

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
APPEALS FROM TWO DECISIONS CONCERNING THE TRANSFER OF
SPECIALTY EGG PRODUCTION BETWEEN GRADING STATIONS

BETWEEN:

ISLAND EGG SALES LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Chair
Mr. Harley Jensen, Member
Mr. Hamish Bruce, Member
Mr. Richard Bullock, Member

For the Appellant

Mr. Christopher Harvey, QC
Counsel

For the Respondent

Mr. Robert P. Hrabinsky, Counsel

Place of Hearing

Nanaimo, BC

Date of Hearing

March 28-30, 2000

INTRODUCTION

1. The Appellant, Island Egg Sales Ltd., is appealing two separate decisions of the British Columbia Egg Marketing Board (the “Egg Board”) denying the transfer of free-run egg production to Island Egg Sales Ltd. from another grading station.

ISSUE

2. Did the Egg Board err or act unfairly in refusing to approve the application to transfer the free-run component (10,000 birds) of the production of Ancor Poultry Ltd. (“Ancor”) to the Appellant in September 1998?
3. Did the Egg Board err or act unfairly in imposing penalties on the Appellant?
4. Did the Egg Board err or act unfairly in revoking its decision to direct 10,000 free-run birds from Ancor to the Appellant in October 1999?
5. One further issue dealing with whether the Egg Board erred or acted unfairly in rejecting the Appellant’s request for a temporary lease allocation or permit to promote the production of free-range/free-run eggs for 15,000 birds in December 1998, and for 6000 birds in February 1999 was raised. However, this issue was not canvassed by either party and as such it does not form part of these reasons.
6. Is the Appellant entitled to costs?

FACTS

Appeal #1

7. The egg industry in Canada is supply managed on a national basis through allocations of quota issued to each province by the Canadian Egg Marketing Agency (“CEMA”). Provincial boards are responsible for the regulation of egg production within each province. In British Columbia, eggs are marketed through grading stations. How eggs should be allocated between those grading stations is the subject of this appeal.
8. The Appellant is a company incorporated pursuant to the laws of British Columbia. The sole director and officer of the company is Mr. Roy Jensen. Island Egg Sales Ltd. operates an egg grading station at 3492 Mt. Sicker Road in Westholme on Vancouver Island.
9. Island Eggs Ltd. is another company incorporated pursuant to the laws of British Columbia. The sole director and officer of the company is also Mr. Roy Jensen. Island Eggs Ltd. holds quota of 17,592 laying hens and operates an egg production facility at the Mt. Sicker Road location. The white table eggs produced from this facility are graded through Island Egg Sales Ltd.. Given that both

companies are corporate extensions of Mr. Jensen, in this decision “Island Egg Sales” is used to refer to both companies operating as a producer/grader.

10. Daybreak Farms Terrace Ltd. (“Daybreak Terrace”) is a company incorporated pursuant to the laws of British Columbia. Mr. Jensen is a director and president of the company. Mr. Ian Christison is a director and secretary of the company. Daybreak Terrace operates an egg grading station in Terrace, BC.
11. In addition, Mr. Jensen and Mr. Christison are joint directors of two numbered companies, 414611 BC Ltd and 414612 BC Ltd. respectively. The numbered companies each own 12,634 birds of layer quota and operate a single production facility in Terrace that ships product to Daybreak Terrace.
12. In 1992, the Appellant began marketing the specialty free-run production from Sunnyside Eggs Ltd. (“Sunnyside”) of Victoria. The Appellant worked with distributors and consumers to develop a market for free-run production on Vancouver Island. By 1997, the Appellant's market for free-run production began to exceed its supply.
13. Daybreak Farms (Interior) Ltd. (“Daybreak Interior”) operated a grading station in Kelowna and was owned by Mr. Bruce Cook and Mr. Jensen. The Appellant initially marketed some specialty product through Daybreak Interior. However, when the Island demand overtook the supply (August through October 1997), the Appellant received one or two skids of specialty eggs per week from Daybreak Interior. In October 1997, the business of Daybreak Interior was sold to Floritto Egg Sales Inc. (“Floritto’s”) in Kamloops. The Kelowna grading station was shut down and the specialty eggs supplied to the Appellant by Daybreak Interior went to Floritto’s.
14. In October 1997, due to an insufficient supply of specialty eggs, the Appellant began shorting customers. It notified the Egg Board that it needed a producer of between 8-10,000 birds to meet its market demands for brown free-range eggs.
15. In January 1998, the Appellant’s supplier of free-run eggs, Sunnyside, sold part of its 11,000 birds of laying quota and reduced its quota holdings to 7820 birds. This sale of quota was to a non-specialty egg producer and accordingly, the Appellant lost 3180 birds of specialty egg production.
16. In August 1998, the Appellant approached Ancor and offered it a premium of \$0.40 per dozen for large and extra large free-run brown eggs and \$0.24 per dozen for medium and small eggs. This offer was \$0.02 cents higher for the larger eggs and \$0.01 less for smaller eggs than the deal Ancor had with Floritto’s. Ancor accepted the offer and on August 29, 1998, the Appellant and Ancor signed an Application for Change of Registered Grading Station and submitted the request to the Egg Board. Floritto’s did not support the transfer, as it required the free-run production from Ancor to accommodate orders from its customers.

17. On September 11, 1998, the Egg Board denied the request to transfer Ancor's 20,000 birds of quota production (10,000 free-run and 10,000 caged white) to the Appellant from Floritto's. According to the minutes of the Egg Board from the September 3, 1998 meeting, it is their policy is to direct product to stations whose markets are growing. In this circumstance, the Egg Board found insufficient justification for the move.
18. On September 30, 1998, the Appellant filed an appeal of the September 11, 1998 decision of the Egg Board. Although the other grading stations were aware of the appeal, they did not intervene.

Appeal #2

19. On October 31, 1998, Sunnyside sold the balance of its quota, 7820 birds to the then Chair of the Egg Board, Mr. Ben Woike, effective November 1, 1998. As Mr. Woike intended to use the quota to produce non-specialty eggs, the Appellant lost its only remaining supply of specialty egg production.
20. On October 9, 1998, at the Egg Board's request, the appeal was adjourned to allow the Egg Industry Advisory Committee ("EIAC") to review the issue of directing product between agencies. The Appellant reluctantly agreed to the adjournment to allow the benefit of EIAC input. The EIAC is comprised of representatives of stakeholders in the egg industry. As an advisory committee, their role is to assess the effects of proposed Egg Board policies on various stakeholders. Their recommendations are not binding and are intended for consideration by the Egg Board.
21. On November 16, 1998, the EIAC met to consider, amongst other matters, whether the Egg Board should continue to direct shippers and whether this should apply to specialty eggs. On November 18-19, 1998, the Egg Board met and reviewed the EIAC recommendations and accepted the EIAC recommendation that the Egg Board should continue to direct shippers to agencies with market need being the primary criteria. However, the Egg Board did not accept the EIAC recommendation that specialty egg production should remain a contractual arrangement between willing producers and willing graders. No rationale was given for this decision.
22. Throughout the fall of 1998, in order to service its market, the Appellant purchased free-run eggs from Sunshine Eggs, a Division of Floritto's. As egg quality was poor and supply was uncertain, this arrangement proved unsatisfactory.
23. On or about December 17, 1998, the Egg Board's field representative Ms. Jan Legere discovered a flock in excess of 5000 unregistered laying hens at the Sunnyside location on Scarborough Road in Victoria. Mr. Sandy Christison, the owner of the farm and the brother of Mr. Ian Christison, had previously sold his

quota. He advised that the laying hens belonged to Daybreak Terrace. This was confirmed by letter dated January 13, 1999, from the Appellant's then solicitor Mr. Michael Scherr, who informed the Egg Board that the unregistered laying hens at Sunnyside belonged to Daybreak Terrace and not the Appellant.

24. In early 1999, the Egg Board attempted to facilitate a resolution of the first appeal and address the supply problems of the Appellant and Daybreak Terrace. This facilitation failed to resolve matters.
25. Between November 18, 1998 and February 18, 1999, the Egg Board imposed various over-production levies for birds grown illegally at the Sunnyside Farm, which levies were directed to Mr. Jensen as principal of the various companies involved in arranging for this illegal production.
26. In or about February 1999, Mr. Jensen and Mr. Christison moved 6100 birds of laying quota from Terrace to Vancouver Island to cover the over-quota production at the Sunnyside. Given that the Terrace operation did not reduce its production following the transfer of quota, it too was over-produced and subject to over-quota penalties. The over production was in excess of the 6000 birds transferred to "legitimise" the Vancouver Island production. In February or March 1999, the over-quota birds in Terrace were destroyed.
27. On June 29, 1999 following a pre-hearing conference, the Appellant identified that in addition to appealing the decision of the Egg Board to deny the transfer of Ancor to the Appellant, it intended to argue that the imposition of over-quota levies was unfair. The Appellant does not seek to distinguish between individual levy allocations but rather seeks to have all levy allocation assessments set aside on the broad argument that "they flow from the administrative unfairness of the Board".
28. In or about June 1999, Golden Valley Foods Ltd. ("Golden Valley") purchased Floritto's Lower Mainland production and took over its contracts. As a consequence of that purchase, Golden Valley acquired the specialty production of Ancor and another producer, Mr. Ralph Regehr of Wincrest Farm. At the time of acquisition, and unbeknownst to Golden Valley, both Ancor and Wincrest were expanding their specialty egg production.
29. Soon after the purchase, Golden Valley informed the Egg Board that it would be receiving too much specialty egg production as a result of the expansion by Ancor and Wincrest. Golden Valley advised that it would continue to take the specialty eggs until the Egg Board found another grading station to take the production. The Egg Board informed the Appellant of this opportunity.
30. The Appellant had Golden Valley sign an Application for Change of Registered Grading Station. After agreeing to terms with Ancor, the Appellant forwarded the Application along with a written contract to Ancor for signature. Mr. Rudy Dueck of Ancor had suffered several negative incidents shipping his product to Floritto's

and preferred the proximity of Golden Valley. He was also tired of being shifted between grading stations and so delayed signing the documents. By October 1999, Mr. Dueck of Ancor had not yet signed the documents. During that month, Golden Valley notified the Egg Board that it had changed its mind and now required the production from both Ancor and Wincrest. Given Mr. Dueck's preference to ship to a local grading station, he no longer wished to transfer.

31. In October 1999, the Egg Board met with the Appellant and Golden Valley to try and resolve the entitlement issue to the Ancor and Wincrest specialty production. The parties were unable to resolve the issue and so, on November 3, 1999, the Egg Board directed up to 5000 birds of production to the Appellant. This production was comprised of all of the Wincrest production (2000 birds) and up to two additional skids (96 boxes) of free-range eggs per week from Ancor to the Appellant. The balance of the Ancor production was directed to Golden Valley. The Egg Board also directed that the Terrace quota remain in free-run brown production on Vancouver Island. This arrangement does not meet the entire specialty market needs of the Appellant.
32. On November 24, 1999, the Appellant appealed the decision of the Egg Board made on November 3, 1999 "regarding the application by Island Eggs for direction of 10,000 free-run birds to Island Egg Sales, as previously agreed, and for permission to transfer quota back to Terrace".
33. In the week of March 13, 2000, the Appellant contacted Golden Valley and advised that due to market conditions it did not need the specialty production from Ancor or Wincrest for a one week period. The Appellant asked Golden Valley to pick up all the specialty production for that week.

ARGUMENT OF THE APPELLANT

Appeal #1

34. According to the Appellant, these appeals involve two separate instances of unfair action by the Egg Board. In the first appeal, the Appellant argues that the Egg Board acted unfairly in September 1998 when it refused to approve the application to transfer the free-run component of Ancor's production despite the consent of both Ancor and Island Egg Sales. The Appellant argues that it is not seeking special treatment, however, there were special market needs and special considerations with respect to Vancouver Island that the Egg Board should have taken into account but did not.
35. The Appellant worked from 1992 to 1997 to build up the specialty egg market on Vancouver Island. It worked with Sunnyside to convert its production to free-run to service this market. However, in 1998 when Sunnyside sold its quota to two table egg producers, their supply disappeared.

36. The Egg Board takes the position as a matter of policy that it will not transfer a producer from one grading station to another without the consent of both grading stations. It encourages grading stations in need of product, such as the Appellant, to convert its own production or work with its own producers to convert to specialty production. The Appellant argues that neither of these options was open to it as it already had a premium market for table egg production and it could not afford the capital expenditure to purchase more quota and convert to specialty production. Other producers shipping to the Appellant were not willing to convert their operations either.
37. The Appellant argues that it is the role of the Egg Board to control production and transfers. It can impose conditions on transfers of quota. In this circumstance, given the shortage of specialty eggs on Vancouver Island, the Egg Board could and should have imposed conditions on the transfer of the Sunnyside quota to ensure that it remained specialty production. The Egg Board also controls transfers between agencies. It controls the relationship between the producer and the processor. If the Egg Board fails to fairly manage the interplay between producers and processors, problems are inevitable. That is what has transpired in this instance.
38. The Appellant argues that when the Egg Board was presented with the fact that the Appellant had lost its primary supply of specialty eggs and had a willing producer to supply that production, under any standard of fairness, the Egg Board should have granted approval of the transfer. This unfairness was further compounded when the Egg Board sought to adjourn the Appellant's appeal of this decision pending advice from the EIAC.
39. The EIAC recommended that a commercial arrangement between a willing producer and a willing grading station should be the deciding factor in an application to transfer. The Egg Board ignored this recommendation and maintained its denial relying on Floritto's competing demand.
40. However, when the Egg Board's reason for denial is tested and closely examined, the Appellant points out that the customers who would not be supplied by Floritto's, in the event of a transfer, were from out-of-province. Thus, the effect of the Egg Board's decision is to promote and support an export market over a BC market. The Appellant argues that because the Egg Board is constituted under provincial legislation, its primary responsibility should be the market within BC.
41. As a result of straitened circumstances, and in desperation, the Appellant turned to a self-help remedy to meet its market demands. It placed an illegal flock at Sunnyside. This unregulated, unregistered production was discovered by the Egg Board and has resulted in approximately \$48,000 in over-quota levies. The Appellant seeks to have these levies set aside as they flow from the administrative unfairness of the Egg Board. The Appellant argues that the levy power is not intended to be a tool to stifle regional industry.

Appeal #2

42. The second instance of unfair action by the Egg Board involves a decision to again deny the Appellant's Application for Change of Registered Grading Station.
43. In 1999, the Appellant read an Egg Board publication in reference to the Van Nuys Farms Appeal stating that there was no shortage of free-run production in BC. The Appellant strongly objected to this statement and once again wrote to the Egg Board regarding their circumstances. In response, Mr. Peter Whitlock, then Interim General Manager of the Egg Board, advised the Appellant of two potential producers (Ancor and Mr. Regehr) whose production Golden Valley did not need.
44. The Appellant prepared an Application for Change of Registered Grading Station and obtained Golden Valley's signature. During August and September 1999, the Appellant approached Ancor and obtained an agreement on price and the date of transfer of 10,000 birds of free run production. Unfortunately, Mr. Dueck was reluctant to change grading stations yet again and stalled on signing the Application. Approximately three or four days prior to the transfer date, Golden Valley changed its mind and decided to keep Ancor's production. The Egg Board did not honour the arrangement between the Appellant and Ancor and refused to transfer the necessary specialty production to the Appellant. The Appellant argues that this decision was unfair.
45. Further, the Appellant argues that had the Egg Board made the right decision in the first instance in September 1998, the 1999 events would not have taken place. Even though these events are a consequence of the first decision, the Appellant argues that this matter can and should be independently reviewed.
46. The Appellant also raises the issue of the Terrace quota transferred to Vancouver Island to legitimise the production from the Sunnyside. The Egg Board wants this quota to remain on Vancouver Island as specialty production. The Appellant argues that it has a business obligation to return the quota to the Terrace operation. In this situation, there is a tri-partite approval. Both grading stations and the producer want the quota returned to Terrace and yet the Egg Board is refusing the application. The Appellant argues that this is the first time the Egg Board has ever refused such a request. The Appellant argues that the Egg Board's actions are illogical and unfair.
47. The Appellant also seeks an extension to the stay on the imposition of levies placed by the BCMB prior to the hearing commencing.
48. Finally, the Appellant seeks its costs in this appeal as the conduct of the Egg Board towards Island Egg Sales, an industry stakeholder in distress, can only be described as arrogant and unsympathetic. It is not right for the Egg Board to walk away from

its responsibilities and simply say it is up to the grading station to make its own arrangements.

ARGUMENT OF THE RESPONDENT

49. The Respondent argues that these appeals must be looked at from an industry perspective and not a micro-economic perspective. Moving a producer from one grading station to another is a "zero sum gain". From an industry perspective, nothing is accomplished. The only reason why a regulatory board would be concerned with a "zero sum gain" is if it wished to moderate and regulate the profitability of grading stations and insulate grading stations from their own business decisions.
50. The Appellant raises the issue of fairness in the context of evening out the profitability of grading stations and suggests that it is the statutory duty of the Egg Board, and therefore the BCMB, to allocate producers amongst grading stations in a fair and equally profitable manner. According to the Respondent, that is not the mandate of the Egg Board.
51. The Appellant appears before this Panel resolved not to do anything to contribute to the growth of the specialty egg market. It has made its own business decisions. However, this is not to say that other opportunities are not open to the Appellant. Further, the Egg Board has done nothing to limit or abrogate the Appellant's opportunity; it has the same opportunity as all other industry participants have. There is the opportunity to purchase more quota and thereby expand operations; there is the opportunity to convert production or convert other producers. However, the Appellant, for its own reasons, has chosen none of these options. The Respondent argues that it can not be the responsibility of the Egg Board to react to the business decisions made by industry participants on a micro-economic scale.
52. The Egg Board's policy on direction of product is found at subsections 3 (c) and (d) of its Standing Orders which provide:
 - (c) Marketing Agency - The Registered Grading Station through which a Registered Producer's regulated product is marketed shall be deemed to be the agency through which that Registered Producer markets the regulated product.
 - (d) Change of Marketing Agency - A Registered Producer may change the agency through which the regulated product is marketed only in the manner prescribed by the Board.
53. Although the Egg Board has authority over direction of producers, it does not take an active role in segmenting the "producer pie". The authority is exercised only when there is an application and thus, a need to put limits on producers switching between grading stations. In order to allow an application, the Respondent argues that there must be a compelling reason based upon industry interest. Thus, the Egg Board will only permit a producer to move from one grading station to another

where there is an increase in “disappearance rate” i.e. a growth in egg sales in the market place. This policy recognises and respects the effort and commitment made by a grading station in developing the specialty product industry. If not for this policy, large grading stations would be able to selectively take producers away from smaller grading stations without limitation. This would ultimately be to the detriment of the Appellant.

54. The Respondent reviewed the evidence. Mr. Dueck’s evidence was that he did not wish to change grading stations again and ship his product to the Appellant. This evidence demonstrates a failure on the part of the Appellant to reach out and develop a business relationship with this producer.
55. The Respondent also notes the Appellant’s surplus of specialty product. There is no dispute that the Appellant contacted Golden Valley in March 2000 and asked it to take the production from Wincrest Farms and Ancor for one week. The Respondent argues that it is inconceivable that there would be market softness for a one-week period amounting to 5000 birds of production.
56. Mr. Jensen referred to plans to place birds without quota in the future. The Respondent argues that the inference to be drawn is that if the Terrace quota is allowed to return to Terrace, the Appellant intends to replace it with production on Vancouver Island that is not covered by quota. The relief sought by the Appellant is really a licence to produce without quota.
57. The Respondent argues that the Appellant can participate in the specialty egg market. There is nothing in the rules, policies and directions of the Egg Board that precludes the Appellant from taking advantage of a real opportunity. While it may be more economically attractive to pursue this opportunity outside the regulated marketing system, it is entirely possible to pursue it from within. The Respondent argues that the Appellant’s desire to operate outside the regulated system is the reason for seeking an extension of the stay regarding over quota assessments.
58. Finally, the Appellant took issue with the failure of the Egg Board to impose conditions on the transfer of the Sunnyside quota to its then Chair, Mr. Woike. If that is the Appellant’s position, the Respondent argues that the BCMB should consider imposing conditions on the Appellant’s producer companies to supply the specialty production it seeks.
59. The Respondent argues that it is the function of the Egg Board to create policies that encourage the development of new industry segments. But the Egg Board should not regulate with a view towards moderating or regulating the profitability of grading stations as that is outside the jurisdiction of the Egg Board and would detrimentally effect the small grading station.

REPLY OF THE APPELLANT

60. In reply, the Appellant takes issue with the Respondent's argument that it is not right to deprive a grading station that has made the effort of working with a producer to convert to specialty production. In theory this may be fine, but the Panel can not lose sight of reality based on the evidence. In the first appeal, Floritto's took no action to convert Mr. Dueck's production; rather it was Mr. Dueck who made the large investment to change over to specialty production. His efforts should be protected but what efforts of Floritto's should be protected?
61. In the second appeal, the circumstances are even clearer. What did Golden Valley do to be rewarded with this shipper? According to Mr. Dueck's evidence, not only was Golden Valley surprised when it found out Ancor had increased its production, Golden Valley did not even need the production. In short, Golden Valley did nothing at all to justify keeping this production.
62. The Respondent also relies on maintaining the status quo as between grading stations. If status quo is such an important principle, the Appellant argues that it should have applied to the decision to transfer quota from Sunnyside to Mr. Woike without restriction. In other words, conditions should have been placed on the quota transfer to ensure it remained specialty production. The Appellant points to the past example of Ms. Christine Delight where, in order to maintain production as specialty, restrictions were placed on a quota transfer. The Appellant argues that the Egg Board should have imposed similar conditions in this case.
63. The other point the Appellant raises with respect to maintaining the status quo is that it should not be allowed to trump fairness. It is the Egg Board's responsibility to ensure that new markets are being served.
64. Finally, with respect to the Egg Board policy on directing product, if the result of applying those policies is to do nothing to assist a grading station that has lost its sole source of specialty product then the Appellant argues that the Egg Board should change its policy. To do otherwise leads to an unfair result.
65. With respect to the evidence, the Appellant maintains that it did everything it could to develop a business relationship with Mr. Dueck. The Egg Board hampered its efforts; the relationship would have prospered had the Egg Board made the appropriate decision in the first instance in 1998.
66. Second, the Respondent argues that it is not believable that the Appellant would have experienced market softness of one week. If it had been longer, one would expect the Egg Board to lead evidence of surplus eggs going to the breakers. No such evidence was called.
67. Finally, the Respondent argued that the function of the Egg Board is to employ a policy that will encourage new industry segments but its responsibility is not to regulate the profitability of grading stations. The Appellant argues that this misconstrues its submission. The Appellant does not suggest that the Egg Board

should regulate the profitability of grading stations, rather it should afford equal access based on market need. The Egg Board failed to provide equal access in this instance.

DECISION

68. These appeals touch on broad issues relating to the specialty egg market in the province. The market for specialty production be it free-range, free-run or organic has increased over the past several years. It is a premium market but it also has greater costs of production. The Egg Board has been grappling with how to service the specialty market within the regulated marketing system.
69. The EIAC has recently been involved in a facilitation process on Vancouver Island in an attempt to bring about some solutions to the problem of servicing specialty markets. Part of the problem appears to be the number of unregulated flocks established on Vancouver Island in recent years. These unregulated producers have begun production in response to market demand not being met by the regulated sector. These unregulated producers are at an obvious advantage to regulated producers, as they operate illegally without the expense of purchasing quota.
70. The BCMB supports the regulated marketing system. We believe that in order for the regulated system to continue to be strong, it must be flexible and responsive to the demands of the market place, within the legitimate constraints of supply management. If the regulated system is not responsive, unregulated and illegal production may expand to meet market demand, thereby weakening the regulated marketing sector and creating difficult issues of enforcement.

Appeal #1

71. Turning to the facts of this case, the inescapable conclusion is that the Egg Board's decision to deny the transfer of Ancor to the Appellant in 1998 was flawed. As a result of this decision, the Egg Board left a portion of the specialty market on Vancouver Island exposed to the unregulated sector, of which the Egg Board was well aware. In response, illegal production grew to meet the unmet market demand.
72. A further concern of the Panel is the delay in hearing the first appeal. The BCMB granted an adjournment of the first appeal in order to allow the EIAC to conclude its review and make recommendations. It appears that the Egg Board accepted all the EIAC recommendations except the one that would have allowed Ancor to transfer to the Appellant. While the Egg Board was not bound to follow the EIAC's recommendation, given that the appeal had been adjourned to allow the EIAC to make recommendations, the Egg Board owed the Appellant an explanation as to why it chose not to accept the one recommendation that favoured the Appellant's transfer.

73. It should be noted that our concern here is one of process. We should not be taken as saying the Egg Board's decision to not follow the EIAC recommendation was wrong. In fact there may be very good policy reasons, such as promoting market stability, to control the transfer of producers between grading stations.
74. In coming to its decision about whether the transfer should be allowed, the Egg Board applied its formula to determine increasing market share. This formula is based on a determination of whether a grading station's "net disappearance rate", a reflection of market share, is increasing year over year. The Egg Board argues that increasing market share is a guiding principle in allowing a transfer between grading stations.
75. The problem with this analysis is that it fails to consider the impact of the unregulated sector. In this case, the Appellant did develop a market. It spent six years creating a demand for specialty product. However, when it lost access to specialty product, its market share declined and was further eroded by the unregulated sector. The application of the Egg Board formula to this situation leads to the result that no producer will be directed to a grading station where its market share is lost to unregulated, illegal production. The practical effect of the Egg Board's decision to not transfer product was to exacerbate the Appellant's supply problems and to contradict its policy of directing product to the increasing market.
76. Looking to the effect of the transfer on Floritto's, the other grading station, raises further concerns for the Panel. It appears from the evidence that Floritto's did not require the Ancor production to meet a BC specialty market. Rather, the specialty market being serviced was in Alberta. It is the Panel's belief that the inter-provincial market should not be serviced at the expense of the BC market. This is especially so where the BC market is under attack by illegal, unregulated producers.
77. Looking next to the producer's perspective, Mr. Dueck's relationship with Floritto's in 1998 was unsatisfactory. He describes his eggs being transported in old beaten up trucks, which caused increased cracks and breakage. Although he was compensated for this loss if he complained, it appears that he had concerns regarding the overall quality of this operation. This is no doubt why, in 1998, Mr. Dueck was interested in moving his production elsewhere.
78. Finally, the Panel is concerned by the appearance of preferential treatment of certain grading stations by the Egg Board. The Egg Board enjoyed a good working relationship with Floritto's. There is some suggestion that in 1998, the Egg Board planned to make Floritto's a central clearinghouse for specialty eggs. Earlier in 1998, representatives of both the Egg Board and Floritto's attended at the Ancor farm and spoke to Mr. Dueck and encouraged him to transfer his production from Golden Valley to Floritto's. This transfer was approved despite the objections of

Golden Valley. This level of assistance by the Egg Board is in marked contrast to the assistance offered the Appellant.

79. We have some concern that the close working relationship between the Egg Board and Floritto's witnessed in this Ancor transfer may have coloured the Egg Board's decision to deny the later transfer from Floritto's to the Appellant. The unfortunate consequence of the Egg Board's decision to deny the transfer was to encourage the unregulated market on Vancouver Island. That, coupled with the delay in hearing this appeal, has resulted in an increase in the number of unregulated producers on Vancouver Island, compounding the problem for the Egg Board.
80. Given the foregoing, it is the Panel's belief that the Egg Board should have allowed the Ancor production to transfer to the Appellant in the fall of 1998. The Egg Board should have been more sensitive to the increasing problem of the illegal and unregulated sector on Vancouver Island and less bound to its formula for increasing market share.

Appeal #2

81. In the summer of 1999, following a tip from Mr. Whitlock of the Egg Board, the Appellant obtained the agreement of Golden Valley that it did not need the additional 12,000 birds of production from Ancor and Mr. Regehr. Golden Valley signed an Application for Change of Registered Grading Station. Just days prior to the transaction completing, Golden Valley changed its mind with respect to the Ancor production.
82. Rather than allowing the transfer to take place when Golden Valley changed its mind, as was done in the 1998 transfer of Ancor to Floritto's, the Egg Board tried to mediate a solution. In the end, the Egg Board split Ancor's production between Golden Valley and the Appellant. At first glance, this approach seems fair. However, given the history of events on Vancouver Island and the problems with the number of unregulated producers, the Panel is of the opinion that the Egg Board should have been more sensitive to the consequences of not filling the Appellant's production needs. Given that the Appellant had been requesting more specialty product for years, its need for specialty product would appear to be greater than that of Golden Valley, who had a short time earlier determined that it did not need this product.
83. It should be pointed out that by the fall of 1999, Mr. Dueck was not happy about transferring to another grading station. This is understandable as, over a relatively short period of time, he had been required to ship to four different grading stations. He started in 1992 with Vanderpol's. When Golden Valley bought out Vanderpol's, he began shipping to the Golden Valley grading station. Then, as Floritto's was prepared to pay a higher premium and the Egg Board was supportive, he moved his production to Floritto's in Kamloops. This relationship had some problems and Mr. Dueck sought to transfer to the Appellant in the fall of

1998. The Egg Board turned down this request. In 1999, Golden Valley bought out Floritto's Lower Mainland contracts and as such, Mr. Dueck was again shipping to Golden Valley.

84. Although Mr. Dueck's preference is to ship to Golden Valley due to its proximity to his farm, there is no significant difference to him in shipping to the Appellant. This is confirmed in part by Mr. Dueck's earlier request to transfer to the Appellant. In weighing the needs of the Appellant for specialty product against the logistic preference of Mr. Dueck, the Panel is of the opinion that the Egg Board should have decided in favour of servicing the Vancouver Island market.
85. The Panel is aware that the Egg Board also had to weigh the interests of Golden Valley in maintaining the product. However, as stated earlier, Golden Valley did not have the same long-term need for specialty product as evidenced by its willingness to give up this product in the first place.
86. The Appellant asserts that the Egg Board gave preferential treatment to Golden Valley, especially when compared to the earlier transfer of Ancor from Golden Valley to Floritto's in 1998. That situation is much the same, Golden Valley originally did not take issue with the transfer, however, two weeks prior to it taking effect, it changed its mind and opposed the transfer. The Egg Board, faced with the competing interests of Golden Valley and Floritto's, approved the transfer to Floritto's. It did not broker a deal and split the production as it did when faced with the competing interest of Golden Valley and the Appellant.
87. The Panel agrees that there is at least an appearance of inconsistent and perhaps preferential treatment by the Egg Board of Golden Valley. Golden Valley is a large grading station which no doubt wields a lot of power and influence. While the decision may have had less to do with personalities and more to do with a desire on the part of the Egg Board to strengthen production on the mainland at the expense of Vancouver Island, the inconsistent treatment between grading stations is troubling.
88. In coming to this decision, the Panel has placed a great deal of weight on the existence of a significant black market in specialty eggs on Vancouver Island. We should not be taken as saying that the existence of a black market for specialty eggs in and of itself justifies the transfer of product to a grading station. In some situations, the more appropriate response will be heightened enforcement. However, in 1998, there was a producer who wanted to ship to the Appellant, a region with need of specialty product and a grading station that was servicing an out-of-province market. In 1999, there was one grading station that did not need the product, the Appellant who had been desperately requesting the product and a producer whose desire to not transfer, can best be described as a neutral factor.
89. In the Panel's opinion, in the unique circumstances of both applications, the balancing of the competing interests between grading stations should have been

resolved in favour of the Appellant. Even though this decision may have created problems for other grading stations in other regions, the acute problem of specialty egg supply on Vancouver Island had to be addressed.

90. It is interesting to note that if the Egg Board's policy for directing product is examined closely, at its core is a desire to allocate product to areas with increasing market demands. It is difficult to imagine a clearer sign of an increasing market demand than the growth of the black market and the increase in illegal, unregulated producers. In the Panel's opinion, the Egg Board must do more than blindly apply its formula when determining the appropriateness of a transfer between grading stations. At the very least, its consideration must extend to the impact of the decision on other grading stations and the regions they supply.
91. Accordingly, the Panel is of the opinion that the Appellant should receive specialty production to service its market. Over a six-year period commencing in 1992, the Appellant worked very hard to develop a market for specialty eggs on Vancouver Island. This is not a case where the Appellant has sat back and done nothing and now seeks a hand out. It developed a market. By delaying and denying assistance, the Egg Board in effect handed this market over to other grading stations and the unregulated sector. Our concern here is not competition between grading stations but rather the foreseeable impact of Egg Board decisions on the growth in the illegal unregulated sector and the negative impact on the supply management system.
92. We disagree with the Egg Board that transfers of producers between grading stations are a "zero sum gain". This analysis overlooks the importance of maintaining regional markets. The Egg Board has a duty to consider the impact of its policies and decisions on regional markets. Unless there is a very good economic or policy reason, Egg Board decisions should not detrimentally undermine a regional market. One region should not be sacrificed to benefit another. Unfortunately, that is exactly the effect of the Egg Board's decisions in relation to Vancouver Island and the Appellant.
93. The Panel recognises that it is very difficult to turn back the clock; much has transpired in the meantime. However, we direct the Egg Board to give priority to the Appellant to ensure that it receives the necessary product to service its specialty market. We cannot go further and dictate the amount of production to be directed to the Appellant, as there was evidence of a softening of the Appellant's market. Whether this is a temporary or permanent state of affairs, we are uncertain. The Egg Board will need to make a determination on this issue. We also recommend that the transfer of product to the Appellant be reviewed annually or at the Appellant's request, to ensure a reasonable supply is maintained.

Over-quota Levies

94. There remains the issue of the Appellant's over-quota production. The Appellant admits to the illegal production, and does not take direct issue with the Egg Board's jurisdiction to impose over-quota levies. Rather, it seeks to challenge the levies indirectly on the grounds that the earlier refusals for more specialty egg production were wrong.
95. We acknowledge that our legislation is broad and that we could set the levies aside as a matter of discretion. However, even given our finding that the Egg Board did not exercise correct judgment in dealing with the Appellant's applications for more specialty product, it does not necessarily follow that we should grant relief from the assessed over-quota levies. To accept the proposition that persons should be relieved of the consequences of illegal action because they disagree with an earlier decision by a commodity board would in our view be both undesirable and dangerous. Thus, the BCMB would normally only entertain granting such relief in very limited circumstances.
96. The Panel has spent considerable time deliberating whether we should relieve against the over-quota levies in these circumstances. We are however, unable to come to a decision based on the evidence before us. While we have evidence relating to the circumstances and amount of over-quota levies assessed against the Appellant between November 18, 1998 and February 18, 1999, we are unclear on the over-quota position of the Appellant after that time. Specifically, we are unsure of what, if any, over-quota assessments arise since the BCMB issued its stay on February 21, 2000 or on what grounds any such assessments are said to arise.

ORDER

97. The BCMB makes the following orders:
 - a) The Respondent erred in refusing to transfer the Ancor production to the Appellant in September 1998.
 - b) The Respondent erred in refusing to transfer the Ancor production to the Appellant in October 1999.
 - c) The Respondent is to give priority to the Appellant's request for specialty production.
 - d) The Respondent is to review the Appellant's specialty egg requirements annually.
98. With respect to the issue of over-quota levies, the BCMB directs the Respondent to provide written submissions on the following points, to be received not later than Friday, August 18, 2000:
 - a) What are the circumstances surrounding any alleged over-production of

the Appellant from February 18, 1999 to the present?

- b) During what time period from February 18, 1999 to the present was the Appellant allegedly over-produced?
- c) What is the amount of over-quota levy calculated on that over-production?

99. The Appellant is to provide its response to the Respondent's submission on or before Friday August 25, 2000. The Respondent is to provide any reply to the Appellant's submission on or before Thursday, August 31, 2000.

100. Following receipt of the above written submissions, the Panel will release its decision as to the appropriate remedy and as to the issue of costs.

Dated at Victoria, British Columbia, this 4th day of August 2000.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Harley Jensen, Member
Hamish Bruce, Member
Richard Bullock, Member