

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*
AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA
EGG MARKETING BOARD TO DENY TWO NEW ENTRANT PRODUCERS IN
THE KOOTENAY REGION

BETWEEN

BREN-DEN VENTURES LTD. dba SUNSHINE VALLEY ORGANICS
GRANT GOOSSEN
PATRICK BARTEL

APPELLANTS

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Daphne Stancil, Panel Chair
John Les, Chair
Diane Pastoor, Member

For the Appellants:

self-represented

For the Respondent:

Robert Hrabinsky, Counsel

Date of Hearing

July 5, 2017 and written submissions

Place of Hearing

Castlegar, BC

INTRODUCTION

1. The appellant, Bren-Den Ventures Ltd., is a new entrant egg producer/vendor in the Creston area with a 3,349 bird operation operating under the name of Sunshine Valley Organics (Sunshine Valley). This appellant became a new entrant producer in 2011 and operates a grading facility established, for its own production which was a requirement for a new entrant in that geographical area in 2011. This appellant is seeking to expand its grading operations. The other two appellants, Grant Goossen and Patrick Bartel, want new entrant quota through the New Producer Program (NPP) to produce eggs in the Creston area to ship to an expanded Sunshine Valley grading station.
2. The appellants are appealing the April 3, 2017 decision (April Decision) of the British Columbia Egg Marketing Board (Egg Board) denying their request to issue new entrant quota to Mr. Goossen and Mr. Bartel so that they can partner in the proposed expanded grading station in the Kootenay region and increase regional production to fill a shortage of supply currently filled by eggs imported from Alberta.
3. The British Columbia Farm Industry Review Board (BCFIRB) held a pre-hearing conference (PHC) on May 1, 2017. Although Mr. Barkman on behalf of Sunshine Valley mentioned two parties he was aware of that may have a potential interest in the matter and provided details of his conversation with one of the parties about Sunshine Valley's expansion plans, BCFIRB did not follow up specifically with those parties regarding the appeal. BCFIRB requested that the Egg Board post the notice of appeal on its website and invite interested parties to intervene. The notice posted by the Egg Board was silent on the opportunity for interested persons to intervene.
4. The appeal proceeded to hearing on July 5, 2017. The panel issued an order at the hearing requiring the Egg Board to re-post a notice on its website to industry and invite any interested parties to make a submission on the appeal. BCFIRB wrote directly to the two parties noted during the PHC inviting their submissions. The submission process concluded on August 4, 2017. BCFIRB received brief submissions from Charlene Rast of The Pickle Patch/The Egg Patch, and Heidi Germann of Fields Forward, a food and agriculture network of regional producers, businesses and local government.
5. In brief, the appellants argue that sound marketing policy requires further egg production be established in the Creston area due to the demand for local product which is not being met, and this should be achieved through the Egg Board approving and starting at least two new entrants in the area. Sunshine Valley prefers a direct allocation of new entrant quota to the producers who are willing to work with Sunshine Valley, Mr. Bartel and Mr. Goossen.

6. The Egg Board does not dispute that the Kootenay region would benefit from additional local production. Its regionalization study confirmed the existence of that regional demand and that Alberta is currently supplying 13.7% of the market. It agrees that it would be strategic to start two new entrants in the Kootenay region to fulfil the market demand with local product. The issue however, is whether the Egg Board erred by rejecting Sunshine Valley's proposal to fulfil the demand for local product in the Kootenay region based on two specific new entrants eliminating the opportunity for other potential applicants to be considered through a draw. The Egg Board asserts that it would not be strategic, accountable, fair, effective, transparent or inclusive, to fulfil the demand for local product in the Kootenay region by making an extraordinary, direct issuance of quota to the appellants (to the exclusion of all other interested persons who might otherwise qualify for new entrant quota in the region). The Egg Board's view is that this regional demand should be fulfilled through allocations made through the NPP.

ISSUE

7. Did the Egg Board err in its April Decision to deny the appellants' proposal for two directly-awarded new entrant producers in the Kootenay Region?

APPELLANTS' CASE: Evidence and Submissions

Mr. Barkman

8. Mr. Barkman and his spouse are organic egg producer/vendors. They own and operate a provincially registered grading station, grade the eggs they produce and market those eggs as Sunshine Valley Organics. Their eggs are sold in stores and bakeries in and around the Creston area under the trade slogan "Nested in Creston".
9. Mr. Barkman explained how he has gained recognition with the retailers in the Creston area as an egg producer over the last five years, and earned their trust based on his product. Stores in Nelson, Rossland, Kimberly and Invermere want him to supply them with more eggs. In addition to organic eggs, the retailers are requesting free range eggs.
10. Mr. Barkman contacted the Egg Board and spoke with Executive Director Katie Lowe, about how he could get more eggs into the Kootenay area and expand his business to supply the growing regional need for eggs. By email dated September 5, 2016, he requested that the Egg Board issue NPP quota to Mr. Bartel and Mr. Goossen who would "share the work load" at the grading station:

As a grader here in creston i am putting in a request for more quota here in creston . i presently hold quota for 3349 birds of organic quota and most of my customers would also like to buy free range none organic eggs from me . There would also be quite a number of stores that are not organic that would come onstream too. There are two farmers here that have relocated here from manitoba that are very familiar with raising livestock that would like to be involved in producing eggs in the creston area. Why these men seem fitting is , there experience, the fact they arent yet involved in other farming ,

they have the finances to make it happen and they have young families to help with the farm work. As a grader producer it would be beneficial to have other producers to share the work load at the grading station and have someone who is more up with the times than myself when it comes to the electronic world. Another point to mention is creston eggs are the best way to remove AB eggs coming into BC. Some of the stores i supply with organic eggs where selling AB eggs but when they found they could buy local BC eggs switched to mine. If they could get local non organic they could switch those also. Please give this attention as soon as possible as these men will have to move on to other options if this wouldnt be available in the near future.

11. Mr. Barkman received an email from Ms Lowe of the Egg Board, indicating the Egg Board had received the results of a “regionalization” study and she would put the matter on the November (2016) Egg Board meeting agenda.
12. Mr. Barkman received a further email from Ms Lowe January 30, 2017, indicating that the “Board has discussed your request for a New Entrant in the Creston area and has reviewed the regionalization study that shows the need. Prior to adding a New Entrant to Creston the Board would like to invite you to a Board meeting so you can explain your business plan, in detail, including how you are planning on doubling your egg sales.”
13. Mr. Barkman testified he then, with the assistance of Mr. Bartel and Mr. Goossen, developed the Sunshine Valley Farms business plan, dated February 2017. He contacted Ms Lowe for advice while preparing the plan and tried to ensure it responded to the various questions and comments from the Egg Board Chair included in an email to Ms Lowe dated February 4, 2017 which Ms Lowe had forwarded.
14. Mr. Barkman advised he attended the February 17, 2017 Egg Board meeting with Mr. Goossen and Mr. Bartel to explain the business plan in detail including Sunshine Valley Farms’ market response to consumer demand for eggs, based on an expansion of the existing grading facility and the direct award of new producer quota to Mr. Goossen and Mr. Bartel.
15. Following the meeting, Mr. Barkman received an email on February 20, 2017 from the Egg Board thanking him for attending the Board meeting and advising that staff would be providing more detailed information and the matter would be on the Agenda for March 29, 2017.
16. On April 3, 2017, Mr. Barkman received the April Decision from the Egg Board turning down his request, which stated in part:

The Board had an opportunity to further review and discuss the options presented. After a vigorous debate the Board has declined your request on the basis that the New Producer Program was developed to assist new producers with entering the industry, not to capitalize the construction of a grading station...

The Board agrees that it is strategic to start two new entrants in the Kootenay region to fulfil the market with local product. In the event that there is a New Producer Program draw in the future and you have a grading station with adequate capacity to accept a new producer, the Board will ensure that the Kootenay Region has priority.

At this time it would not be fair to other potential applicants in the Kootenay Region to limit the applicant pool to the prospective business partners. It would not be transparent or inclusive for the Board to hold a draw for the Kootenay Region, requiring applicants to produce for one grading station, knowing that the grading station would only sign those applicants willing to enter into a business contract to fund the building of a grading station.

17. In response to the April Decision, Mr. Barkman pointed to the staff Issue Document titled 4.1 Creston Allocation entered as an exhibit in these proceedings and its recommendation to hold a new producer draw. Relying on this document, he says that currently, the Egg Board has 14,468 units in reserve and 3000 units for Terrace. He notes, based on this Issue Document, that there were no qualified applicants for the Terrace area draw and he argues that the quota is not needed there.
18. Mr. Barkman described how Mr. Goossen applied to the recent NPP draw, but the Egg Board rejected his application because the notary dealing with the application “missed a signature”. Other than that omission, he argues the application was complete and Mr. Barkman asked when he discovered in August, 2016 that the Egg Board had not completed its new producer draw if Mr. Goossen could be re-considered for it.
19. Mr. Barkman also points to the regionalization study which states “as this is the area with the greatest need additional new entrants should be allocated here, rather than to the Interior Region as a whole”. He says this is in line with Egg Board’s Strategic Initiative 4.1 which is “to reduce imports into BC, both interprovincial and from the US”.
20. In response to the Egg Board’s assertion in its decision that the NPP “was developed to assist new producers with entering the industry, not to capitalize the construction of a grading station”, Mr. Barkman denies that he seeks to use quota to capitalize the grading station. He says the focus is to increase production in the Kootenay Region. The business plan seeks to expand the grading station to address the added production. In his view, rather than each new producer grading their own eggs it makes sense to expand the existing grading station.
21. Mr. Barkman argues that with expansion and additional product for grading, his grading station would be more efficient. Currently he grades only the eggs from 3,349 hens. He can make a living but cannot expand without more throughput and labour. He explained with his economic situation, it is not viable to buy more quota, build barns and then expand the grading station.

22. Mr. Barkman argues that the appellants meet all the requirements and the “flavour” of the NPP to “sustain and renew in new and existing markets”.
23. Mr. Barkman acknowledges the Egg Board’s commitment in its April Decision to two new producers being drawn from the Kootenays: “in the event that there is a New Producer Program draw in the future and you have a grading station with adequate capacity to accept a new producer, the Board will ensure that the Kootenay Region has priority”. However, his position is that no bank will finance on the basis of “in the event”; a bank needs a guarantee before it will approve financing.
24. In response to questions about issuing quota directly to Mr. Bartel and Mr. Goossen only, Mr. Barkman admitted that although he was looking for these two individuals to be new producer start-ups, he acknowledged that they may not be the only possible ones to supply his grading station. He says the challenge is having a secure supply of eggs as a basis for financing. The need in the area is great and he is open to any two new producers that would support his grading station.
25. In response to questions from the Egg Board about the ability to enter into a custom agreement to source free range eggs from another grading station outside the Kootenays, Mr. Barkman said that would not be honest as he markets under the trade slogan “Nested in Creston”; they are selling local eggs to the market not BC eggs. He also mentioned the considerable cost associated with taking eggs from another grader and the requirements of CFIA to regrade and relabel.

Mr. Bartel and Mr. Goossen

26. Mr. Bartel and his spouse have backgrounds in agriculture. Mr. Bartel has some experience in poultry production from another province. They now own 25 acres in the Agricultural Land Reserve (ALR) in Creston, but were not resident in British Columbia when the Egg Board advertised its new entrant draw for 2016. He currently teaches in a private school but wants to farm full time. He is enthusiastic about being a possible new egg producer and being part of the grading station.
27. Mr. Bartel assisted Mr. Barkman with the development of the business plan for Sunshine Valley and made the presentation to the Egg Board on behalf of the appellants at its February 2017 meeting. He supports the business model outlined in the plan as it ensures that the producers would also have an interest in the grading station, and would have some influence over its longevity and stability.
28. Mr. Bartel says he is qualified to participate in the NPP and to operate a grading station. He has experience with Safe/Safer/Safest, a broiler industry program as well as Start Clean/Stay Clean. He has set up greenhouses and is familiar with GAP (a federal program to promote Good Agricultural Practices) and National Animal Care Programs. He is aware of the social licence under which agriculture operates and the difficulties that can arise when a grader does not understand these

programs. He is prepared to invest money and time to build a sustainable egg industry in the Kootenays.

29. With respect to organic egg production, Mr. Bartel advised he is in the process of having his land certified for organic production, has experience with organic production and confirms that he has found a source for local organic grain.
30. Mr. Bartel argues that a robust egg industry in the Kootenays benefits current and future farmers, provides jobs, protects the environment, and satisfies customers' demands for local eggs.
31. Mr. Bartel advised he would apply under the NPP in the Creston region if the Egg Board held a draw.
32. Mr. Goossen and his spouse live on ALR land in Creston which he says is suitable for egg production. Mr. Goossen has experience with raising hogs in Manitoba. He says they applied for the Egg Board's NPP quota lottery in 2016; they were the only applicants from the Creston area who applied for the draw but unfortunately, their application was considered incomplete due to a missing notarized signature.
33. Mr. Goossen says currently to become a producer in the Creston area, a producer must find a way to grade his own eggs as the facilities to do so are limited. Mr. Barkman's grading facility only accommodates the eggs from his NPP quota from 3,349 hens weekly (approximately 21,000 eggs per week). Mr. Goossen says that Mr. Barkman approached him and Mr. Bartel to come up with a business plan to produce more eggs in that area and to increase the volume of eggs for the grading station. He describes Mr. Barkman as a mentor.
34. Mr. Goossen referred to a letter of support from Fields Forward and says the appellants have support from their community to fill the demand for eggs.
35. In response to questions from the Egg Board, Mr. Goossen admits that he did not appeal the Egg Board's decision to remove him from the 2016 NPP draw. He was not aware of an appeal process and the letter of June 10, 2016 from the Egg Board advising that he was disqualified from the selection process did not refer to an appeal process or the time to appeal. He agreed that he could participate in future NPP draws.
36. In conclusion, the appellants argue that they would have liked another opportunity to revise their business plan before it got rejected by the Egg Board. They did not understand that there was no possibility of direct awards of quota or the requirement that new producer applicants indicate in the application how they planned to grade their eggs (self grade or ship to a grader). They are still interested in applying for new producer status and are keen to be egg farmers in the Creston area. They hope that with all three partners working together in the grading station it will be more financially feasible.

37. If the only way to get further production into the Creston area through the NPP is via a draw conducted by the Egg Board, the appellants ask for another NPP draw to be conducted for an area of the province or region, within a reasonable distance from the Sunshine Valley grading facility. Mr. Bartel and Mr. Goossen would apply. They would like to see a timely solution to the lack of local supply of eggs for the Creston area and hope that they are part of that solution.

RESPONDENT'S CASE - Evidence and Submissions

38. The Egg Board called two witnesses: Board member Jennifer Woike, a producer/grader on Vancouver Island and Executive Director Ms Lowe. The Egg Board says that it created its NPP to facilitate the entry of new persons into the table egg industry; its Rules are set out in Schedule 1 to the Egg Board's Consolidated Order of May 12, 2010¹.
39. Ms Lowe testified that in 2016, the Egg Board planned new producer draws for four categories: Terrace, Lower Mainland, other Regions and "small lot"² (available to all regions). The Egg Board began the draw process in April 2016 and completed it in January 2017. There was no successful candidate for Terrace or the Kootenay region.
40. In an attempt to be more strategic in its decisions to award new producer quota, the Egg Board initiated a Regionalization Study on egg sales in the Kootenays, Okanagan and Vancouver Island. This study, completed in November 2016, showed that 219,300 dozen eggs were being imported from Alberta and sold at retail in the Kootenays (representing 13.7% of the domestic production).
41. By email dated September 5, 2016, Mr. Barkman requested that the Egg Board make an extraordinary, direct issuance of quota to two specific individuals. The Egg Board says Mr. Barkman (doing business as Bren-Den Ventures) was successful in obtaining quota from the 2011 NPP draw as a producer-vendor and since then, he has successfully marketed all of the eggs he has produced through his grading station, Sunshine Valley. He built a grading station to grade eggs for marketing the egg production from his quota. Ms Lowe described the grading station as inefficient and at maximum capacity as it takes 6 days to grade the eggs from 3,348 hens.
42. The Egg Board advised Mr. Barkman that his request would be put on the Egg Board's November agenda given that it had the results of its Regionalization Study.

¹ British Columbia Egg Marketing Board Consolidated Order of May 12, 2010 (Revised at June 21, 2017)

² A small lot producer is an unregistered producer licensed annually by the Egg Board, that keeps or maintains not more than three-hundred and ninety-nine (399) and not less than one-hundred (100) Layers in aggregate. New producers wishing to apply for production in this category apply to a separate draw than those applying for production based on quota.

43. Egg Board staff prepared an Issue Document in advance of its November 23, 2016 meeting, Egg Board staff stated:

A producer grader from Creston has confirmed that the Kootenays are in need of at least two new entrants at 3000 quota units. **As this is the area with the greatest need additional new entrants should be allocated here, rather than to the Interior Region as a whole. This is in line with Strategic Initiative 4.1 which is to reduce imports into BC, both interprovincial and from the US.**

44. Egg Board minutes show that the Egg Board discussed the issue, stating as follows:

The BCEMB requested a Regionalization Study be conducted on the egg sales in the Kootenays, Okanagan and Vancouver Island so that new entrants could be more strategically placed in the future. To reduce imports from Alberta for small, regional markets, staff recommends issuing 3000 quota units through the New Producer Program to the Kootenay's for the purpose of producing eggs for the Brenden Ventures. The Board requested further support information on this recommendation.

By email dated January 30, 2017, the Egg Board wrote to Mr. Barkman acknowledging the need for new entrant production in the Creston area and inviting him to present his business plan at meeting of the Egg Board

45. As noted above, after this meeting, the Egg Board invited Mr. Barkman to attend a future meeting to discuss his proposal. Mr. Barkman, together with the other two appellants attended the Egg Board's meeting on February 17, 2017 to address the request for an extraordinary direct issuance of quota.
46. Egg Board staff then prepared its Issues Document: 4.1 Creston Allocation which summarizes the February meeting with the appellants and makes recommendations for various options to meet the needs of the region in a fair and just way, based on selecting two new producers through a draw process and directing the production to the existing grading station for a minimum of ten years.
47. Ms Lowe testified that the Egg Board accepted there is a need for more production in the Kootenay region and discussed the type of production needed, as well as how to select producers and have eggs graded. Ms Lowe advised Sunshine Valley on behalf of the Egg Board that the import to the region from Alberta amounts to the production from about 6,600 hens. She advised this would support two new entrants. She also conveyed this information to the Egg Board during the March 2017 meeting. Ms Lowe later testified that the amount of quota units needed to displace imports to the Kootenays was closer to 8,620 quota units.
48. Ms Lowe noted that BC is long on free-range product so adding a new entrant in that production type may be viewed unfavourably; established grading stations could react negatively to providing a new entrant with quota that would increase competition in an already saturated market. As noted above, the Egg Board suggested that the appellants test the market for free range production by purchasing eggs from another grading station and undertaking the necessary work

to repackaging them which would assist with reducing the current over-supply of free range eggs in other parts of the province. Ms Lowe disagreed with Mr. Barkman and stated these eggs would not need to be regraded just repackaged.

49. Ms Lowe also indicated that the Egg Board was concerned about the precedent set by a direct issuance of quota to support this grading station. She says every grader in BC is short on product at any given time and they too would seek to have quota assigned to them.
50. The Egg Board says in coming to its decision, it applied a “SAFETI” analysis as reflected in the Issue Document:

Strategic – Starting new entrants under the NPP will provide local product in the Kootenay Region that is currently displaced with product from out of province. Furthermore, by imposing a restriction to ship to Mr. Barkman’s grading station, the decision will support a small regional grading station and will provide the community with the local BC product they desire. On the other hand, issuing quota as a means of raising capital for a grading station would not be strategic. Doing so would not meet the intent of the NPP or the SAFETI principles articulated by the BCFIRB. Quota is to be used for production - not as a means of raising capital, or as an end to itself.

Accountable and Fair – The NPP provides a chance to start as a new producer to all qualified persons who apply. It would not be fair to other potential applicants in the Kootenay Region to limit the applicant pool to Mr. Barkman’s prospective business partners.

Effective – The Egg Board expects that starting new producers will provide additional BC product to the Kootenay Region and reduce the region’s requirements for out-of-province eggs. In addition, it should increase the sustainability and longevity of the small regional grading station. The restrictions on the allotments are to ensure that the new entrants continue to supply the grading station and that the grading station remains in the region.

Transparent – The new entrant draw will be posted on the website and ads will be placed in regional newspapers. The decisions regarding this allotment are also available on the BCEMB website.

Inclusive – This is inclusive as with any New Entrant Draw, it will be open to those applicants willing to start production within a reasonable distance from Sunshine Valley Farms’ proposed grading station location that is willing to enter into this relationship with the grader.

51. The Egg Board says this SAFETI analysis based on the option outlined in the Issue Document 4.1 Creston Allocation, of selecting two new producers from a new producer draw, supports its decision to deny direct awards of producer quota. Its view is that it would not be fair to other potential new producer applicants in the Kootenay Region to limit the applicant pool to the prospective business partners. The Egg Board argues that it would not be transparent or inclusive to hold a draw for the Kootenay Region requiring applicants to produce for one grading station, when that grading station will only sign applicants willing to enter into a business contract to fund the building of a grading station.

SUBMISSIONS FROM INTERESTED PERSONS

52. As indicated above, potential interveners were not advised of the opportunity to intervene in this appeal and after consulting with the parties during the hearing, the panel ordered a further submission process from potential interveners. Ms Rast of Pickle Patch, a supplier of local eggs, made a brief submission and indicated her support for the appellants' proposal. She does not think new operations would interfere with her small operation especially as she is not certified organic making it a different commodity. She agrees that Mr. Barkman's business has not hindered her business but actually increased her sales and demand.
53. The Fields Forward coordinator confirmed their ongoing support for the Sunshine Valley proposal, the need for local eggs in their community and the room for more expansion. She also confirmed their view that expansion will not put the existing egg farmers out of business but rather that they welcome the expansion.

PANEL ANALYSIS AND DECISION

54. The appellants argued their appeal on the basis that the Egg Board erred in its April Decision by denying their request for a direct award of NPP quota to Mr. Goossen and Mr. Bartel.
55. The Egg Board, in its Consolidated Order has created a NPP which sets out the rules for how a potential new entrant can apply to the Egg Board to participate in a NPP draw for quota. The Consolidated Order provides:
- s. 6(1) The Board may issue Layer Quota to Persons or adjust, reduce, alter or cancel Layer Quota issued to such Persons, at such time or times, in such amounts and in such a manner as may be determined by it.
 - s. 7 The Board may issue Layer Quota in accordance with the New Producer Program Rules set out in Schedule 1.
56. Schedule 1 sets out the requirements for applicants and creates a draw process for new producer selection by the Egg Board from a pool of eligible applicants. Section 1 of Schedule 1 provides:

The Board may, in its sole discretion, restrict participation in a New Producer Program draw to: (a) applicants who have a genuine intention to be actively engaged in the production of a Specialty Egg Class; (b) applicants who have a genuine intention to be actively engaged in egg production within a Region other than the Lower Mainland;

57. While the Egg Board has the discretion to issue quota on whatever terms it deems appropriate, the panel agrees with the Egg Board that there is no basis on the facts before us to order a direct award of quota to the appellants. The panel accepts the Egg Board's SAFETI analysis that such a direct award would not be strategic as it would set a precedent and encourage other graders to make similar applications for direct awards to specific new producers. It would also not be fair to other potential applicants in the Kootenay Region to make an ad hoc award of quota outside the existing NPP and thereby limit the applicant pool to only Mr. Barkman's prospective business partners.
58. While the panel finds that the Egg Board did not err in deciding not to direct award NPP quota to the appellants, the panel is concerned with the current under-supply of local eggs in the Creston area. 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 a commodity board are consistent with sound marketing policy and made in a procedurally fair manner.
59. In our view, there were procedural flaws in the Egg Board's decision-making process which led to a result that perpetuated its lack of response to the needs of the market and inconsistency with sound marketing policy.
60. The appellants came to the Egg Board with an idea in September 2016. They saw a regional need (which was confirmed by the Egg Board in November 2016 through its regionalization study) and tried to explore potential ways to address that need with the Egg Board. It does not appear that in these early conversations with board staff, that the appellants were ever advised that whatever business model they were contemplating to expand the grading station, that model would need to fit within the existing NPP rules.
61. The appellants created a business plan which contemplated direct awards of NPP quota. While the Egg Board sent the appellants back to address certain issues in the business plan, it does not appear that the Egg Board raised an issue with the concept of a direct award of NPP quota which the business plan was based on. The Egg Board did not clarify that it would assess any proposal in the context of the NPP rules or indicate that to be successful a proposal would have to enable the Egg Board to make a decision consistent with these rules.
62. Similarly, when the appellants met with the Egg Board to present their plan in February 2017 and again sought a direct award of NPP quota, the Egg Board did

not take the opportunity to advise the appellants that whatever their plan with respect to the grading station, the notion that NPP quota would be direct awarded was a non-starter. The appellants were simply thanked for their presentation and sent away to await a decision.

63. Finally, when the Egg Board issued its April Decision, it acknowledged the regional need for production but rejected the appellants' request for a direct award of NPP quota. In its view (which the panel accepts as noted above), such a direct award was neither strategic nor fair.
64. Even in the face of the regional need for the egg production from about 9,000 birds and the Egg Board's acknowledgement that it would be strategic to meet this need, the Egg Board went no further saying only "[i]n the event that there is a New Producer Program draw in the future and you have a grading station with adequate capacity to accept a new producer, the Board will ensure that the Kootenay Region has priority". It is difficult to reconcile this statement with the Egg Board's express acknowledgement of the strategic need to meet the demand for local production in the Kootenays.
65. Given the Egg Board's statement noted in the above paragraph, it is no wonder that the appellants felt it necessary to bring this appeal. From the outset, the Egg Board failed to address the appellants' expectation of a direct award of quota. In its April Decision the Egg Board finally addressed the issue of direct awards of quota, but then failed to move expeditiously to address the regional need by announcing a new producer entrant draw and the regional need for eggs continued to be serviced by eggs produced mainly in Alberta.
66. A year has passed since Mr. Barkman first approached the Egg Board with his plan, and the market demands for locally produced eggs in the south central and east Kootenays remain unmet. The Egg Board received the results of its regionalization study in November 2016 which confirmed Mr. Barkman's direct knowledge from local retailers of an under supplied market in that region. While the Egg Board appears initially to have been supportive of increasing production in the Kootenay Region, it appears to have lost its focus, becoming distracted by what it saw as Mr. Barkman's efforts to capitalize the redevelopment of his grading station through the award of NPP quota to potential business partners.
67. The panel understands that Mr. Barkman had a specific business model in mind initially. However, it does not appear that the Egg Board took timely steps to advise Mr. Barkman to align his business plan with the regulatory environment. In the hearing, Mr. Barkman expressed a willingness to adjust his business model; but in the panel's view it would have been preferable for these discussions to have occurred at the Egg Board staff or Board level many months ago and a NPP draw held expeditiously. Mr. Barkman also testified that he was prepared to work with any producer that wished to ship to him and use the additional new production throughput to achieve financial support for the expansion.

68. Having recognized both the regional demand and the existence of potential qualified producers in the region, in the panel's view it would have been both procedurally fair and consistent with sound marketing policy for the Egg Board to have moved expeditiously after its February 2017 board meeting to advise the appellants that while it was not prepared to direct award NPP quota, it would hold a NPP draw in the region within thirty days. This draw could have been conducted and new producers would have been identified by June 2017. Development of new operations would now be well underway.
69. In light of the foregoing and the resultant delay, the panel has determined that the appropriate remedy in these circumstances is to direct the Egg Board, as first instance regulator, to conduct a NPP draw as soon as practicable on an abridged timeline in order to get more production into the Kootenay region. As context to this direction, the panel also emphasizes its findings that:
- there is an acknowledged need in the region for the production from about 9,000 birds (quota units);
 - to date this need has been met with out-of-province production; and there has been a delay in establishing a NPP draw for the Kootenay region. The panel notes that the Egg Board received an allocation of growth and issued a *pro rata* increase in production provincially in the Spring of 2017.

ORDER

70. The panel dismisses the appellants request for a direct award of NPP quota.
71. The panel directs the Egg Board to:
- a) establish a NPP draw for the Creston Valley area of south central and east Kootenays as soon as practicable, but no later than 14 days after the date of this decision;
 - b) consider only those applicants in this selection process who apply to this draw, not any applicants who may currently be on a waiting list derived from a previous draw;
 - c) shorten the notice period required for the NPP draw from the 30 days prescribed in Schedule 1 of the Consolidated Order to 21 days;
 - d) follow Schedule 1, with the exception of c) above as it applies to the draw process, and provided that for purposes of section 1(4)(i) of Schedule 1, an applicant may, with the consent of Sunshine Valley and despite that Sunshine Valley requires expansion, indicate an intention to ship to Sunshine Valley as a Grading Station Operator; and
 - e) select a minimum of two new producers from the draw to be "started" as soon as practicable.

72. There is no order as to costs.

Dated at Victoria, British Columbia this 3rd day of October, 2017.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Daphne Stancil, Panel Chair



John Les, Chair



Diane Pastoor, Member