

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA EGG MARKETING
BOARD TO END THE MARKET GROWTH ALLOWANCE PROGRAM AS OF
JANUARY 1, 2017

BETWEEN:

FIVE-FRY FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

AND:

ALARY FARMS

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	Daphne Stancil, Presiding Member John Les, Chair Diane Pastoor, Member
For the Appellant:	Art Friesen
For the Respondent:	Robert Hrabinsky, Counsel
For the Intervener:	Darren Alary
Date of Hearing:	June 7, 2017
Place of Hearing:	Abbotsford, British Columbia

INTRODUCTION

1. This decision responds to an appeal of a decision of the British Columbia Egg Marketing Board (Egg Board) to end the Market Growth Allowance (MGA) program¹, put in place to respond to a market need for conventionally produced (from caged hens), white table eggs and eggs for processing.
2. The appellant Five-Fry Farms Ltd. (Five-Fry), managed by part owner Art Friesen, could not take advantage of the program by producing eggs for the full period of time it existed, and appealed on that basis.
3. The intervener Alary Farms Ltd. (Alary), through its principal owner and manager Darren Alary, supported the appellant in its appeal. Alary's situation as a single flock producer on a single property added to its inability to fully access the MGA program.

BACKGROUND

4. British Columbia is part of an integrated national supply management system that uses quota to manage and control the production and marketing of several commodities (eggs, chickens, turkeys, hatching eggs and milk). The *Natural Products Marketing Act (NPMA)* provides that the Lieutenant Governor in Council may establish schemes to manage the production of these commodities and establish either boards or commissions to manage the supply and production of the various commodities. The government of the day through the Lieutenant Governor in Council enacted the British Columbia Egg Marketing Scheme, 1967 (Scheme), to put a system in place to manage the production of eggs through a quota system and to establish the Egg Board.
5. Section 16 of the Scheme provides:

The purpose and intent of this scheme is to provide for the effective promotion, control and regulation of the production, transportation, packing, storage and marketing of the regulated product within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part.
6. In managing quota under the Scheme, the Egg Board is to consider, amongst other things, “any variation in the size of the market for eggs” (section 5(1)(d)).
7. The appellant Five-Fry is a registered producer of eggs, and its manager Mr. Friesen has an interest in at least two other registered producer farms.

¹ When the Egg Board announced this program in July 2015 and changed it in December 2015, it referred to it as a temporary market growth allowance (TMG). By the time the Egg Board ended the program in October 2016, it referred to the program as the market growth allowance (MGA) program. Since this appeal is based on that time, the panel refers to it as the MGA program, except where including the Egg Board's evidence regarding the history of the program.

8. The intervener Alary is a registered producer of eggs, is a single flock operation and the principal Mr. Alary has an interest in this single farm.
9. The Egg Board has membership in the Egg Farmers of Canada (EFC), which on an annual basis predicts the national demand for table eggs and allocates the production according to a formula to each of the provinces and the North West Territories.
10. The national EFC process of allocation has traditionally been retrospective, taking the demands of previous years into consideration to determine the need for a future year. Because of this retrospective process of determining national allocation the EFC underestimated the recent needs of many provinces beginning from about 2015 on.
11. The increased demand is in part a result of the Canadian health community advising that they no longer had significant concerns related to the regular consumption of eggs. Consumers responded by eating more eggs.
12. Coincidentally, the United States, an alternate source of eggs for many Canadians, lost about 15% of its capacity to produce eggs due to flock reductions as a consequence of avian influenza (AI). British Columbia itself suffered an AI outbreak in 2014 and in 2015, and affected producers were in the process of re-establishing their flocks with chick production that had also resumed at the time the MGA program came into effect.
13. With both domestic supply constrained and import capacity reduced, graders advised the Egg Board that they were unable to meet the demands of their customers in the retail sector. Similarly, the processor which often “topped up” its needs from imports could not afford to pay the higher prices being charged by its US suppliers due to a short US egg supply connected to the impact of AI on US production.
14. Despite an increased demand for eggs, the Egg Board must comply with its national agreement and national allocations to ensure British Columbia produces to the amount it is allocated by the EFC. Any increases in production must be within the allocated amount. If British Columbia produces more than the allocated amount, the EFC charges the Egg Board penalties which the Egg Board collects from its registered producers. The Egg Board refers to these penalties as “liquidated damages”.
15. In early 2015, members of the Egg Board began discussions to consider how to respond to provincial demand for eggs, while maintaining its national obligations. The Egg Board sent an email July 3, 2015 to all its registered producers announcing the MGA program. The Egg Board described the program as follows:

A fundamental corner stone of supply management is the requirement to match domestic production with domestic demand. At this time, we are facing a chronic shortage of both table egg supply and breaker supply. Factors leading to this

situation include significant growth in consumption and the current AI crisis in the USA, approximately 15% of USA egg supply has been lost.

High prices and tight supply are putting Canadian processors at risk and may result in loss of processing capacity in Canada. The EFC and your Board are looking at a number of short, medium and long term solutions to secure supply for the Canadian market. A medium response strategy would include managing hen inventory to get closer to the 97% issuance ceiling. The present utilization percentage is 90.83%. As result the Board has taken the following action.

Effective July 5, 2015 all producers in good standing will be permitted a temporary market growth allowance (TMG) of 3% of your current quota for all current flocks and new flocks placed prior to July 1, 2016. (Emphasis added.)

Program Details:

1. The TMG acts as a tolerance sleeve. It will allow producers to house an additional 3% hens based on current quota holdings and quota credit licenses. For example if you presently have 1000 hens quota, an active quota credit license for 100 hens and 62 hens of EFP then you can house 1162 hens plus 3% for a total of 1197 hens.
 2. TMG must be housed in accordance with present housing density policies.
 3. As TMG acts as a sleeve, no levies will be charged on these extra hens. You may reduce current quota credit usage in the amount of the 3% sleeve as of July 5, 2015.
 4. TMG hens are non-saleable and not eligible for Quota Credits.
 5. The need for the TMG program will be assessed on a quarterly basis. In the event that cutbacks are required, the TMG program will be eliminated first.
 6. In order to qualify for TMG hens the producer must be in good standing as per consolidated orders.
16. On December 31, 2015, the Egg Board announced changes to the MGA program by email to its registered producers. The Egg Board changed the underlined paragraph noted above in paragraph 15, to read:

Effective December 11, 2015 all producers in good standing will be permitted a market growth allowance (MGA) of 6% of your current quota for all current flocks and new flocks placed prior to December 31, 2017;

and made changes to paragraphs 1 and 3 of the above as noted by the underlining:

1. The TMG acts as a tolerance sleeve. It will allow producers to house an additional 6% hens based on current quota holdings and quota credit licenses. For example if you presently have 1000 hens quota, an active quota credit license for 100 hens and 62 hens of EFP then you can house 1162 hens plus 6% for a total of 1231 hens.
3. As TMG acts as a sleeve, no levies will be charged on these extra hens. You may reduce current quota credit usage in the amount of the 6% sleeve as of December 11, 2015.

17. The next day - January 1, 2016, the Egg Board released its publication the Scrambler², which included the following regarding the MGA program:

Production Increases

1. Farm Products Council has approved EFC's request to increase the national allocation by 728,050 layers. This represents an increase to BC of 82,983 layers. A request has been sent to BCFIRB for approval to distribute this to producers pro-rata. Further to that, EFC will likely request an additional increase in March. We will keep you posted!
 2. EFC has approved all provinces moving to 100% utilization prior to assessing liquid damages. BC has been at 97% so this represents an increase of 3%.
 3. The 3% TMG sleeve has been increased to 6% and extended for two years to account for this utilization rate increase. The name of the program has changed to the Market Growth Allowance. More information on the MGA program can be found here.
18. As a consequence of the MGA program, egg production increased and without intervention would have resulted in a level of production in excess of the national allocation and the need for payment from producer levies of liquidated damages on the overproduction. In mid-September 2016 the Egg Board notified registered producers that the MGA program would be reduced back to 3% of each producer's quota holdings or discontinued all together. Producers continued to order chicks to respond to the program. On October 28, 2016, the Egg Board issued a notice to registered producers that the MGA program would end on January 1, 2017, in production week 1 for that year.
19. On November 25, 2016, Five-Fry filed an appeal of this decision of the Egg Board to end the MGA program alleging that Five-Fry was unable to take full advantage of the program because the program did not include provisions to transition producers in and out, resulting in uneven producer participation in the program. Put another way, Five-Fry argued that Five-Fry, and other producers, did not all have the same opportunity to produce eggs under the program.
20. Alary applied for and was granted status as a full-participant intervener on the basis that it could offer the perspective of a "single farm, single flock" registered producer to the appeal and the impact of the "hasty end" to the Egg Board's MGA program on it and other similar registered producers.

² The Scrambler is newsletter-type publication the Egg Board prepares and issues on a regular basis to its registered producers and others.

21. As context to this appeal it is important to note that as the demand in the market place for eggs continued, EFC responded with quota increases for EFP and table eggs. BCFIRB approved the issuance of quota in the following amounts in the period of time relevant to this appeal:
- 44, 575 hens for table eggs and 100,000 hens for EFP on March 16, 2015,
 - 82,983 hens in total for table eggs (70,501 for existing producers and 12,742 for new entrants) on July 15, 2015, and
 - 82,983 hens on March 9, 2016, in response to a request from the Egg Board on December 23, 2015.
22. On March 21, 2017, after receiving submissions from the parties, the presiding member issued a process letter clarifying the matter on appeal, which stated in part:

In our view, the appellant's February 24, 2017 letter clarifies that the order he seeks to appeal is the order cancelling the Market Growth Allowance (MGA) Program, on the ground that the cancellation order failed to include transitional provisions that would ensure all producers could benefit equally from the 6% MGA. Since the Egg Board agrees that "the Appellant was not able to avail itself of the 6% sleeve when the MGA Program was in effect", the appellant has in our view satisfied the threshold of showing that it is aggrieved or dissatisfied by the cancellation decision. Whether that position is valid is of course the question for the appeal.

As we note above, the issue arising on this appeal is whether, as matter of sound marketing policy and in light of the Egg Board's orders, the decision to cancel the MGA was deficient by failing to include transitional provisions that would have given the appellant the opportunity to access the 6% MGA production in a similar manner as any other producer. In stating the issue this way, we want to make it clear that it is not open to the appellant to use this appeal to challenge orders of the Egg Board made prior to the orders regarding the 6% MGA Program and unrelated to that program, such as the leasing rules. The issue at this time is whether, in light of all pre-existing rules, the absence of transitional provisions for the MGA program, when the decision was made to cancel the program, was contrary to sound marketing policy.

ISSUE

23. Did the British Columbia Egg Marketing Board err in its October 28, 2016 decision to end the 6% Market Growth Allowance effective January 2017 and not implement transitional provision to ensure fairness for all producers?

APPELLANT'S SUBMISSION AND EVIDENCE

24. On behalf of Five-Fry, Mr. Friesen testified that his fundamental concern with the Egg Board's sudden termination of the MGA program was that not every producer could produce the full 6% of the allowance in addition to meeting quota obligations. He explained that some producers were able to adjust their operations, mainly because of available barn space,

to allow them to grow the full amount of the potential additional 6% and for the duration of the program, whereas other farms, including Five-Fry could not.

25. Mr. Friesen also testified that at the time of the program he found it difficult to get the number of chicks he required as the hatcheries were just getting back into full production after the AI outbreak in 2014 in British Columbia.
26. Mr. Friesen noted that he was familiar with the Egg Board announcement of the MGA program on July 3, 2015, and the program details, as outlined in points 1-6 listed in the above paragraph 15. Under cross-examination he acknowledged his familiarity with point 5, “The need for the TMG program will be assessed on a quarterly basis. In the event that cutbacks are required, the TMG program will be eliminated first.”
27. Mr. Friesen testified that even though he read the program announcement, his expectation was that the program would have to take into account the life cycles of the birds and the time involved with ordering chicks, raising them to maturity and laying capacity. From this, he concluded that if July 5, 2016 was the end date of the program this meant that if a producer ordered chicks, then the producing hens would be placed in the barn after about five months, in December 2016 and would produce until January 2018 to complete their twelve month cycle. Similarly, when Five-Fry received the second announcement from the Egg Board stating that the program would be continued to December 31, 2016, Mr. Friesen testified his expectation was that these birds would produce as late as June 2018.
28. Mr. Friesen went on to point out that this was not the case as when the Egg Board issued its decision to end the program on October 28, 2016, the correspondence indicated under the heading “What this means”:

Effective Week 1, 2017 your total allowable hens will not include an MGA component.

As of Week 1, 2017 if the total number of birds in your barn exceeds your total allowable hens (2017 Quota Licence), you will need to apply for a quota credit licence for the difference between those two numbers. Updated Quota Licences for 2017 will be sent to producers mid-December 2016.
29. Citing the Egg Board announcement of September 16, 2016 he advised that as of that date it was not clear to him if the Egg Board would be ending the program or when. It did however place another constraint on full access to the program through the elimination of the Lease Pool Program as it applied to the MGA program, “Effective immediately, the Lease Pool Program will no longer be accepting any new applications and will not be extended past its planned end date of June 30, 2017.”
30. Mr. Friesen made the point that while he understood he could not question past decisions of the Egg Board, certain of them pertaining to either restricting or elimination the leasing of other properties and new rules aimed at biosecurity, they nonetheless constrained his ability

to manage the Five-Fry property and infrastructure in a manner that would allow Five-Fry to take full advantage of the MGA program.

31. Mr. Friesen referred to extracts from the Egg Board's Start Clean – Stay Clean program and advised that because a production unit required cleaning and disinfecting before new hens could be placed, this built a delay of up to seven days into the time frame available to a producer to place birds to take advantage of the MGA program. This timing would not be the same for all production units and accordingly, some producers could get into the MGA program sooner than others. He also noted that under the national biosecurity program, Chapter 3 Flock Health Management Standards, the Egg Board discouraged the addition of "new" birds to production units already in production due to the risk of the introduction of disease, so even where a barn had room for extra birds it could not be utilized until the existing flock had been removed.
32. Mr. Friesen pointed out that the Egg Board had adopted the guidelines of the Canadian Agri-Food Research Council eliminating the use of "forced" moulting to extend the life cycle of birds, which eliminated another mechanism to increase production within the units of Five-Fry without the addition of new birds. He argued that the combination of the rules discouraging the mixing of age classes of birds and eliminating forced moulting of birds required a producer to place additional chicks in the appropriate time window to participate in the program. Under cross-examination Mr. Friesen acknowledged that the production rules and guidelines applied to and affected every registered producer, not just Five-Fry.
33. Finally, Mr. Friesen testified that it was less expensive for a producer to produce eggs through the MGA program as there was no levy payable to the Egg Board for this production. He inferred that because of this, those who could maximize their production through the MGA program benefitted substantially on that production.
34. Five-Fry sought as a remedy the issuance of production credits, such as quota credits, to all producers who could not take full advantage of the program so as they could acquire the same production level as those who were able to participate to the full extent in the program and this would result in all producers being in the same situation. Mr. Friesen acknowledged it could be a challenge to calculate and apply such an outcome so it may be simpler to provide producers with a production addition of about six months, the period of time he determined the program had been cut short by, and this would be an acceptable remedy. Mr. Friesen also mentioned a levy abatement on current production as a substitute for issuance of production credits, as a possible remedy.
35. In summary Mr. Friesen argued that not all registered producers could participate in the MGA program to the same extent. Those that started into the program later than others received less benefit. He submitted this was in part due to the lack of transitional provisions, but also because of how existing rules placed constraints on producers. He submitted this unfairness could have been alleviated if the program had been developed with transitional

provisions which would have, at a minimum, adjusted for the natural production cycle of the birds when the program ended. In this context Mr. Friesen argued that the Egg Board had not developed performance measures that would have allowed the Egg Board to track production arising from the MGA program against its objectives. He went on to say because of their absence the Egg Board had to act in a hasty manner to end the program which resulted in unfairness to the registered producers.

INTERVENER'S SUBMISSION AND EVIDENCE

36. On behalf of Alary, Mr. Alary adopted the positions and submissions of Five-Fry regarding the appeal. Alary also sought some mechanism of production adjustment so that all producers could benefit equally from the MGA program.
37. Mr. Alary agreed with Mr. Friesen that his expectation was that the MGA program would take into account the normal production cycle from chick to spent hen and testified that he felt the program did not do so.
38. Mr. Alary also testified it was difficult to obtain all the chicks requested from the hatchery at the time of the program, but he was not aware of any rules that prevented a producer from ordering more chicks than theoretically the producer had barn space for.
39. Mr. Alary explained a time line chart to the panel which showed that the Egg Board required producers to utilize quota allocation first, then time sensitive quota credits next, before any MGA program production could be claimed. He advised this rule became slightly complicated as the Egg Board offered new quota allocations pro rata to producers during this time as well. It also became further complicated by the MGA program adjustment which increased that original program production amount of 3% of quota allocation to 6% of production based on quota holdings.
40. Mr. Alary expanded his barn from August 2015 to October 2015, in order to access as much production as he could, based on the various programs. At the end of the MGA program, he estimated that Alary was able to produce for just over three months of the program. This represented only a portion of his potential access to the MGA program had he been able to acquire and place more birds to fully utilize his barn space, coincident with the program timing.
41. Mr. Alary testified that based on what he knew from other producers, most benefitted somewhat and a few benefitted to the full extent of the program.
42. Mr. Alary indicated that, in his opinion, the multi-flock producers were the ones who were able to benefit more fully because they had the size to make renting a barn cost effective as they could fill it with MGA program hens, whereas a farm of Alary's size was too small for such actions to be cost effective.

43. In closing, Mr. Alary submitted that the program worked unequally across all producers and that the inequality became greater for a single barn, single flock operation because it had less flexibility to adjust its production cycles and systems within the time frame of the program.
44. Mr. Alary also took exception to the Egg Board's "messaging" of information. The Egg Board's October 28, 2016 announcement indicated that the MGA had been a success, when the Egg Board itself acknowledged it had no performance measures in place to track production from the MGA program specifically. He submitted that most of the production increase must have been due to the uptake and implementation of the new quota issued to registered producers over the time of the MGA program.
45. Mr. Alary supports Five-Fry's suggestion of some form of production credit compensation to offset the degree of inequality of participation in the MGA program experienced by Alary, as a remedy.

RESPONDENT'S SUBMISSION AND EVIDENCE

46. The Egg Board called as witnesses, Walter Siemens, currently and at the time period covered by this appeal, a registered producer and Egg Board member; and Katie Lowe, currently Executive Director of the Egg Board. She was employed by the Egg Board throughout the time covered by the appeal in different roles, penultimately Interim General Manager. The witnesses provided evidence on behalf of the Egg Board as a panel.
47. As a board member that attended meetings of EFC on behalf of the Egg Board, Mr. Siemens explained to the panel the annual national allocation cycle with interim adjustments, and confirmed that the Egg Board would be required to pay liquidated damages on behalf of its producers from levies where the province over produced its allocation.
48. Mr. Siemens testified that as context to this appeal, in 2015 the rules for construction and types of bird housing were changing and had not been settled nationally to an extent that provided certainty to producers who wished to re-invest in the industry through growth or expansion. In his view, meeting the expectations of consumers for production standards was very important to support the industry's social licence to produce eggs. He testified that during this time, there were reduced imports from the US due to AI, which was about a five to seven per cent loss of the total Canadian supply. He reported the US was seeking eggs from Canada in early 2015.
49. Mr. Siemens acknowledged the Egg Board's obligation to the consumers of British Columbia to match supply of eggs with demand and noted that early in 2015, supply was not meeting demand and this was a significant concern, as British Columbia was producing only about 90% of its allocated amount.

50. Mr. Siemens testified that registered producers produced according to their quota holdings with enhancements from quota credits which are derived from quota. He indicated that most producers used a computer software program to assist with timing of placing birds and establishing the number of chicks required to meet the expected outcomes based on a 12 month cycle.
51. Mr. Siemens advised that the Egg Board's members discussed how to bring production of eggs in British Columbia up quickly to satisfy demand at several meetings prior to the program announcement on July 3, 2015. Ms Lowe confirmed that the Egg Board met and discussed how to increase production on at least two occasions, May 27 and 28, 2015 and June 30, 2015, and considered two options to quickly enhance production, based on staff advice.
52. The Egg Board June 30, 2015 meeting minutes reflect that:

EFC has granted the BC Egg Marketing Board 100,000 hens of special EFP Allotment. The intent of this program is to provide short term relief for the shortage of eggs to the processing market resulting from the reduction of imports due to Avian Influenza in the US.
53. During the meeting, staff requested that Egg Board members consider two options, issue the production allotment on a first available, first filled basis to maximize production for the Christmas season or issue it on a pro-rata basis, which the minutes show would be the less efficient option to utilize the EFC's temporary market growth allowance.
54. The June 30, 2015 meeting minutes reflect the following:

After some discussion the Board decided to go with Option 1 as this would be the most efficient method for producers and allows BC the ability to obtain an addition (sic) 35,000 hens through the Temporary Market Growth Allowance.
55. At the same meeting, Ms Lowe advised that by the end of December, 2015, 52% of a new quota issuance would be in production.
56. As noted earlier in this decision, the Egg Board announced its temporary MGA program on July 3, 2015.
57. At the October 24, 2015 meeting, Ms Lowe advised the Egg Board that "staff has seen a sizable increase in the amount of CPPs (chick placement permits)" and this contributed to the prediction for over production. Staff noted mechanisms to avoid the early "pulling of flocks". The meeting minutes of October 24, 2015, disclose that when the Egg Board made its decision to end the MGA, effective January 1, 2017, in production week 1 for that year, the Egg Board would be "looking at an early fowl removal program to remedy the situation of possibly running into liquid (sic) damages".

58. Ms Lowe testified that she sent an email to registered producers on October 28, 2015 advising of the Egg Board's decision to end the MGA, the email advised:

The decision took into account producer feedback regarding BCEMB's September letter on this topic, the additional CPPs recently inputted by producers, and best/worst case scenarios provided by staff. Producer feedback correctly pointed out that a gradual phase out would create inequity based on 19 week dates. Guided by the principle of fairness, the MGA will end Week 1 so that everyone is impacted in the same manner.

What this means

Effective Week 1, 2017 your total allowable hens will not include an MGA component.

As of Week 1, 2017 if the total number of birds in your barn exceeds your total allowable hens (2017 Quota Licence), you will need to apply for a quota credit licence for the difference between those two numbers. Updated Quota Licences for 2017 will be sent to producers mid-December 2016.

Considerations will be made for producers who have 19 week placement dates prior to Week 8, 2017 who do not have the quota credits to cover their flock. What we will do in the future

We will continue to monitor our utilization rate and rolling average moving into and throughout 2017. If our projections prove inaccurate and BC is positioned well in 2017; the MGA may be brought back. Alternatively, if the rolling average appears problematic as we move into 2017, the Board is considering an early fowl removal program to help lower provincial utilization. This decision was not made lightly. The Board fully understands the impact this decision has on producers. We have attached projections to this letter to help you understand how we came to our decision.

59. An issue note prepared for the December 10, 2015 Egg Board meeting indicated that "the national egg industry is still in a period of growth and an additional increase in allocation is expected. Approximately 50% of producers are taking advantage of this program to increase their inventories. This represents 80% of producers with available space." The issue note recommended: "That the TMG program continue until July 1, 2017 in order to help keep provincial utilization stable during this period of growth." On this basis the Egg Board increased the MGA program to 6% and extended the program until December 31, 2017. As noted above, the Egg Board advised the industry of the increase in MGA production and the extended date for placement to December 31, 2017 on December 31, 2015.
60. At the same meeting in December, 2015 the Egg Board decided to end the "Fowl removal" program for those producers unable to house 100% of their allocation capacity.
61. Ms Lowe advised that by the time of the September 8, 2016 Egg Board meeting, the utilization rate based on allocated quota was close to 100%. She advised further that staff predicted that at this rate of production increase, the industry in British Columbia would be incurring liquid (sic) damages as of week 8, 2018. Staff recommended to the Egg Board in that meeting that "the 6% MGA be discontinued on 19 week placements that occur March

2017” and that “placements above 3% of their total allowable hens will no longer be approved with 19 week placement dates after March 2017.”

62. As noted previously in this decision, this advice led the Egg Board to decide to reduce the MGA back to 3%, and to consider a reduction of up to 0% (eliminating placements) on or after week 1, 2017. The Egg Board decided it would determine the exact amount for reduction at the next meeting after EFC had a reply from Farm Products Council of Canada regarding the requested quota issuance.
63. Ms Lowe also advised the panel of some details through the use of graphs and noted the Egg Board data showed that for the duration of the MGA program, overall:
 - farms categorized medium size (quota from 6,201 to 28,499 hens) participated in the MGA program to the greatest extent (as high as 80%), followed by small size farms (quota under 6,200 hens) (from 40-50%) and largest farms (quota over 28,500 hens) the least (15-30%);
 - 125 of 135 producers, participated in the program, and commented that this was well over 70% of producers; and
 - once the program was well underway, the utilization rate spiked quickly so that staff anticipated a 104% utilization in week 1653. In an issue paper Ms Lowe prepared for the October 24, 2016 Egg Board meeting, Ms Lowe describes this time-frame as week 8, 2018.
64. Ms Lowe reminded the panel that the Egg Board would be required to pay liquidated damages on amounts of production exceeding 100% utilization as determined by EFC.
65. Ms Lowe testified that in addition to the emails that staff sent registered producers about the MGA program and the report in the Scrambler, Egg Board staff attended the regular monthly meetings of the BC Egg Producers Association to provide updates.
66. The Egg Board submits that it:
 - focused on market needs in establishing the MGA program,
 - monitored the MGA output as closely as practical, given that the program operated in a time of several new quota issuances to producers,
 - provided producers information on an ongoing basis regarding the program,
 - ended the MGA program when it did to avoid incurring penalties for overproduction, and
 - allowed producers to shift MGA program production to quota credit production to avoid early removal of flocks.

PANEL ANALYSIS AND DECISION

67. While the primary purposes of the NPMA are to provide for the promotion, control and regulation of the marketing of certain natural products, including eggs, BCFIRB acting in its supervisory and appellate capacity, has the authority to decide whether regulatory decisions of commodity board are consistent with sound marketing policy.
68. The appellant and intervener acknowledge that the Egg Board's role is to respond to market needs. They conceded their focus is on one aspect of a market response, the lack of fairness to individual registered producers in how the Egg Board put the MGA program in place and ultimately how it ended the program. In result, Mr. Friesen and Mr. Alary submit that in meeting its responsibilities to the public to ensure that producers, graders and processors meet the market demand for eggs, the Egg Board must treat its registered producers equally which they say means, treat their registered producers fairly.
69. The Egg Board submits that its decisions regarding the MGA program were consistent with sound marketing policy because the Egg Board made its decisions to ensure the necessary market response to increased demand for eggs. The Egg Board further submits that it treated its registered producers fairly when establishing, implementing and ending the MGA program. Where the Egg Board and the appellant and intervener differ is in how to determine fairness. The effect of the Egg Board's submission is that it does not believe it is necessary for every producer to take up the program to its full extent in order for their decision to be fair. In other words, not every registered producer need achieve the same benefit (determined by degree of participation) from the program in order to be fair. The appellant and intervener say that the program would be fair if every producer was allowed its full access to the program based on each producer's quota holdings. The appellant conceded it may be impossible to end a program without some minor discrepancies between producers, but because of the hasty closure of this program the result was not "close enough" to be fair.
70. This appeal is at its core about determining whether or not the Egg Board made its decisions regarding the MGA in a manner consistent with sound marketing policy and if so whether it did so in a principled way that address the appellant and intervener's concerns regarding fairness.

Sound Marketing Policy

71. It is clear to the panel that the Egg Board, through the market information it acquired at the national level as a member of EFC and the direct contact from graders and British Columbia's processor, was aware that in late 2014 and early 2015 the British Columbia egg industry was not meeting the consumer demand for eggs. On this, there does not appear to be any dispute.

72. The Egg Board provided evidence that it took its responsibility to meet consumer demand seriously and the Egg Board was engaged in a national negotiation for quota allocation increases for EFP and table eggs. Once achieved, the Egg Board was aware there would be a time delay in translating these increases into actual production. The Egg Board explained that nationally the housing standards for hens were being reviewed with an expectation for change. Producers were unsure of how to expand their operations (barns and facilities) to be consistent with the evolving national standards.
73. The Egg Board determined it needed to consider another approach to increasing egg production while the new quota allocations led to actual production, based in part on new infrastructure to produce increased barn space. The Egg Board analysed “barn capacity” available in early 2015 and made a decision that there was enough surplus to establish a temporary program, so that if the existing barn space was utilized fully, some of the demand would be met.
74. The Egg Board announced the temporary MGA program in July 2015, recognizing that it was an interim program to bridge the gap before the full implementation of the new quota allocations. The panel agrees with the Egg Board that a bridge program applying a “first available, first fill” approach to existing surplus barn space to supplement current production until the implementation of the new quota allocations was a valid mechanism to achieve some immediate production increases.
75. The panel concludes that the MGA program was consistent with sound marketing policy.

Sound Decision-making

76. In order to respond to the concerns of the appellant and the intervener, the panel must evaluate whether or not the Egg Board adopted, implemented and ended the MGA program in a principled and fair manner. BCFIRB has adopted the application of what it refers to as SAFETI³ principles as a means of determining whether or not decisions meet its expectations of sound decision-making. The Egg Board argues that its decision to adopt, implement and then end the MGA program is consistent with sound marketing policy and BCFIRB’s SAFETI principles. We have applied the SAFETI lens below and agree.
77. **Strategic.** The Egg Board explained that its long term objective was to negotiate and achieve quota allocation increases and therefore more production through the national system. It has identified two “strategic imperatives” in its latest business plan: to more powerfully market eggs to meet the evolving desires of consumers; and, to be a driving force

³ The “SAFETI” principles have been developed by BCFIRB in consultation with the commodity boards it supervises to support a principles based approach to decision-making by commodity boards to carry out their responsibilities. SAFETI stands for “Strategic”, “Accountable”, “Fair”, “Effective”, “Transparent”, and “Inclusive”.

to better match supply and demand in the industry. In order to achieve these strategic imperatives, the Egg Board plans to influence a shift in allocation policy at the national level to a more proactive approach. This would avoid, in the absence of production interruption, the situation of catching supply up to meet demand. The Egg Board considered the implementation of the MGA program a key element of an interim strategy to increase production as it influenced a better predictive national allocation system. The panel agrees and finds the MGA program to be consistent with the Egg Board's longer term strategy regarding the national annual allocation process.

78. The Egg Board describes the termination of the MGA program effective Week 1, 2017 as a strategic necessity to prevent British Columbia from becoming liable to pay liquidated damages on account of over production. It says it would not have been strategic to permit certain producers to over-produce when additional production was not required and to do so would not be market-responsive and could result in the Province paying liquidated damages. The panel agrees.
79. **Accountable.** In this hearing the Egg Board identified accountability to several parties – the consuming public, registered producers, graders, and a processor. There are a few others, but certainly these are important. The Egg Board took into account the interests of these parties in developing the MGA program. Its ambition to increase supply reflected its accountability to the consumer and responded to the needs of the graders and processor. Its reliance on and communication with registered producers reflected a primary accountability. The communication included direct emails pertaining to significant program implementation details, general communication through the Scrambler publication and producer meetings.
80. In considering the adequacy of this communication, the panel turns to the requirements of the Scheme and past directions of BCFIRB regarding the Egg Industry Advisory Committee (EIAC). Based on the evidence the panel heard, it appears the Egg Board omitted to refer the matter of the proposed MGA program or any changes to it, to the EIAC. Doing so would have ensured broader consultation with members of the production chain for example, hatcheries and feed suppliers, and in addition to ensuring the members of the EIAC were kept up to date directly by the Egg Board, the EIAC may have provided the Egg Board with useful information. On balance, despite the omission, the panel finds that the Egg Board met the expectations of accountability.
81. **Fair.** The appellant and intervener argue that because not every producer could access the MGA to the same extent, the uneven uptake of the program resulted in unfairness. The panel's primary focus for the fairness test is on process. Taking into account the type and frequency of the communication to producers, which was direct through emails and indirect through the Scrambler publication and producer meetings, the panel concludes producers had sufficient information to be informed about the program and to make operational choices on this basis. In the program announcement (July 3, 2015) and the program adjustment announcement (December 31, 2015), the Egg Board advised producers it would monitor

production and the program would be terminated as necessary. The Egg Board exceeded its commitment to quarterly communication.

82. The panel agrees with Mr. Alary, “there was a lot going on” as the Egg Board attempted to get production up through the MGA program and at the same time it was implementing the quota allocation. The panel is satisfied, based on specific email communications introduced as evidence, that staff at the Egg Board assisted producers by answering specific questions asked by individuals to assist with their operational choices. The panel finds the Egg Board was fair in communicating program expectations and details to producers.
83. A central issue for the appellant and intervener appears to be that because of individual circumstances and the production cycles specific to their farms they could not avail themselves of the same amount of program production as others. They each had to consider their individual barn space, their ability to access chicks for placement, the production cycles of the hens, and their production priorities arising from rules connected to production of quota holdings made complicated by the acquisition and implementation of new quota allocations. As Mr. Alary put it with respect to trying to accept and integrate new growth from new quota allocations into his farm while trying to produce for the MGA program – “what a problem to have”. As an incentive to encourage quick response to the MGA program, the Egg Board did not require producers to pay a levy on production from the MGA program. The Egg Board intended the program to be a “first available; first fill” program and announced it as such.
84. The panel agrees with the Egg Board that it had no obligation to ensure that all producers could participate in the same way. The MGA program was simply a temporary bridging program to fill a gap before all new quota allocation could be in production. Every producer faced the same production rules and requirements, some because of timing and production space could respond more quickly and fully than others. Consistent with an earlier decision of BCFIRB, we find that it was not necessary for the Egg Board to consider the impact of its policy on the individual financial circumstances of a producer (*Kuszyk dba Three Gates Farm v. British Columbia Chicken Marketing Board*, (BCFIRB, Dec 24, 2010, corr Jan 4, 2011).
85. The graphs provided in evidence by the Egg Board confirmed Mr. Alary’s understanding that smaller farms did not participate at the same rate of frequency in the MGA program as medium size farms, so they took advantage of the MGA program production on which no levy is payable at a lower rate than medium sized farms. Interestingly, farms in the large category (over 28,500 hens of quota) participated the least. Individual producers availed themselves of the program to differing degrees because of their own unique circumstances. All producers with excess barn capacity were able to access the MGA program production.
86. The other concern that Five-Fry raised, that the absence of transitional provisions in the program resulted in unfairness, in our view, has no basis. It is true that the MGA program

did not specifically identify transitional provisions, but we find the program effectively incorporated transitional provisions. No birds were removed from producing before their full life cycle was complete, because the Egg Board directed that MGA program production could shift to quota credit production related to the implementation of new quota production and all producers could receive new quota during the period of the MGA program. The panel finds no unfairness to the appellant or intervener arising from the Egg Board's decision to end the MGA program because of the lack of transitional provisions.

87. **Effective.** The appellant raised the concern that the Egg Board could not have known if the MGA was effective, despite its announcement that the program had been a success, because the Egg Board had not established a performance measure to evaluate the program production against. The panel agrees with Five-Fry to this extent, from the evidence presented by the Egg Board, there did not appear to be a simple way for the Egg Board to disaggregate the production arising from the program from the total production as shown in its graphs predicting when production would exceed 100% of allocation. The panel notes however that there could have been some tool to do so. The MGA program production did not attract a levy charge and presumably the Egg Board could have calculated the total production from the MGA program per week. Because they had this capability, a performance measure could likely have been developed and monitored.
88. The panel accepts the Egg Board's evidence that it tracks total egg production carefully and is able to predict production outcomes for several weeks in advance. The panel also accepts the Egg Board's prediction of the time when the industry was going to be in a penalty situation. From all the evidence presented, it is clear to the panel that the establishment of the MGA program was effective in stimulating additional production until producers could produce eggs from the newly issued quota allocation. Similarly, the panel concludes that the Egg Board was effective in ending the MGA program when it did to avoid penalties as liquidated damages for overproduction of eggs, on behalf of the producers. It is possible that a performance measure could have given the Egg Board an additional way to evaluate the effectiveness of the program, but the panel finds it was not a requirement to do so due to the ability of the Egg Board to track total production and to accurately predict when it was likely to exceed 100%. Finally, the panel concludes that the Egg Board's failure to establish and report on a performance measure for the program was not determinative of the effectiveness of the MGA program.
89. **Transparent and Inclusive.** These principles are somewhat linked to the accountability and fairness principles discussed above. The panel finds that the communication tools the Egg Board adopted to explain the MGA program details made it clear to all registered producers what to expect from the program and with the exception of the apparent omission of consulting with the EIAC, the affected or interested parties received the relevant information. As noted above, it is clear that individual producers may have availed themselves of the program to differing degrees. This was because of their own unique circumstances, not because of the lack of information about the program on which they were

able to make their individual production choices. The rules applied equally to all and did not arbitrarily favour some producers over others. The panel concludes that the principles of transparency and inclusivity were met by the Egg Board when it made its decisions regarding the program.

Conclusion

90. The panel concludes, based on its analysis of sound marketing policy and its application of the SAFETI principles, that the Egg Board did not err in its decision to end the MGA program. Further, the Egg Board developed adequate transitional provisions for the MGA program as it evolved. All producers benefitted from the preservation and expansion of their markets and the strengthening of their industry through this innovative measure of the MGA program. The panel dismisses the appeal.

ORDER

91. The appeal is dismissed.

Dated at Victoria, British Columbia, this 30th day of August, 2017.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Daphne Stancil, Presiding Member



John Les, Chair



Diane Pastoor, Member