact that the appellants have both grower and processor interests has resulted in them seeking the "best of both worlds" and this is not workable.
52. The BC Dairy Association (BCDA) appeared as an intervener through its Executive Director who acknowledged that member disagreements occur but one central association gives

producers with varying interests the ability to participate in a structured democratic process to promote the best interests of the sector overall.

ANALYSIS

53. The issue in this appeal is the proper interpretation to be placed on the Chicken Board's authority to fund the Association. The appellants argue that this power cannot be read so broadly as to allow the Chicken Board to fund in whole *all* the expenses incurred by the Association; rather the power to fund is limited to only those expenses "necessarily incurred" in carrying out the purposes of the *Scheme*. It is the appellants' position that if an activity is not "necessary" for the implementation of the *Scheme*, it should not be funded. The respondent rejects the notion that funding of Association expenses is limited to those expenses "necessarily incurred" in furtherance of the purposes of the *Scheme* but rather argues that it has a broad discretion to pay "any or all" of the Association expenses incurred in carrying out the purposes of the *Scheme*.
54. The starting point of the panel's statutory interpretation is that "the *Act* and the *Scheme* must be given a fair and liberal interpretation so as to make effective the legislative intent as applied to the administrative scheme involved", *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at QL p.4 and *Hallmark Poultry Processors Ltd. v British Columbia (Marketing Board)*, 2000 BCSC 569 at para 18.
55. We accept that the *Act* is a clear example of legislation which must be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. The purpose of the *Act* is to preserve orderly marketing – sufficient but not overabundant supply: *Truong Mushroom Farm Ltd. v. British Columbia (Mushroom Marketing Board)*, [1999] B.C.J. No. 1079 (S.C.) at para. 81. The purpose of the *Scheme* is to impose orderly marketing on the production of chicken in the province through the creation of the Chicken Board with broad regulatory powers.
56. The *Act* gives the Chicken Board broad powers to raise and allocate funds (s. 11(1) (o)), the *Scheme* authorizes the Chicken Board to use any monies received by the board in carrying out the purposes of the scheme including "paying to the British Columbia Broiler Growers' Association⁶ any portion or all of the expenses incurred by the said association with the authority of the board in carrying out the purposes of the scheme" (s. 4.01 (k)).
57. The *Scheme* does not say, as the appellants argue, that the Chicken Board pay only those expenses of the Association "necessarily" incurred in furtherance of the *Scheme*. This is an important distinction. The *Oxford Canadian Dictionary, 2004* defines "necessarily" as

⁶ Now the BC Chicken Growers' Association.

meaning “as a necessary result; inevitably” and “necessary” as meaning “requiring to be done, achieved etc.; requisite, essential”.

58. In the panel’s view, to import a notion that only “necessary” expenses or expenses “necessarily” incurred in the furtherance of the purposes of the *Scheme* are properly funded significantly alters the meaning of the phrase “expenses incurred...in carrying out the purposes of the scheme.” In our view, to adopt this approach would require the reading down or narrowing of what is a broadly worded power which is not consistent with the legislative intent. Clearly, the kinds of expenses incurred that can be identified as “necessary” for the purposes of the *Scheme* would be considerably fewer and more restrictive than expenses incurred in “carrying out the purposes of the scheme”. The panel cannot agree that this approach is consistent with the language, purpose or context of the *Act* which creates a system of orderly marketing and which requires the Chicken Board to make policy decisions to best achieve the objectives of regulated marketing.
59. We say this for the following reasons. The *Scheme* gives the Chicken Board broad discretion to regulate the industry. It is mandated through government policies such as the Ministry of Agriculture’s 2004 Regulated Marketing Economic Policy⁷ to ensure that the regulated marketing system operates in the interests of all British Columbians and that boards are “responsive to the needs of British Columbia producers, as well as to processors, consumers and other participants in the British Columbia food system.”
60. The requirement that the Chicken Board be responsive to the broader industry poses unique challenges. In *Lilydale Co-operative Ltd. and "7 Growers" v. British Columbia Chicken Marketing Board*, February 21, 2005⁸, a panel of BCFIRB described the challenges:
9. ...These appeals involve legislative policy and affect multiple interests. They require us to do more than make findings about past facts and events. We are required to weigh different policy alternatives, each of which reflects legitimate concerns and potential advantages and disadvantages, and to select the policy approach or framework that we conclude would, on balance, best achieve the objectives of regulated marketing given the realities of the chicken industry....
82. As seen in the argument summaries above, each party has advanced its case strongly. In this context, we wish to candidly state that anyone who believes that any of the positions advanced before us is a magic bullet that is “all good” or “all bad” is either being naïve, less than honest or perhaps, to use Mr. Wakefield’s term, an evangelist. Beyond the superficial appeal of certain rhetoric, very few policy questions in this area have a black or white answer. It is more

⁷ <http://www.firb.gov.bc.ca/reports/eggs/AppendixA-RegulatedMarketingEconomicPolicy.pdf>

⁸ http://www.firb.gov.bc.ca/reports/chicken/05_feb_21_bcfirb_decision_lilydale_7_growers_cmb_04-04_04-10_04-11_policy.pdf

common to have to make policy choices between difficult options, recognising that policies are never final judgments; they change with the circumstances and with experience.

61. These passages, including the suggestion that very few policy questions “have a black or white answer”, indicate that on any issue, there is a range of policy choices authorized by the *Scheme*. The challenge for the Chicken Board is to make the policy decision that best achieves the objective of regulated marketing.
62. The Chicken Board relying on the *Ponich* decision referenced “the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest” and argues that one way to preserve this delicate balance is to have a strong, effective growers’ association with regional representation.
63. The panel agrees that a strong growers’ association is a critical element in the Chicken Board’s ability to make balanced and informed decisions. In the panel’s view, this need was amplified as a result of the move away from a grower elected board (in existence from inception in 1931 to 2000) to a fully, then partially appointed board. The addition of government appointed members was intended to promote balanced decision making, recognizing the need to take into account the often very conflicting positions of industry players in making policy choices consistent with statutory authority. In addition, changes such as the creation of PPAC (a committee consisting of growers and processors) to give the Chicken Board advice on all pricing and production decisions changed the decision making dynamic. Under this model, the Chicken Board hears the strongly advanced views of producers and processors before making production and pricing decisions.
64. It is apparent from the foregoing discussion that the Chicken Board has a range of possible policy choices it can make consistent with its statutory authority and in making these choices the Chicken Board is not required to ask itself whether a particular policy choice is “necessary” or “essential” for carrying out the purposes of the *Scheme*. Rather, the Chicken Board must satisfy itself that all its policy decisions are authorized by the *Scheme*. To emphasize this distinction, the panel points to an example from this appeal. The Chicken Board pays the Association for expenses incurred through the BCPA in facilitating the implementation of the Environmental Farm Plan Program which reduces risks of potential harmful environmental effects from farming activities.
65. In the panel’s view, this program does fall within the Chicken Board’s broad mandate to provide for the “effective... control and regulation, in any and all respects... of the production...[of chicken] within the Province” as in our view, this power is broad enough to capture programs that address the potential negative impacts associated with that production.

While the panel agrees that such a program promotes a stable provincial chicken industry and is in the public interest, we doubt whether one could say this program is “necessary” for the purposes of the *Scheme*. It is not “essential” in achieving the purposes of the *Scheme* and in fact, we wonder what activities could meet the necessary or essential requirement. There are other ways of addressing on-farm environmental issues, some that perhaps could even be judged at some future point to be better and more effective. However, the panel accepts that the decision to provide funding for the implementation of the Environmental Farm Plan Program through the Association and BCPA is consistent with the *Scheme* and helps achieve the overall objectives of regulated marketing for the provincial chicken industry.

66. The government itself has recognised the important role of the Association by expressly authorizing its funding. The fact that the government has not similarly authorized the funding of the Primary Poultry Processors Association may be recognition of the historical power imbalance between growers and processors which created the need for price stabilization and orderly marketing in Canada in the first place.⁹ Whether or not this is a reasonable decision is one for the government and not for the Chicken Board or BCFIRB on this appeal. Our task is to apply the *legislation* as written.
67. For the foregoing reasons, the panel rejects the notion that the Chicken Board’s funding of the Association is limited to expenses “necessarily incurred” in furtherance of the purposes of the *Scheme*.
68. The panel now turns to consider what Association expenses are authorized by the *Scheme*. We do not accept the view advanced by counsel for the Association, in his March 30, 2012 correspondence to the appellants that the Association is not simply a private society but an industry association funded by statutory authority and that the Chicken Board is “directed ... to pay to the Association all or a portion of the Association’s operating expenses which the Association incurs in carrying out its purposes under the *Scheme*”. To the extent that this statement suggests that the funding of the Association is guaranteed we disagree. As a matter of discretion and in accordance with sound marketing policy, the Chicken Board may fund the Association’s expenses incurred for purposes of *Scheme* but it is not directed to do so.
69. We agree with the appellants that the Chicken Board does not have a blanket power to fund all of the Association’s expenses without careful review and to the extent that the Chicken Board funds expenses that are outside the purposes of the *Scheme*, it is acting outside its powers.

⁹ http://www.firb.gov.bc.ca/reports/09_oct_1_looking_back_final.pdf at pages 6-13.

70. The panel has considered the wide range of industry activities the Association is involved in and the appellants' criticisms of unnecessary duplication in legal fees, per diems, programs relating to biosecurity and animal care, training in relation to lobbying, price negotiations and funding secondary organizations.
71. The appellants' criticisms regarding unnecessary duplication may have had more resonance when the Chicken Board was a grower-elected board and where there may have been a perception, real or otherwise, that the board acts first and foremost in the interests of growers and not the broader industry.
72. However, as we have already indicated there is an expectation that regardless of their composition, all boards and commissions established under the *Act* be responsive to not only the needs of growers but also to processors, consumers and other participants in the food system. Further, as we identify above in paragraph 63, the Chicken Board has, in the past 10 to 15 years undergone a shift in focus where it has become more engaged in activities beyond those that pertain primarily to BC chicken production. As a result, the role of the Association has gained in prominence given its involvement in PPAC and other grower related issues.
73. We accept that even though the Chicken Board is not undertaking the activities performed by the Association, these activities remain very important for the industry and would need to be performed by the Chicken Board, its staff or others if not carried out by the Association. Further, the Chicken Board's evidence that it is very aware of the Association's activities through monthly meetings of various staff and directors with Association directors and ongoing informal dialogue leads the panel to conclude that there is very little if any duplication of activities.
74. We consider the appellants' specific criticisms below.
75. The appellants take issue with what they say is unnecessary duplication in the Association's participation in legal proceedings, meetings or committees where the Chicken Board is involved. The panel accepts that the Association, in providing its views in these forums may be partisan, reflecting the best interests of growers. Similarly, the Primary Poultry Processors Association would be expected to advance positions in the best interests of their membership. However, the participation of both associations serve a useful purpose under the *Scheme*, assisting the Chicken Board with finding "the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest"¹⁰. While there may be situations where the participation of the Association in a particular legal proceeding, meeting or committee may

¹⁰ See *Ponich, supra*

not be authorized by the *Scheme* or consistent with sound marketing policy, other than raising the issue of duplication generally, the appellant has not pointed to a specific instance in 2012 where the duplication was unauthorized.

76. Regarding biosecurity and animal care, the appellants argue that as the Chicken Board deals with these issues on behalf of the industry, it is duplicative to also fund these through the Association. The panel observes that while the Chicken Board has implemented a mandatory Biosecurity Program through its Orders, there remains an important leadership role for growers in the development of industry biosecurity standards. Their biosecurity strategic plan goes beyond the mandatory Biosecurity Program to deal with a range of initiatives including partnering with industry, local communities and all levels of government to improve biosecurity and prepare for emergency outbreak situations. We do not see these activities, on their face, as being outside the purposes of the *Scheme*.
77. With respect to animal welfare, the Chicken Board delivers the Chicken Farmers of Canada Animal Care Program. The Association's involvement is through the BC Farm Animal Care Council, which is a broader cross-commodity initiative working towards responsible animal care in the BC livestock sectors. BCFIRB has recognized animal welfare as a significant issue that livestock sectors must deal with comprehensively and proactively. The panel disagrees with the appellants' characterization of these expenses as duplicative and sees the Association's involvement in these areas as complementary to the Chicken Board program.
78. Mr. Vane questioned training expenditures in relation to lobbying, primarily on the basis of his not having sufficient information to assess whether the expenditures were appropriate or not. Mere speculation by the appellants is insufficient to establish that an expense falls outside the purposes of the *Scheme*. As we have already said, we accept that in providing its views in various forums the Association may be partisan, reflecting the best interests of growers. But we view this as serving a useful purpose under the *Scheme*. Training in effective advocacy and to ensure lobbying is conducted within legal boundaries in our view therefore falls within the purposes of the *Scheme*. That said, we do recognize that certain lobbying activities of the Association could be unauthorized by the *Scheme*, but for the purposes of this appeal, the appellant has not pointed to any particular lobbying on the part of the Association that was on matters not authorized by the *Scheme*.
79. The appellants pointed to recent price premium negotiations as not being in the interests of the industry as a whole and not necessary for the purposes of the *Scheme*. Price negotiations clearly fall within the purposes of the *Scheme* and of necessity are partisan. The limited evidence on the negotiations in question is not sufficient in this case to establish that this was not an authorized expenditure under the *Scheme*. The appellants say all pricing is better

conducted through the PPAC mechanism. However, that is not the issue before us on this appeal.

80. The appellants also argue that the Association does not have the power under the *Scheme* to allocate public monies to secondary organizations such as the BCPA. On this point, the panel agrees with the testimony of BCPA director Allen James that there are issues such as Environmental Farm Planning, biosecurity, and animal care that are common to all poultry sectors and proactive joint efforts may be more effective and efficient than carrying out these activities separately.
81. However, even if these joint efforts are more efficient, we recognize that funding still must be within the purposes of the *Scheme*. If the Chicken Board wanted a third party to undertake an activity on its behalf that is within the purposes of the *Scheme*, the Chicken Board is authorized to pay that expense directly. In this case, the Association has determined that collaboration with other parts of the poultry industry and/or agriculture provides for efficiencies (something the appellants support) and the Chicken Board, in providing funding to the Association for that purpose, has authorized payment of that expense indirectly through the Association.
82. The panel concludes that the power to fund the Association is broad enough to allow the Association to fund a secondary organization to undertake initiatives beneficial to the industry.¹¹ However, as with expenses incurred directly, the Association and the Chicken Board need to demonstrate in a transparent and ongoing manner that expenses incurred by a secondary organization are for the purposes of the *Scheme*.
83. In reviewing more generally the wide range of activities undertaken by the Association in 2012 which the appellants have placed in issue on this appeal, the panel is satisfied that legally these activities, at least on their face, relate to the purposes of the *Scheme*. This conclusion should not be taken as a blanket endorsement of the expenditures of the Association but rather that on a broad reading of the legislation, the appellants have not satisfied the panel that any of the 2012 expenditures they put in issue are unauthorized. In our view and based on the evidence heard in this appeal, this conclusion dispenses with the issue under appeal.
84. It follows that the appellants' application seeking an order prohibiting the Association from using Chicken Board funds to pay legal fees and expenses incurred in relation to its intervener role in the appeal is also dismissed. The Association's participation is consistent with the need for a strong grower representation on matters like those raised on this appeal which are significant to the chicken industry in the province.

¹¹ We observe here that at least for the BCPA, the presence of two Association directors on the BCPA board provides for direct oversight.

85. However, for the reasons that follow, our dismissal of the appellants' appeal regarding the legality of the 2012 funding of the Association does not mean that we are endorsing the Chicken Board's current funding process. We have concluded that as the first instance regulator, the Chicken Board, in its budget approval process needs to satisfy itself that not only are the Association expenses it funds legally authorized under the *Scheme* but also that the expenditures are consistent with sound marketing policy. Clearly, instances could arise where although legally authorized, an expenditure might not be consistent with sound marketing policy.
86. The panel agrees with the appellants that the Chicken Board, when collecting mandatory levies under legislated authority, is responsible for how that money is used on an ongoing basis and has the obligation to be transparent and accountable. The panel also agrees with the appellants that the current funding process has room for improvement.
87. We say this because it is the Chicken Board, not the Association, that is responsible to the growers who pay the mandatory levy to ensure that growers have sufficient information to know what activities have been undertaken by the Association from the funding provided by the Chicken Board, what those activities cost and how those activities fit within the statutory mandate and sound marketing policy. While the appeal process did provide greater transparency regarding the 2012 funding process, it is our view that in the ordinary course the Chicken Board funding approval process does not provide an adequate degree of transparency and accountability generally and to chicken growers specifically.
88. The ongoing communication between Chicken Board and Association directors may be effective in addressing industry issues and sufficient for the purposes of the Chicken Board's exercise of its discretion. But it does not replace the need for formal accountability measures to demonstrate that mandates and responsibilities are understood and fulfilled by both the Chicken Board and the Association. The Finance and Audit Committee's aim is to meet quarterly to initially review the Association's funding request and supporting budget and subsequently review actual expenditures to budget during the course of the year in order to identify concerns. However we note the committee chair's evidence that, at least in 2012, there were only two such meetings. Further, while the focus on budgetary variances year over year may help to identify areas of concern, this does not, in and of itself, ensure that expenditures fall within the statutory mandate. In our view, the current funding approval process is too informal and lacking in documentation, particularly with respect to demonstrating that the Association expenditures are incurred for the purposes of the *Scheme* or that the expenditures accord with sound marketing policy.

89. While we agree with the appellants that the current funding system is lacking in transparency and accountability, we disagree on how to fix the problem. We do not agree that it is appropriate or necessary to require the Chicken Board to micro-manage the activities of the Association through identification of “specific deliverables”, restriction of activities, and funding only upon completion of a proposal and after detailed review of all invoices.
90. Instead, and consistent with BCFIRB’s recent Governance Initiative¹² designed to improve the decision making of both BCFIRB and the commodity boards it supervises, and in the interests of greater transparency and accountability, the funding process needs to have as a focus the Chicken Board’s statutory mandate.
91. To achieve this end, the panel directs the Chicken Board to modify its process of approving funding for the Association as follows:

Purposes of the Scheme

The Chicken Board must identify the statutory framework under which it is prepared to fund the Association and clarify any activities or expenses that are either not within the purposes of the *Scheme* or that it is not prepared to fund as a matter of sound marketing policy. The Chicken Board also needs to identify what supporting documents it requires from the Association to demonstrate that proposed expenditures fall within the purposes of the *Scheme*.

Budget Process

Currently, to obtain funding the Association submits a draft budget to the Chicken Board for discussion and recommended approval by the Finance and Audit Committee and then final approval by the Chicken Board. Going forward, before the Chicken Board can consider the Association’s draft budget, the Chicken Board must have sufficient documentation or explanation from the Association to demonstrate how each activity or category of expenditure fits within the statutory framework and is consistent with sound marketing policy. The draft budget and supporting documents must be sufficiently detailed to allow the Chicken Board to know what activities or categories of expenditure the Association proposes as well as the estimated expense in each case and the basis for the estimate. The Association must also provide an explanation of how those activities and expenditures relate to the purposes of the *Scheme* and sound marketing policy in order for the Chicken Board to make informed funding decisions within the statutory mandate in relation to the Association’s funding request.

¹² http://www.firb.gov.bc.ca/2011_about_firb_governance_initiative.htm

Annual Reporting

The Chicken Board currently publishes the Association's audited financial statements in the Chicken Board's Annual Report. However, going forward the Chicken Board must also receive a comprehensive summary from the Association reporting on the past year's activities and expenditures in relation to the approved budget for that year. This Funding and Uses Report must be published in the Chicken Board's Annual Report. The purpose of this Report is to provide a meaningful discussion of what money was received by the Association from the Chicken Board in the past year and how the activities and categories of expenditure in the approved budget for that year relate to the purposes of the *Scheme* and sound marketing policy, what the money was spent on in reference to the various budgeted activities and categories of expenditure, and what was ultimately accomplished with the funding. As well, the Report is to compare the past year's expenditures with the budgeted amounts for that year and actual expenditures in the prior year. Growers must be given an opportunity to raise questions or concerns and any issues raised are to form part of the Chicken Board's discussions with the Association in the next year's funding process.

Meeting Requirements

The Finance and Audit Committee indicated the intention to review Association expenditures under the approved budget quarterly; however in 2012 this did not occur. In our view, the Chicken Board or the Finance and Audit Committee need to meet at least quarterly with the Association to review budget performance. The purpose of these meetings is to review Association expenditures on a year-to-date basis including variances from the approved budget for the year and from actual expenditures in the prior year. Potential cost overruns need to be identified and addressed in a timely fashion. If required, approvals for increased funding need to be sought from the Chicken Board. Areas of surplus must be identified and any net surplus as at the end of the year must be returned to the Chicken Board forthwith.

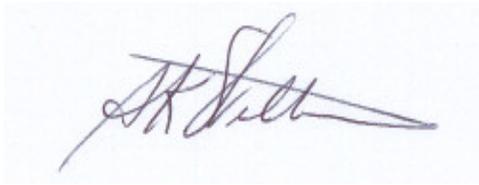
CONCLUSION

92. The appeal is dismissed.
93. The appellants' application seeking an order prohibiting the Association from using funding from the Chicken Board to pay legal fees and expenses incurred in relation to its intervener role in the appeal is also dismissed.
94. The panel directs the Chicken Board to amend its funding approval process in accordance with paragraph 91 above.
95. Given the dismissal of the appeal, there will be no order as to costs.

Dated at Victoria, British Columbia this 18th day of December, 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Suzanne K. Wiltshire, Presiding Member



Andreas Dolberg, Member



Diane Fillmore, Member