IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT

AND

TWO APPEALS BY JOHN JANSEN AGAINST DECISIONS OF THE
BRITISH COLUMBIA EGG MARKETING BOARD CONCERNING LEVIES

BETWEEN:

JOHN JANSEN

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

AND:

CANADIAN EGG MARKETING AGENCY

INTERVENER

DECISION

APPEARANCES BY:

For the British Columbia Farm Industry Review Board	Suzanne K. Wiltshire, Presiding Member Richard Bullock, BCFIRB Chair Dave Merz, Member
For the Appellant	John Jansen
For the Respondent	Robert Hrabinsky, Counsel
For the Intervener	David Wilson, Counsel
Location of Hearing	Abbotsford BC
Date of Hearing	November 30, 2007

INTRODUCTION

1. The appellant, John Jansen, has filed two appeals with the British Columbia Farm Industry Review Board (BCFIRB). The appeals were heard together.

2. The first appeal concerns an increase in the uniform levy communicated by the British Columbia Egg Marketing Board (Egg Board) to Mr. Jansen in documents dated December 22, 2006.

3. The second appeal concerns the Egg Board's October 24, 2006 letter to Mr. Jansen respecting levies paid by permittees. The Egg Board advised that all outstanding levies were payable by permittees and that, consistent with its earlier decision to rescind the "banked levy" provision of its orders effective June 2005, it had calculated the amount due to Mr. Jansen in respect of the "banked" amount of levies paid with respect to his Temporary Restricted Licence Quota (TRLQ) and attached its calculations. The Egg Board made no provision for a comparable amount to be returned in respect of levies paid by Mr. Jansen on Special Permit Licence Quota (SPLQ) that he had held under two permits.

4. The Canadian Egg Marketing Agency (CEMA) appeared as an intervener with respect to the uniform levy and the increase in that levy. CEMA took no position with respect to the refund of "banked" amounts in relation to "special" levies imposed by the Egg Board.

5. The following witnesses were heard: John Jansen, David Taylor, Chair of the Egg Board, and Peter Clarke, Vice-Chair of CEMA.

ISSUES

6. Did the Egg Board err in increasing the uniform levy on the appellant's production effective December 31, 2006 (week 01/2007) as communicated in its determinations dated December 22, 2006?

7. Did the Egg Board's October 24, 2006 determination err in not providing for the return of a "banked" amount in respect of levies paid by the appellant on SPLQ held by him?

BACKGROUND

8. Mr. Jansen is a specialty egg producer with certified organic egg (COE) production.

9. As of December 31, 2004 Mr. Jansen held the following quota: layer quota for 3882 birds; TRLQ for 5000 birds; and SPLQ for 1046 birds expiring April 11, 2005. He had earlier held SPLQ for 1800 birds that was issued June 30, 2003 and expired June 30, 2004.

10. Effective January 1, 2005 the Egg Board converted Mr. Jansen's 5000 bird TRLQ to specialty quota. The Egg Board did not convert the 1046 bird SPLQ and that special permit expired on April 11, 2005. The Egg Board's determination not to convert the 1046 bird SPLQ to specialty quota was upheld by BCFIRB on appeal. See *John Jansen v British Columbia Egg Marketing Board*, March 29, 2007.

11. After April 11, 2005, Mr. Jansen held 8882 birds of specialty quota.

12. There are two principal markets for eggs - the table market and the industrial products market. With respect to eggs produced for the table market, the normal process is that producers sell their eggs to grading stations at the regulated producer price. To the extent market conditions permit, grading stations sell the eggs to the table market. Under the Industrial Products Program (IPP) administered by CEMA, eggs that a grader is unable to sell to the table market, i.e. surplus eggs, are purchased by or on behalf of CEMA at the regulated producer price plus an allowance for grading costs. CEMA then sells these surplus eggs to processors for industrial use at the Urner-Barry price, a fluctuating North American industrial egg reference price that is always lower than the producer price.

13. In addressing the first issue with respect to the uniform levy increase the appellant focused on the IPP and also on the assessment of the levy on a per bird or layer basis rather than on a production or egg basis.

14. The second issue dealing with the refund of a comparable "banked" amount in relation to SPLQ levies paid by Mr. Jansen relates to special levies assessed by the Egg Board against both TRLQ and SPLQ. The relevant sections of the Egg Board's Standing Orders with respect to TRLQ prior to changes made as a result of BCFIRB's Specialty Review (see paragraph 15) provided, in part, as follows:

> Section 6 (i) TRLQ Refundable Levy -A portion of the levy imposed upon holders of Temporary Restricted Licence Quota of an amount from time to time fixed by the Board for each layer which may be kept or maintained by the Registered Producer may be refundable under Section 7(p).
>
> Section 7 (p) Temporary Restricted Licence Quota TRLQ - The Board may establish a provincial pool of quota set aside to facilitate, as required, additional production of all types of certified specialty eggs pending the producer acquiring regular quota. Once regular quota is sourced, the TRLQ must be returned to the Market Responsive Allocation Pool (MRAP) pool. TRLQ may be issued for a maximum of seven years, with a progressive retirement commencing at the end of the fourth year.
> …

> A record will be maintained for each TRLQ producer of the recoverable portion of levy/fees paid. These funds may be drawn upon at any time up to one half of the funds available until the final draw at which time the remaining funds may be drawn. Upon the instructions of the TRLQ holder and upon the approval of a quota transfer by the Board and retirement of an equal amount of TRLQ, a cheque for half the funds available will be issued to the transferee of the quota to the TRLQ holder. If the quota transfer is for less than one quarter of the original TRLQ allocation, the percentage of funds will be adjusted accordingly.
> …
>
> There must be a signed agreement between the Board and the producer detailing the conditions under which the licence will be issued and eventually converted to regular quota.
>
> By the end of year four, one quarter of the TRLQ originally issued must be replaced by regular quota or returned to the MRAP pool. Progressively thereafter, a quarter of the original TRLQ issuance must be replaced by regular quota or returned to the MRAP pool by the end of years five and six. At the end of year seven the producer will be granted the remaining quarter of the quota originally issued.
>
> Any transferee of quota who has accessed the TRLQ recoverable levy or been granted TRLQ quota in the previous two years will be subject to a 40% clawback on that portion of the transfer. Any quota clawed back must be added to the MRAP pool. …

No similar provisions were made with respect to SPLQ.

15. In September 2003 BCFIRB commenced a supervisory review, instructing all five supply managed boards to carry out a review of their policies and programs with respect to specialty markets. This supervisory review, known as the Specialty Review, resulted in a number of directions being issued by BCFIRB in its September 1, 2005 report entitled *Specialty Market and New Entrant Submissions – Policy, Analysis, Principles and Directions* (2005 Specialty Review Report). Boards were instructed to implement the directions through changes to their board orders. Interested persons may source the 2005 Specialty Review Report and other documents pertaining to the Specialty Review in their entirety at: http://www.firb.gov.bc.ca/specialty_review.htm.

16. Section 5.6 of the 2005 Specialty Review Report dealing with permit conversion called for conversion of specialty permits to quota licences. It was pursuant to this direction that Mr. Jansen's 5000 TRLQ was converted to specialty quota.

17. Levies are discussed at section 5.14 of the 2005 Specialty Review Report. The following policy directions were given with respect to levies:

> 1. Levies and fees assessed specifically for permits or temporary quota use, not

including regular administration and marketing fees charged by a Board on all regular quota production, are to be terminated from January 1, 2005 forward.

2. Subject to the discretion of the Boards, all levies and fees charged for permits or temporary quota up to December 31, 2004 should be due and payable.

3. Each permittee should be fully paid up for all levies owed to the Boards up to December 31, 2004 or the nearest applicable quota period ending after December 2004, prior to any permit conversion to quota of any class.

4. All levies established should be based on the cost of providing the service. Different levies should be considered for different quota classes based on class specific services and a pro rata share of infrastructure and administration costs.

5. Where practical, levies should be charged on the basis of product sold rather than quota units.

18. While no specific directions were given with respect to special levy amounts "on deposit" for future quota purchases, BCFIRB commented in Appendix 3 of the 2005 Specialty Review Report at section 2.17 that amounts paid "on deposit" for eventual quota purchase should be reimbursed.

FIRST ISSUE – UNIFORM LEVY INCREASE

A. Appellant's Evidence and Argument

19. Mr. Jansen says that the Egg Board erred in increasing the amount of levy payments applicable to his production. He says that:
    - The levy as applied to COE producers should not include components, such as the CEMA levy for industrial product disposal, that are not and would never be used by COE producers.
    - The levy calculation reflects an unfair bias against COE production because the levy is based on quota, i.e. the number of birds, rather than eggs produced and COE production rates of lay are lower than conventional rates of lay.
    - The above flaws in the levy are even more serious because of the levy increase.

Industrial Products Program

20. Mr. Jansen took the panel through a series of calculations he had carried out to arrive at a figure of $0.1436 which he submitted was the amount as at December 30, 2006 levied per bird per week with respect to the IPP component of the levy. Applying that amount to his 8882 bird specialty quota, he arrived at an amount of $66,323.92 which he submitted was the portion of the levy paid by his operations in respect of the IPP.

21. Mr. Jansen then took the panel through another series of calculations to arrive at a figure which he submitted was the net cost of IPP disposal within British Columbia

in fiscal 2006. He then prorated that figure to arrive at a cost of COE disposal in British Columbia of $15,130.45 and a prorated cost for his operations of $2,203.74.

22. Based on these calculations, Mr. Jansen submits that while his farm unit portion of the IPP cost was $2,203.74, the levy paid by the farm unit was $66,323.92.

23. Mr. Jansen also referred the panel to documents which indicated that organic eggs were imported in 2004 (70,200 dozen), 2006 (8,100 dozen) and 2007 (96,255 dozen). He submits that these imports show the province has been organic product short for some time.

24. While information to which Mr. Jansen referred showed disposal of some surplus COE production under the IPP in 2006 and he also acknowledged having written to the Egg Board regarding surplus production in 2005, Mr. Jansen maintained that these were not "regular" surplus situations resulting from overproduction.

25. Referring next to grade out sheets for his production for the weeks 2005/30-32, Mr. Jansen pointed out that in some instances his organic eggs had been downgraded to free run or brown eggs and the lower adjustment for these types of eggs rather than the higher organic egg adjustment had been applied. He submits this shows COE producers do not have access to the IPP.

26. However, Mr. Jansen subsequently acknowledged that when the 2005 Specialty Review Report directions began to be implemented in October 2005 this type of downgrading no longer occurred and since that time a COE producer with eggs going into the IPP would be paid full price, i.e. the regulated producer price plus the organic premium.

27. Noting the imports previously referred to and the fact that little organic production is disposed of through the IPP, as well as the previous downgrading rather than disposal under the IPP, Mr. Jansen submits that the IPP does not benefit COE producers.

28. Mr. Jansen submits that the Egg Board needs to adopt proper accounting procedures to assign the IPP component of the levy to the type of production giving rise to the costs associated with that program. He further submits that COE production should be removed entirely from the IPP and then COE producers could downgrade their own product.

29. Mr. Jansen rejects the Egg Board's argument that it cannot unilaterally charge some producers a levy and not others. In this regard, he says that other commodity boards do this through pooling to better reflect where costs are incurred.

Levy Assessed on Layers not Eggs

30. Mr. Jansen took the panel through another series of calculations. Referring to levy week 52/2006 and based on an 80.3% rate of lay for COE production and a proposed lay adjustment of $0.05 per dozen, he calculated a levy over assessment of $154.21 with respect to his then production of 3600 dozen. Deducting this over assessment from the actual price paid as of August 27, 2007, and comparing the resulting amount to the Egg Board's calculated cost of production less the proposed $0.05 lay adjustment, he arrived at a price deficit of $0.53 per dozen. For his production at the time of 3600 dozen, he submitted the result was a total price deficit of $1,908.

31. Mr. Jansen submits these calculations demonstrate that the rate of lay difference for COE production is not being compensated in price and thus there would be no double count if levies were applied on a production basis.

32. Mr. Jansen submits that it is not quota or the number of birds that attracts services and related costs, it is production. To suggest producer prices should be adjusted for lay rate costs results in COE production subsidizing other production types and provides a market disadvantage.

33. Mr. Jansen submits that every other supply managed commodity board bases levies on production not quota. As for "off farm" sales, he says that other commodity boards also have "off farm" sales and these sales must be accounted for in production and verified by audit.

34. Mr. Jansen submits that levies should be calculated on the basis of eggs produced and not quota or the number of birds.

B. Evidence and Arguments of the Respondent and Intervener

35. The Egg Board observed that BCFIRB did not undertake a detailed constitutional or legislative analysis and did not purport to do so in its 2005 Specialty Review Report. Rather, BCFIRB made comments and observations in the context of an extensive review in which feedback from stakeholders was solicited and considered.

36. The Egg Board and CEMA both submit:
    - The IPP is an essential and integral component of the national supply management system. It is the essential means by which the price for table eggs is stabilized and maintained. COE producers benefit from the resulting price stability.
    - The Egg Board cannot act unilaterally to relieve certain producers from the obligation to pay levies, either provincial or federal, imposed under the CEMA Levies Order.

- The Province of British Columbia entered into a Supplementary Federal Provincial Agreement obliging the Egg Board to make complementary levies in like amounts as federal levies in furtherance of an integrated system.
- It is a practical necessity to assess levies on layers rather than eggs and this has been recognized in the "St. Andrew's Accord", a national agreement entered into in 1999.
- Assessment of levies based on layers does not reflect an "unfair bias" against COE production.

Industrial Products Program

(i) Evidence of David Taylor and Peter Clarke

37. Both Mr. Taylor and Mr. Clarke testified regarding the IPP and the levy. Their evidence is summarized below.

38. There is no separate levy for the IPP. The IPP is just one factor entering into CEMA's determination of the levy amount. Once the levy amount has been determined by CEMA, the Egg Board is obliged to levy the amount determined and remit it to CEMA.

39. While the IPP is largely thought of as a "removal program", it also serves to supply product to processors and to promote price stability in the table market by providing a home for surpluses when they occur. The sale of table eggs into the processed market also means Canadian eggs supply the Canadian processed market.

40. A producer is indifferent as to the market into which his eggs are sold because he receives the regulated producer price plus, in British Columbia, the premium applicable to the type of specialty eggs he produces. This is possible because: (i) under the IPP as administered by CEMA surplus eggs are purchased from the grader by or on behalf of CEMA at the regulated producer price plus an allowance for grading costs; and, (ii) under the specialty buy back program implemented by the Egg Board in October 2005, the applicable specialty premium is also paid. The type of downgrading in 2005 that the appellant referred to occurred before the implementation of the specialty buy back program and no longer occurs.

41. Surpluses occur from time to time each year and also occur within each class as a result of seasonal demand or other factors such as retail pricing. The IPP helps to smooth out seasonal peaks and valleys in production.

42. COE surpluses have occurred in the past and may again. If a COE surplus were to occur the Egg Board would look first at downgrading to minimize the loss and in the worst case to the removal of surplus through the IPP. In either case the COE producer would receive the regulated producer price plus the organic premium for his eggs. Without the IPP the only way to move surplus would be to downgrade

the eggs (i.e., to non-organic status) and sell at a lower price or simply lower the price for organic eggs. A lower organic egg price would have the effect of lowering the price on all classes of eggs.

43. The IPP provides fair producer returns since a producer gets paid the same price no matter where the eggs end up. Over time a producer will get his cost of production plus a reasonable return. Because all producers are treated equitably across the country, all share equally in the charge to run the IPP.

44. The IPP benefits all producers whether or not their eggs are sold into the processed market. The specialty producer benefits even if the specialty producer's eggs are not sold into the processed market because the IPP supports the table market price.

45. The Egg Board established a specialty markets advisory committee (Specialty Committee) to advise it on matters pertaining to specialty production, including pricing. In recommending pricing the Specialty Committee has regard to the CEMA cost of production for caged white layers plus additional production costs relating to various specialities. However, the committee's pricing recommendations must also be based on market realities. Often the full cost of production cannot be recovered in the marketplace immediately and must be done gradually over time.

46. Specialty production has not yet been dealt with at the national level. The cost of the BC specialty buy back program is budgeted at $100,000 annually and is paid out of general Egg Board revenues.

(ii) Arguments of Respondent and Intervener

Sources of Provincial and Federal Authority Regarding Levies

47. The respondent and intervener in their submissions briefly reviewed the constitutional framework for regulated marketing, making reference to sections 91 and 92 of the *Constitution Act, 1967* and to the landmark case known as the "*Egg Reference*" see *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 (S.C.C.) as well as to later cases that referenced that case.

48. They submit that as a practical matter the effective regulation of the market requires concurrent overlapping federal and provincial regulation because the market is "undifferentiated" in that the regulated product trades both within and without the province. Because it is not possible to know whether a particular egg produced by a particular producer will be marketed intra-provincially or extra-provincially, overlapping federal and provincial regulation is necessary. See *British Columbia Milk Marketing Board v. Bari Cheese*, [1993] B.C.J. No. 1748 (S.C.) [appeal dismissed [1996] B.C.J. No. 1789 (C.A.)].

49. The Egg Board is vested with both provincial and federal authority to impose and collect levies. Provincial authority flows from section 37(v) of the *British Columbia Egg Marketing Scheme, 1967* (B.C. Reg. 173/67) and section 11(1)(o) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330. Federal authority flows from the *Agricultural Products Marketing Act*, R.S.C., 1985, c. A-6 and the *British Columbia Egg Order* (C.R.C., c. 140) made under that Act.

50. The Egg Board cannot act unilaterally with respect to all matters concerning levies because CEMA is also independently vested with federal authority concerning levies and has exercised that authority to impose levies on British Columbia producers. This federal authority is derived from the *Farm Products Agencies Act*, R.S.C. 1985, c. F-4 and the *Canadian Egg Marketing Agency Proclamation*, C.R.C., c. 646.

51. Pursuant to section 10 of that Proclamation, CEMA made the *Canadian Egg Marketing Levies Order* (SOR/2003-75). The Order provides, in part, as follows:

> 1. The following definitions apply in this Order.
>
> "Agency" means the Canadian Egg Marketing Agency.
>
> "Commodity Board" means any of the following:
> …
> (f) the British Columbia Egg Producers; ...
>
> "Plan" means the marketing plan the terms of which are set out in Part II of the schedule to the Canadian Egg Marketing Agency Proclamation. …
>
> 3. (1) Each producer shall pay, on each dozen of eggs marketed by the producer in interprovincial or export trade, a levy of …
>
> (f) in the Province of British Columbia, $0.3954; …
>
> (2) Subsection (1) ceases to have effect on December 29, 2007.
> …
>
> 4. If eggs are sold or otherwise disposed of by a producer to a grading station operator, the grading station operator shall deduct the amount of the levy payable under section 3 in respect of those eggs from the moneys payable by the grading station operator to the producer for the eggs.
> …
>
> 5. The Agency, having obtained the concurrence of each Commodity Board, hereby appoints each Commodity Board, under subsection 10(4) of the Plan, to collect the levy payable under section 3 on behalf of the Agency.

> 6. (1) A levy payable under section 3 shall be remitted to the Commodity Board of the province where the producer on whom the levy is imposed is engaged in the production of eggs.
> …
>
> (3) Each Commodity Board shall send to the Agency all the levies received by it under subsection (1) during a week at the end of that week. …

52. Section 36 of the *Farm Products Agencies Act* concerning the recovery of debts due an agency make any levies imposed by CEMA a debt due to CEMA and therefore the Egg Board cannot act unilaterally to relieve certain producers from the obligation to pay levies imposed under the *Canadian Egg Marketing Levies Order*. Nor can the Egg Board relieve producers from the obligation to pay the "provincial" component of the levies imposed under the Order without running afoul of the principle of "concurrency". A "de-linking" of the exercise of federal and provincial legislative authority cannot be accommodated without offending the core principles of concurrency and co-operative federalism.

Federal-Provincial Agreements

53. Both the respondent and the intervener say that in addition there is a contractual basis for co-operative federalism. The IPP must also be considered in this context.

54. In the original 1972 federal-provincial agreement for eggs and in the revised 1976 federal-provincial agreement entitled "Federal-Provincial Agreement in respect of the revision and consolidation of the Comprehensive Marketing Program for the purpose of regulating the marketing of Eggs in Canada" (1976 FPA) currently in force, CEMA is required "to be responsible for the cost of removing from the shell egg market all eggs in excess of demand that are produced within the provincial allocation of the province, provided the province is in compliance with this Agreement." CEMA carries out this responsibility through the IPP, formerly the Surplus Removal Program.

55. The benefits provided by the IPP relate directly to the core purposes of the orderly marketing system for eggs which, as stated in the Preamble to the 1976 FPA, are:

> …the establishment of a comprehensive orderly marketing program for the purpose of ensuring the orderly marketing of eggs in Canada, a fair return to the producer, a dependable supply of high quality eggs to the consumer, the cooperation and coordination between the various provincial Egg Commodity Boards and the Canadian Egg Marketing Agency which was established pursuant to the said agreement.

56. It was explicitly understood by the 1976 FPA signatories that in fulfilling its responsibilities CEMA would incur costs that would have to be funded through levies. The costs of these activities are nationally pooled to provide for equitable

treatment for all producers across the country. Schedule C of the 1976 FPA requires the commodity boards to collect as agents for CEMA the funds necessary to provide for the costs of the successful operation of CEMA.

57. Following the *Egg Reference* the signatories to the 1976 FPA entered into supplementary arrangements and agreements to provide a secure funding base for the then entitled Surplus Removal Program, now the IPP. The Supplementary FPA entered into by the Province of British Columbia provides for the imposition and collection of levies. It contemplates that the levy system will be integrated, that provincial levies will be complementary to federal levies and that provincial levy rates will be the same as federal levy rates. The levy system is intended to be destination neutral and to produce the same uniform levy amount to fund national activities irrespective of whether eggs are marketed locally or outside of the province.

58. Section 1 of the Supplementary FPA authorizes CEMA within each province to purchase and sell or otherwise dispose of eggs that are in excess of table market demand in the province.

59. Section 2 of the Supplementary FPA provides for the cooperation of the parties in developing an integrated system of levies. Under section 2(a) CEMA is to make orders for the imposition of levies in amounts established by it from time to time with the charging provision to read: "A levy is hereby imposed on every producer of cents per dozen of eggs marketed by him minus the number of dozen of eggs, if any, marketed by him in intraprovincial trade." Section 2(b) requires each commodity board to make complementary orders for the imposition of levies in like amounts from time to time, with the charging provision to read: "A levy is hereby imposed on every producer of cents per dozen of eggs marketed by him minus the number of dozens of eggs, if any, marketed by him in interprovincial and export trade."

60. Section 3 of the agreement goes on to provide that each commodity board as agent for CEMA will make weekly payments to CEMA to enable CEMA to operate the comprehensive marketing program, including the operation of a national surplus removal scheme for the benefit of producers in the province which comprises the removal of surplus both within and without the province together with related administrative and other expenses.

61. The Supplementary FPA is a legally enforceable agreement. See *Alberta Egg and Fowl Marketing Board v. Canada (Minister of Agriculture)*, [1995] F.C.J. No. 997 (T.D.), paragraph 87.

62. The amounts levied to which the appellant objects are obligations under the Supplementary FPA. The funding of national activities by the levy system as contemplated by the Supplementary FPA is not an "a la Carte menu" from which provinces or individual producers can opt in or out. The levy system is an

integrated whole designed to apply equally to all producers. Provinces can impose provincial levies as required to fund provincial operational and marketing activities, but they cannot erode the national funding base by allowing certain quota holding producers to be exempt from paying the levies other producers must pay.

63. The appellant's statement, that he has no problem with CEMA but he shouldn't have to pay, won't work. The Supplementary FPA and the principles of cooperative integration it contemplates leave no room for a province to carve up the levy system and exempt some producers from having to pay levies or apply a different rate to some producers as opposed to others. If British Columbia were to do so, it would be inconsistent with legal commitments under the Supplementary FPA and inconsistent with the dovetailing, integrated form of regulation that underpins the orderly marketing system for eggs. In bringing the system into the current century, the federal provincial arrangements should not be set aside when the arrangement is working.

64. The growth in specialty production will require the system to adapt and British Columbia is doing that. However, the inclusion of specialty production within the system needs to be done in a manner consistent with the provisions of federal provincial agreements and the integrity of the overall system.

Benefits of the IPP

65. The principal "service" the Egg Board provides is the administration of the national supply management system for eggs in British Columbia. The IPP administered by CEMA is an essential and integral component of that system and has two functions: (i) it is the means by which producers share the responsibility to supply the industrial products market for eggs; and, (ii) it is the essential means by which the price for table eggs of all classes is stabilized and maintained.

66. In a supply managed industry it is the responsibility of all producers to supply the market. The IPP eliminates the arbitrary inequities that would result from any given producer's production entering the industrial market rather than the table market.

67. Graded production of any class, whether organic or conventional, is of equal quality and the producers are of equal status. Either is capable of supplying the higher priced table market or the lower priced industrial market. There is no rational basis to discriminate against any group of producers capable of supplying the higher value table market. To do so would mean that prices could no longer be controlled within the table market as the group discriminated against could "destroy" prices overnight by diverting production from the industrial market to the table market. This situation is analogous to the market disparity that originally existed within the dairy industry and that provided the very foundation for the principle of equalization. See the remarks of the Honourable J.V. Clyne in the *Report of the British Columbia Royal Commission on Milk (1954-55)* at page 37.

68. These fundamental principles were recognized by the Supreme Court of Canada in the *Egg Reference* where Chief Justice Laskin at paragraph 18 characterized the essence of the orderly marketing system for eggs as follows:

> This integrated scheme is designed to introduce stability into the egg market on a national level by assuring all producers a producer price for their eggs within their respective quotas, regardless of whether those eggs are sold locally or extra-provincially and regardless of whether they are sold for table consumption or end up in the surplus removal programme. The producers, however, share the cost of this programme, again on a national level, through the levies payable in respect thereof. In short, if in a particular Province there is a large surplus of within quota eggs, it would be because the table demand there has been met by out-of-province eggs but the producers in that Province would still get the producer price for their eggs within their respective quotas and the deficiency in returns on the surplus sold by CEMA in the processors market would be made up by levies exacted from all producers equally.

69. The IPP is an integral part of the "three pillars" of supply management in the egg industry; namely: production management, import controls and regulated pricing. CEMA's surplus disposal functions under the IPP are of critical importance to the well-being of the industry and benefit all producers:

- The IPP brings stability to the marketplace. There is only limited scope through flock placement timing to gear production to seasonal and other dips and surges in demand in the table market. CEMA's surplus disposal function serves to level out the peaks and valleys for the benefit of all industry segments.

- One of the principles entrenched in the 1976 FPA is that the producer price is to be set at a level that over time will return to producers their costs of production plus a reasonable return. The IPP helps ensure a fair return to producers on their production by providing for producers to receive the regulated producer price whether their eggs are sold for table or industrial use.

- The IPP enables the industry to meet the demands of Canadian egg processors. Eggs are sold by CEMA to processors at prices that allow those processors to compete in North American and world markets.

70. Without the IPP, CEMA could not fund removal of surplus eggs, industrial products processors would import eggs, and there would be no safeguards to prevent diversion of low priced eggs into the higher priced table market. This would result in significant market volatility of the type experienced before the supply management system came about.

71. All commercial egg producers benefit from the orderly marketing activities carried out by CEMA including IPP activities, whether their eggs happen to be sold into the IPP or not. Producers whose eggs are not needed for the table market receive

the regulated producer price and CEMA then sells the surplus eggs to processors at a substantial loss. Producers whose eggs are sold for table use receive the price and market stability benefits of the IPP. This applies not only to "regular" egg producers but also to producers of specialty eggs who sell their eggs at a premium relative to "regular" eggs.

72. Specialty eggs can be sold into the IPP if they are surplus to the table market for the specialty concerned. In British Columbia the producer will receive the regulated producer price plus the applicable premium.

73. To accept the appellant's argument that he should not support the IPP program because he is distinct as a COE producer would severely undermine the system.

74. CEMA cannot agree with the concept that levies must be "service based" if that means certain producers can unilaterally claim exemption from programs to be equally funded on a national basis like the IPP. Even if that concept was accepted, it is clear that all commercial egg producers in British Columbia, including specialty producers like the appellant benefit substantially from services CEMA provides, notably, through the IPP.

75. The IPP is the essential means by which the price for table eggs of all classes is stabilized and maintained. This is achieved by providing a market to absorb temporary production excesses (whether arising from within or without the province) without eroding the table egg price. Organic production is not immune to such temporary production excesses or the impact from production excesses arising from outside the province. The organic egg market enjoys the "service" i.e. the price stability provided by the national supply management system regardless of the extent to which organic eggs enter the processed market.

Levy Assessed on Layers not Eggs

76. Mr. Clarke and Mr. Taylor said with respect to the basis of assessment:
    - Because of difficulty accounting for eggs, all provinces agreed to assess levies on the basis of layers. Agreement to assess on this basis is known as the St. Andrew's Accord.
    - Pursuant to the St. Andrew's Accord, British Columbia has agreed to a uniform per bird levy.
    - Assessment on the basis of layers fits with quota distribution on a per bird basis and the audit of layers for quota purposes.
    - While grading records could be relied on to determine egg production, there would be accounting difficulties with respect to off farm sales.

77. The respondent and intervener submit that it is a practical necessity to assess levies on layers because it is feasible to measure and record the number of layers kept by a person but it is not feasible to measure and record the number of eggs produced. It is too easy for eggs to "disappear" into the market without detection. This

practical necessity has been nationally recognized since the St. Andrew's Accord. That agreement provides for levies to be assessed against layers using a national average rate of lay, despite the fact that rates of lay vary among provinces, different types of production, producers of the same class of production and even from flock to flock.

78. The levy calculation does not reflect an "unfair bias" against COE production because differences in the rate of lay among organic and non-organic production are accounted for in the premium payable on organic production. Levies are accounted for in the CEMA cost of production formula which expresses the cost of production, including the cost of levies, on a per egg basis. The CEMA cost of production is specifically considered by the Specialty Committee in recommending the premium to be paid on organic production having regard to the cost of levies per egg. The Specialty Committee in making pricing recommendation must also be sensitive to market pricing.

79. To account for the differences in the rate of lay in the levy calculation by basing such calculations on the number of eggs produced would double-count the impact of rate of lay differences and would be contrary to the St. Andrew's Accord.

C. Analysis

80. The appellant's evidence and arguments are directed not to the actual increase in the levy but in support of the appellant's views that (i) COE producers should not have to pay any portion of the levy attributable to supporting the IPP program; and, (ii) the levy should be assessed on the basis of egg production and not on the number of layers.

Industrial Products Program

81. The panel cannot accept Mr. Jansen's argument that the IPP is not and would never be used by COE producers. There have in the past been COE surpluses and this may again occur from time to time. In the event that surplus COE production cannot be sold into the table market, it can be dealt with under the IPP. A COE producer whose production enters the IPP benefits by receiving the regulated producer price plus organic premium as a result of the combination of the IPP and the provincial specialty buy back program.

82. The panel also agrees with the Egg Board and CEMA that the IPP currently benefits all British Columbia producers regardless of class or type of production through the stabilizing effect the IPP has on the price of white table eggs and thus the price of other classes or types of production. Because of this stabilizing effect, a producer benefits even if the eggs he produces never enter the IPP.

83. Central to Mr. Jansen's case are his calculations comparing the $66,323.92 that he says is the portion of the levy attributable to the IPP paid by his farm unit to the

$2,203.74 pro rata disposal cost he says is incurred by the IPP with respect to his farm unit. However, the appellant's calculations as to the net cost of IPP disposal within British Columbia and the prorated cost to his operations fail to take into account that the IPP is and, to be effective, needs to be a national program. British Columbia producers benefit from surplus product dealt with through the IPP program whether that surplus is in British Columbia or elsewhere. Without a program such as the IPP, surpluses elsewhere could potentially enter the British Columbia market at a discount to the table market price in British Columbia negatively affecting all BC producers. Thus the comparison made by the appellant is misleading. The appropriate comparison cannot be made on a provincial cost basis but must be made on a national basis.

84. Similarly, the appellant's argument that COE producers have no need for the IPP because British Columbia is short organic production, fails to consider the negative impact on the table market price in BC of surpluses, whatever their type or class and whether from inside or outside the province, entering the table market in British Columbia if there were no national program for surplus removal.

85. We also observe that at the time the increase in the uniform levy was communicated in December 2006, the IPP was fully available to COE producers. In addition, the provincial specialty buy back program ensured that COE producers would receive not only the regulated producer price but also the organic premium in the event any of their production entered the IPP. The downgrading of the appellant's COE production by a grader prior to the implementation of the specialty buy back program in October 2005 is not relevant to the increase in the uniform levy.

86. The panel finds that the IPP was at the relevant time and is currently a "service" of general benefit to British Columbia COE producers.

87. In combination the Supplementary FPA and the *Canadian Egg Marketing Levies Order* provide for the assessment of complementary levies at the federal and provincial levels on each producer at the same rate. In view of our finding that the IPP was at the relevant time and is currently a service of general benefit to British Columbia COE producers, we do not find it necessary to address the difficult legal question of whether the Egg Board could unilaterally impose differential levies on producers in the face of the Supplementary FPA and the *Canadian Egg Marketing Levies Order*. While we received submissions (summarized above) emphasizing the terms and operations of the 1976 FPA, the *Canadian Egg Marketing Levies Order* and the Supplementary FPA, we are not, without full and proper argument, prepared to decide whether a levies order by the Egg Board which is at variance with the provisions of those documents would be legally invalid, as opposed to merely resulting in certain consequences under the federal provincial agreements.

88. We find no basis to exclude from the levy payable by the appellant that portion attributable to the IPP. The appellant did not present evidence or specifically address any other components of the levy and thus we make no finding as to whether other components that are not and would never be used by COE producers should be included in the levy.

Levy Assessed on Layers not Eggs

89. What the evidence makes clear is that whether the levy is assessed on a per bird basis or on the basis of dozens of eggs produced, neither basis of assessment is likely to achieve perfect equivalency.

90. While the appellant would prefer that assessment be based on dozens of eggs produced, the panel accepts the evidence of the respondent and CEMA that assessment on that basis would present practical problems because of issues surrounding "slippage".

91. The assessment of levies on a per bird basis, coupled with an adjustment for a lower rate of lay through the organic premium paid for COE production, will not always result in equivalency because the amount of the organic premium may be constrained from time to time by market realities, even though the goal is to approach equivalency over time.

92. At this time the Egg Board is committed under the St. Andrew's Accord to assess levies on a per bird basis using a national average rate of lay. Significantly, all provinces have agreed to assessment on this basis as a practical necessity even though actual rates of lay may vary regionally, by type of production, among producers of the same class of production or from flock to flock.

93. The panel concludes that in the present circumstances the assessment of levies on a per bird basis in accordance with the St. Andrew's Accord, when combined as it is in British Columbia with the payment of an organic premium which takes into account the lower rate of lay for COE production as well as other factors such as market constraints, is reasonable and does not constitute an "unfair bias" against COE production.

SECOND ISSUE – "BANKED" LEVY AMOUNT IN RELATION TO SPLQ

A. Appellant's Evidence and Argument

94. With respect to the second appeal, Mr. Jansen says that the Egg Board erred in not providing a "banked amount" in respect of the SPLQ levies he paid.

95. He submits that the TRLQ and SPLQ levy amounts per bird were the same. However, since the TRLQ levy included a banked portion, calculated by him as

being at a rate of either $0.32 or $0.40, which was returned to the producer, effectively the SPLQ levy was higher.

96. Since SPLQ is quota and cannot be differentiated from other quota in terms of its production entitlement, Mr. Jansen says that to suggest an incremental value should be levied simply cannot be justified, nor is it legal.

97. Referring to the special permits issued to his farm, Mr. Jansen testified that grader requirements and avian influenza events had given rise to increased demand from 2003 through to March 2005 resulting in his farm providing COE production under special permits.

98. He also held TRLQ and received $90,398.48 as a return of the banked amount in respect of TRLQ levies he had paid.

99. Mr. Jansen submits that since the same levies were applied to both TRLQ and SPLQ an equivalent banked amount should have been returned to him in respect of SPLQ levies he paid. He calculates this amount to be $9,965.28, based on the SPLQ held by him between June 30, 2003 and April 11, 2005 and an equivalent "banked portion levy rate".

100. Mr. Jansen requests that the equivalent "banked amount" of $9,965.28 included in the SPLQ levies he paid be returned to him, so that the TRLQ and SPLQ levies are identical.

B. Respondent's Evidence and Argument

(i) Evidence of David Taylor

101. Mr. Taylor testified that special levies were applied with respect to both TRLQ and SPLQ. SPLQ levies were set at the same rate as TRLQ levies so as not to give SPLQ holders an advantage over TRLQ holders.

102. In a May 16, 2003 letter the Egg Board advised Mr. Jansen in relation to his proposed participation in the 1800 bird SPLQ and his concerns about the levy as follows: "The Directors discussed the reasons for the levy as a cost any other producer would have to incur to have the same right being offered to you. Following discussion it was agreed to set the rate at the proposed 33cents per bird per week." Mr. Taylor explained that the levy was set at this rate in lieu of the SPLQ holder having to acquire quota.

103. The banking of a portion of the special levies paid with respect to TRLQ was an enforced system to set aside funds for future quota purchase because, as originally structured, TRLQ holders were to acquire quota after a time. Pursuant to directions and recommendations subsequently set out in the 2005 Specialty Review Report,

TRLQ was subsequently converted to layer quota and the banked amount was paid out.

104. SPLQ was issued for a variety of reasons, primarily to deal with unusual circumstances of limited duration to meet market demands. In such cases SPLQ was issued for a set period with an expiry date. No amounts were banked or set aside because no subsequent quota purchase was contemplated. In a few cases SPLQ was issued with the objective of bringing certain non-compliant producers into compliance similar to the purpose for which TRLQ was issued.

(ii) Argument

105. The respondent submits that the SPLQ held by the appellant was issued for the limited purpose of addressing short-term production requirements arising in exceptional circumstances. It was issued with the express expectation that it would be utilized only for a finite, short term purpose.

106. The SPLQ issued to the appellant had no "banked amount" or equivalent intended to be set aside to facilitate the later acquisition of quota as a means of facilitating a conversion into compliance since it was temporary in nature and no conversion was ever contemplated.

107. With respect to such short term SPLQ, levies were established at the time at a rate intended to eliminate any direct financial windfall arising from the issue of the SPLQ itself. This permitted the Egg Board to address short-term requirements without generating allegations of favouritism or unequal treatment among producers.

C. Analysis

108. The 2005 Specialty Review Report dealt with special levies in several ways:
- Boards were directed to terminate "levies and fees assessed specifically for permits or temporary quota use, not including regular administration and marketing fees charged by a Board on all regular quota production," from January 1, 2005 forward.
- It was considered reasonable that permit fees and dues payable should be paid by all permittees on the basis that permittees had entered into a contractual agreement with the board. Thus, it was directed that all levies and fees charged for permits or temporary quota up to December 31, 2004 should be due and payable, subject to the discretion of each board.
- The Egg Board initially proposed to maintain "on deposit" amounts paid that were intended to be deposits for future quota purchases. BCFIRB's assessment was that amounts paid "on deposit" for eventual quota purchase should be reimbursed since there was no requirement to purchase quota.

109. In its February 21, 2006 initial response to the Egg Board's proposed changes to its Standing Orders, BCFIRB requested clarification concerning the disbursement of "quota deposit fees" payable by permittees. In its April 7, 2006 response the Egg Board confirmed that it understood BCFIRB expected "quota deposit fees" to be returned to TRLQ and special permit producers prior to their quota being issued pursuant to BCFIRB's direction to convert TRLQ and SPLQ existing at December 31, 2004.

110. The variety of purposes for which SPLQ might be issued and the nature of the appellant's 1046 bird SPLQ and its proper exclusion from the Specialty Review direction to convert specialty permits to quota licences was confirmed by BCFIRB in the earlier March 29, 2007 *Jansen* decision, where the panel stated:

> 23. The Panel accepts that the Egg Board uses special permits for different purposes. They can be issued to allow producers to meet production requirements when they can not produce for various operational interruptions (i.e. quota credits). They are also issued as a result of special circumstances, such as natural disasters, barn collapse or disease to give a producer flexibility in where, when or how he grows out his production. Mr. Jansen's SPLQ permit falls within this category. In both cases, there is an underlying right to produce which has been interrupted and the Egg Board exercises its discretion as to how best to meet market demands. The Egg Board can also issue special permits to specialty producers who were operating without quota in order to ensure production of specialty eggs for a demonstrated market demand. Mr. Jansen's TRLQ permit fell within this category. The significant difference between this latter type of permit is that there is no underlying quota or production right and as such the production must be accounted for within the provincial allocation.
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> 24. The question then arises which if any of these three types of special permits fall within BCFIRB directions for conversion. The purpose behind BCFIRB's Specialty Review was to bring specialty production within regulation. In doing this, BCFIRB required that New Entrant Programs be developed by commodity boards to accommodate new producers. However, BCFIRB also recognized that many commodity boards had previously developed permit programs to accommodate this production. Unfortunately, there was not a great deal of consistency between the permit programs. In addition, the permit programs did not address BCFIRB's concerns about transferability and allocation of growth within a specialty sector. Accordingly, BCFIRB mandated that permit programs be changed; producers that held permits in these programs were entitled to have their permits converted to specialty quota.
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> 25. The Panel agrees with the Egg Board that BCFIRB's directions regarding permit conversion were directed at those producers holding existing special permits allowing them to produce specialty product for the British Columbia market. Specialty producers were issued TRLQ permits granting the right to produce specialty production at a set level. These TRLQ permits (including the TRLQ permit held by Mr. Jansen) were properly converted by the Egg Board to specialty quota. As for the other two types of special permit, issued

> either to allow quota credits to be used to cover production or to allow for production at a different time or location as a result of an interruption in production, the Panel agrees with the Egg Board that these do not fit within BCFIRB's permit conversion direction.

111. Mr. Jansen's 1046 bird SPLQ which was issued November 7, 2004 and expired April 11, 2005 was found in the earlier *Jansen* appeal to have been necessitated by the interruption in production of another producer as a result of avian influenza. Mr. Jansen was given a temporary right to produce eggs that could not be produced by the producer who held the underlying right to produce those eggs. The Egg Board decision that this type of SPLQ was not entitled to conversion even though the quota was held by the appellant as at December 31, 2004 was upheld.

112. The temporary nature of the 1800 bird SPLQ is clear. This special permit was issued to Mr. Jansen June 30, 2003 and expired June 30, 2004. It was issued to meet short term market requirements. In its letter dated May 16, 2003 the Egg Board confirmed the levy rate for the 1800 bird SPLQ proposed to be issued to the appellant and advised this was the cost any other producer would incur to have the same right as was offered to the appellant. The 1800 bird SPLQ was issued on this basis.

113. A portion of the levy was "banked" or held "on deposit" by the Egg Board only in cases where permits were issued with the view that there would be eventual conversion into compliance through purchase of quota. The difficulty faced by the appellant is that the SPLQ which he held was in each case issued to deal with short term production requirements and was issued for a finite period. As such, there was never any contemplation that the appellant would in future need to purchase quota to facilitate conversion into compliance. In the case of the appellant's SPLQ, there were no "banked" or "on deposit" amounts set aside or intended to be set aside for later quota purchase. The appellant's SPLQ was issued on the understanding that a special levy would apply and be fully payable.

114. While the subsequent directions and understandings expressed in the 2005 Specialty Review Report and the February 21, 2006 and April 7, 2006 exchanges of correspondence referred to above, did result in existing "on deposit" amounts being refunded, there was no direction or recommendation to refund all or any portion of special levies generally.

115. Additionally, we note the provisions respecting refund of "on deposit" amounts are not retroactive. There is no provision for or requirement to refund any amount with respect to TRLQ or SPLQ that had ceased to exist, as did the appellant's 1800 layer SPLQ, before December 31, 2004.

116. We conclude that in the case of both the 1800 bird SPLQ and the 1046 bird SPLQ, the subsequent provisions relating to refund of "banked" or "on deposit" amounts do not apply.

117. With respect to the appellant's argument that the incremental amount levied by the Egg Board cannot be justified, the panel observes that the special levy was a term of the special permits issued to the appellant. It is clear from the Egg Board's May 16, 2003 letter to the appellant that he was aware that there was a special levy and was advised of the reason for it and that it would not be changed. He elected to proceed and accepted in succession the 1800 bird SPLQ and the 1046 bird SPLQ and paid the special levies that were a term of those special permits. He did not appeal the Egg Board's determinations as to the special levies payable in respect of his SPLQ at the time such permits were issued. It is too late to do so now.

118. Further, the panel notes the Specialty Review directions provided for the payment by permittees of all levies and fees charged for special permits up to December 31, 2004, subject to board discretion. The Egg Board in its discretion determined that all outstanding levies were payable by permittees. The Specialty Review directions also provided for the termination of levies and fees assessed specifically for permits or temporary quota use, but not including regular administration and marketing fees charged by a board on all regular quota production, from January 1, 2005 forward. This means that the argument put forward by the appellant more generally with respect to special levies has already been considered and direction given by BCFIRB.

119. The panel finds no basis to order return of a "banked" amount in respect of the special levies or any part of them paid by the appellant with respect to the SPLQ that he held.

CONCLUSION

120. We find that the Egg Board did not err in increasing the uniform levy on the appellant's production effective December 31, 2006 (week 01/2007) as communicated in its determinations dated December 22, 2006.

121. We find that the Egg Board did not err in failing to provide for the return of a "banked" amount with respect to the SPLQ held by the appellant.

122. Both appeals are denied.

123. No costs are awarded.

Dated at **Victoria, British Columbia** this **2nd** day of **July, 2008**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per
(Original signed by :)

_____
Suzanne K Wiltshire, Presiding Member

_____
Richard Bullock, BCFIRB Chair

_____
Dave Merz, Member