

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

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

BETWEEN:

JARED LES and EMMA LES dba J & E EGG FARM

APPELLANTS

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

**DECISION**

**APPEARANCES:**

For the British Columbia Farm Industry  
Review Board:

Pawanjit Joshi, Presiding Member  
Peter Donkers, Chair  
Al Sakalauskas, Vice Chair

For the Appellant:

Claire Hunter Q.C., Counsel

For the Respondent:

Robert Hrabinsky, Counsel

Date of Hearing:

By written submissions concluding  
April 15, 2020

## INTRODUCTION

1. The appellants, Jared and Emma Les are egg farmers doing business as J&E Egg Farm (J&E).
2. In 2015, the appellants were selected through the British Columbia Egg Marketing Board's (Egg Board) New Producer Program (NPP) lottery draw in the producer-vendor category and received 3,000 units of layer quota at no cost. Producer-vendors are responsible for self-marketing their egg production, unlike "registered producers" (the majority of BC egg producers) whose eggs are marketed by an egg grader. As such, the pool of NPP lottery applicants for the producer-vendor category is much smaller than the pool of applicants seeking to become conventional registered producers and applicants have better odds of being successful in this draw as opposed to the conventional NPP draw.
3. The appellants have struggled with self-marketing as producer-vendors and there is a lengthy history of communication with the Egg Board.
4. Prior to November 2017, the Egg Board's Consolidated Order defined producer vendor as:

"Producer-Vendor" means a Producer who produces and Markets, offers for sale, sells, stores or transports all or any portion of the Regulated Product produced or grown by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced or grown by any other Person."<sup>1</sup>  
[emphasis added]
5. The Egg Board changed the definition of producer-vendor in November 2017 to replace the phrase "all or any" with "a minimum of 75%". Whether or not this change in definition imposes a requirement is the subject of argument in these proceedings but, in any event, the appellants' struggles with self-marketing persisted and on September 13, 2019, Mr. Les wrote to the Egg Board seeking to be exempted from the 2017 amended definition of producer-vendor and to be allowed to operate under the original definition in place when he "won" his producer-vendor licence. He also asked that all his sales of eggs under the name Free Bird Organic through a partnership with Vitala Foods (Vitala) be counted towards his vending (self-marketing) requirement.

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<sup>1</sup> Section 15 of the British Columbia Egg Marketing Scheme, 1967, B.C. Reg. 173/67 also defines "producer-vendor":

**"producer-vendor"** means any grower who produces and markets, offers for sale, sells, stores or transports all or any portion of the regulated product grown by him but does not process, market, offer for sale, sell, store or transport the regulated product grown by any other person;

6. In its letter of October 7, 2019, the Egg Board agreed to consider the Free Bird Organic sales toward the vending requirement if the appellants continued to be the only producer supplying Free Bird Organic and if they could prove they were vending Free Bird Organic product directly to retailers. As for the request for an exemption from the current definition of a producer-vendor, the Egg Board advised it expected the appellants to comply with the most recent version of the Consolidated Order and vend a minimum of 75% of their production.
7. The appellants appealed the decision to deny its request for an exemption from the 2017 definition of producer-vendor and to count their sales of eggs through Free Bird Organic towards their self-marketing requirements.
8. On January 6, 2020, the presiding member dismissed the Egg Board's summary dismissal application filed in this appeal. The presiding member concluded that determining whether this appeal was out-of-time required a consideration of the appellants' conduct and the reasonableness of their request for an exemption almost two years after the amendment. As such, the presiding member concluded that the appellants had raised an arguable case in favour of an exercise of discretion from the Egg Board to mitigate the impact of the amendments to the Consolidated Order on their operation. The appeal was allowed to proceed.
9. In light of COVID-19, the parties agreed to the appeal proceeding by way of written submissions. Neither party requested an opportunity to cross-examine witnesses on their affidavit despite being given an opportunity to do so.
10. In brief, the appellants argue that the Egg Board refused to engage meaningfully on the request for an exemption and failed to properly exercise discretion in favour of the appellants. Further, they say the Egg Board erred in treating the amended definition of producer-vendor as imposing a requirement on the appellants to vend 75% such that they could be found not in good standing, that it improperly considered the interests of other producer-vendors when none existed, improperly delegated the decision to staff and failed to consider its decisions in light of SAFETI<sup>2</sup>.
11. The Egg Board in response says that the appellants have at all times failed to conduct themselves in a manner consistent with their business plan, the expectations communicated by the Egg Board, and the Consolidated Order, as amended in 2017. Further, it argues that it is not sound marketing policy to allow persons with priority access under the NPP with a stated intention to self-market a material amount of their production to not self-market or outsource vending to a third party.

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<sup>2</sup> 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".

## ISSUE

12. Did the Egg Board err in its October 7, 2019 decision by refusing to honour the terms on which the appellants' producer-vendor licence was issued?

## LEGISLATIVE FRAMEWORK

13. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (*NPMA*) the Lieutenant Governor in Council has the power to establish boards and commissions, and to confer upon them certain powers (section 11).

14. Pursuant to this power, the Egg Board was established by the British Columbia Egg Scheme, B.C. Reg. 173/67 (Scheme) which vests the Egg Board with the authority within the Province to promote, regulate and control the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part. The Scheme defines "producer-vendor" as follows:

**"producer-vendor"** means any grower who produces and markets, offers for sale, sells, stores or transports all or any portion of the regulated product grown by him but does not process, market, offer for sale, sell, store or transport the regulated product grown by any other person;

15. The Egg Board has established its Consolidated Order, as amended in 2017, which among other things provides a different definition of "producer-vendor" (Part 1, section 2)<sup>3</sup>:

**"Producer-Vendor"** means a Producer who produces and Markets, offers for sale, sells, stores or transports a minimum of 75% of the Regulated Product produced by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced by any other Person.

16. The Egg Board also established the NPP to facilitate the entry of new persons into the table egg industry: Part IV of the Consolidated Order (formerly Schedule 1 of the 2015 Consolidated Order). These rules set out the application and eligibility requirements (sections 1 and 2), how the draw will be conducted, and how the waitlist and entry into program will be managed (sections 3, 4 and 5). Section 7 establishes the requirements for purchase or acquisition of further quota by new producers.

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<sup>3</sup> As noted in paragraph 4 above, the 2015 Consolidated Order defined "producer-vendor" in almost the same terms as the definition found in the Scheme:

**"Producer-Vendor"** means a Producer who produces and markets, offers for sale, sells, stores or transports all or any portion of the Regulated Product produced or grown by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced or grown by any other Person."<sup>3</sup>

17. Section 6 of the Consolidated Order sets out special restrictions on quota issued under the NPP relevant to this appeal:

**6. Special Restrictions on Layer Quota Issued Under the Program**

- (1) Layer Quota issued under the New Producer Program may be held for production by the entrant only for so long as the entrant:
- (a) permits Board audits of the farm operation to ensure compliance with Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;
  - (b) is in good standing with all applicable Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;
  - (c) is actively engaged in egg production;
  - (d) continues to own an Independent Production Unit conforming to all applicable requirements under the Consolidated Order;
  - (e) continues to be actively engaged in the production type and region as outlined in their original application; failing which the Layer Quota so Issued shall thereupon be subject to immediate cancellation on notice by the Board to the entrant.
- (2) An entrant issued Layer Quota under the New Producer Program may only change production type or region upon Board approval.<sup>4</sup>  
[emphasis added]

**KEY FACTS**

18. Quota, by its nature, is limited. The share of national egg production BC receives from Egg Farmers of Canada is established by a federal-provincial agreement. Increases or decreases in provincial quota are dependent on national market requirements, which are based on population growth and changes in consumer demand. Because quota is limited, who gets it and how much becomes a strategic question for BC's supply-managed boards, including the Egg Board.
19. BCFIRB has determined it is sound marketing policy for BC's supply managed boards to prioritize a portion of BC quota for new entrants or other public policy objectives as well as niche, regional or specialty markets<sup>5</sup>. The Ministry of Agriculture's Regulated Marketing and Economic Policy<sup>6</sup> also reflects the need for the regulated system to be responsive to regional and market needs. Because quota is required to produce a supply managed product, the overall availability of quota and the cost of quota acquisition in the producer quota market creates barriers to enter these industries.

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<sup>4</sup> Similar restrictions were found in Schedule 1 of the 2015 Consolidated Orders (see paragraph 28.)

<sup>5</sup> [Specialty Markets and New Entrants Submissions: Policy, Analysis, Principles and Directions Decision September 1, 2005](#), Quota Assessment Tools [Supervisory Review Decision, February 2, 2018](#)

<sup>6</sup> [Ministry of Agriculture's Regulated Marketing and Economic Policy](#)

20. Like BC's other supply-managed boards, the Egg Board has established a new entrant program to provide access to quota at no cost to new producers. Because of the benefits to producers of being able to produce and sell a regulated product as part of the supply management system, new entrant programs are generally popular. As such, several of BC's supply-managed boards use a lottery draw as part of the process of determining who will receive new entrant quota at no cost. Commodity boards do not distribute quota to producers using direct economic distribution tools, such as auctions, due to provincial regulatory prohibitions on boards affixing a value to quota.
21. There are three types of licenced producers defined in the Egg Board's Consolidated Order. Registered producers, who are neither producer-graders nor producer-vendors, are required to have their eggs marketed through a grading station operator (e.g. Golden Valley). Eggs from multiple farms are pooled, marketed and sold together by the grading station operator. Producer-graders are contemplated to produce and grade their own egg production. Producer-vendors are contemplated to produce and market their own egg production (egg grading is not specified).
22. In 2015, the Egg Board gave NPP applicants the option for the first time to apply for quota under a distinct "producer-vendor" category. As part of the 2015 NPP selection process, interested parties could apply under one of four categories depending on their business plan, identified on the application form: To Produce on Vancouver Island or BC Interior Region, To Produce Enriched Housing, To Produce under Producer-Vendor licence or BCEMB Small Lot Program Permit Holder. Applicants selected in the lottery draw could receive up to 3000 birds of quota at no cost from the Egg Board<sup>7</sup>.
23. The appellants applied under the producer-vendor category and were the first successful producer-vendor applicant to enter the industry through this category of the NPP.<sup>8</sup>
24. In his April 2015 application to participate in the NPP as a producer-vendor, Mr. Les wrote:

I am excited to apply under the producer-vendor category because it would allow me as a producer to be in touch directly with suppliers and consumers in my community. While Free-Range eggs may be a small portion of the BC egg market, it is a growing category. The buy-local movement is creating a consumer base capable of supporting potential producer-vendors like myself to network with the community and supply Free Range eggs directly from the farm. Taking away one step in the process of getting eggs from the chicken to the table enables consumers to

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<sup>7</sup> If a producer wanted to purchase 3000 birds of quota (allotment awarded through the NPP) it would cost something in the range of \$1,000,000 in the open market.

<sup>8</sup> While the panel is uncertain as to how many people applied under the 2015 draw, the appellants were application #105. From this, we understand there were in excess of 100 applicants.

better understand where their food comes from, which is something I believe is very important.

25. The application also indicated an intention to acquire egg grading equipment (at an estimated cost of \$6700).
26. In February 2016, Mr. Les entered into a contract to purchase land outside Chilliwack in an area he describes as remote with no foot traffic.
27. In May 2016, Mr. Les and his father met with Egg Board staff (then Executive Director Dwight Yokim and staff member Katie Lowe) to discuss his plans for construction. An email written from Mr. Yokim to the Board chair describes the details of the meeting and confirms that Mr. Les applied to be a producer-vender and he doesn't have to be a grader, only that he will be marketing his own eggs. It describes the meeting as cordial and indicated Mr. Les was planning to build a barn for 6,000 birds and was hoping to buy and/or lease the other 3,000 (described as a smart plan). The email indicates Mr. Les was advised of the current leasing program, the fact that the Egg Board had no quota for sale and the need to "stick to their proposal."
28. On May 16, 2016, Joey Aebig, Egg Board Operations Assistant, sent an email to the successful 2015 NPP entrants advising that the Egg Board in the course of running another NPP lottery had been asked questions about the need to follow business plans. Given that the four successful 2015 applicants were in the implementation part of their business plan, he confirmed that new entrants were confined to follow the business plan detailed in their application referencing the NPP rules (then found in Schedule 1 of the Consolidated Order which confirmed that entrants needed to follow the intention expressed in their application to be actively engaged in specialty, regional, furnished housing or producer-vendor production).

### **2017 Amendment to Consolidated Order**

29. In or about June 2016, the Egg Board, as part of a broader consultation process, sent a survey to registered producers, NPP winners and small lot holders, including the appellants. Mr. Les says he was busy completing his barn and planning his July wedding and did not respond to the survey. Beyond the survey, there was no direct contact between the Egg Board and Mr. Les. The survey closed on August 31, 2016 and out of this consultation came a recommendation that producer-vendors self-market 75% of their production.
30. The proposal to require producer-vendors to self-market 75% was discussed by the Egg Board at its September 8, 2016 meeting.
31. On November 18, 2016, Egg Board staff (Ms. Lowe, now Executive Director and Mr. Aebig) met with Mr. Les. Ms. Lowe says that Mr. Les was advised of the plans to amend the Consolidated Order to require producer-vendors to self-market 75%

of their production. Neither Mr. Les nor his wife recall the 75% number being discussed and he says he was not aware that this requirement was even under consideration.

32. In an email to Mr. Les dated November 25, 2016, the Egg Board stated:

What the BC Egg Marketing Board requires from you is your producer–vendor ramp-up plan. We need to know how quickly you plan on moving from a grading station marketing your product to you marketing it. Clearly defined goals with timelines need to be presented.

33. Mr. Les responded by letter dated December 2, 2016 setting out what he describes as his “aspirational” plan to ramp up his self-marketing as follows:

In partnership with Vital Foods, I am launching a free-range egg brand called Free Bird. I intend to sell all of my self-marketed eggs under the Free Bird brand. My birds will be 19 weeks on January 1st 2017, and I expect to have marketable eggs ready to sell by February. The following timeline applies to the production from the 3000 quota units I was allotted through the NPP.

**February 2017:** begin self marketing Free Bird

**June 2017:** 25% of farm production self-marketed

**December 2017:** 50% of production self marketed

**June 2018:** 75% of farm production self marketed

**December 2018:** 100% of farm production self marketed.

The total ramp-up time is two years and in the meantime Golden Valley will be custom grading my eggs and marketing the remaining eggs until I am 100% self-marketing. I have been in contact with T&T Supermarket, and plan to approach Safeway and Whole Foods to take on the Free Bird product.

I believe these goals are realistic and achievable and I will be compiling quarterly reports to ensure I am on track to meet them.

34. On or about January 30, 2017, the Egg Board submitted its revised draft Consolidated Order to BCFIRB for prior approval as required by section 37(c) of the Scheme. These amendments were wide ranging and the result of the Egg Board’s review of the Consolidated Order conducted over several years. The changes to the definition of producer-vendor was just one of many revisions.
35. On or about March 27, 2017, the BCFIRB issued its Prior Approval decision of the Egg Board’s amendments to the Consolidated Order. The revised Consolidated Order came into effect with the amended definition for producer-vendor on November 1, 2017.
36. During this period, Mr. Les experienced challenges with his business plan. Golden Valley Foods (Golden Valley) is BC’s largest egg grading station and the grading station through which J&E was marketing its product. Golden Valley downgraded



J&E's free range eggs to free run as there was insufficient market from what had been planned. J&E, despite being eligible, was disqualified from participating on a Egg Board quota exchange to acquire quota as Golden Valley was only prepared to sign-off on caged white production and J&E was not producing caged white eggs. As such, the Egg Board considered this a circumvention of the rules and not something it could endorse.

37. In light of communications with the Egg Board and Golden Valley, in March 2018 Mr. Les decided to pursue organic certification for his self-marketed production.

### **Egg Board's Finding of Non-compliance**

38. In May 2018, the Egg Board determined that the appellants were in non-compliance with the Consolidated Order as a sales report for Free Bird Eggs confirmed that J&E were not the only supplier for Free Bird Eggs.
39. During this same period, the Egg Board began advising Mr. Les that he did not have enough quota credits for the number of birds he had under production. A June 11, 2018 email summarizes this history:

Since your recent flock was placed on December 28, 2017, you have been aware that you do not have enough quota credits to sustain your flock:

- January 8, 2018 – I sent you an email and reminded you that did not have sufficient QCs for the flock that turned 19 weeks and entered production on December 28, 2017. At that time you were instructed that “producers are not permitted to go into a negative QC balance so you will need to acquire more QCs prior to your next licence”
- April 3, 2018 - you submitted another QC licence for 34 days, which expired on May 7, 2018 and brought your QC balance to 95
- May 8, 2018 to Present day - no QCs have been acquired. This means that you have been overproducing at roughly 181% (5967/3293) of your quota value for over a month.

40. The Egg Board's email advised Mr. Les that quota was the backbone of supply management and quota credits were intended to allow producers to temporarily increase production to stay in compliance. In order for supply management to be sustainable, the Egg Board's mandate and responsibility was to ensure producers maintain appropriate numbers of birds in relation to their quota. Mr. Les was advised that as long as he was non-compliant with the Consolidated Order, his farm was not eligible for any national allocation and could not earn quota credits. He was also reminded of the need to honour his intentions to self-market in accordance with his NPP application which had been a concern in 2016 and 2017 and was asked for an update.
41. In his June 12, 2018 email, Mr. Les summarized his struggles. He stated he was given very little information about the NPP and was still unclear of the

requirements to satisfy the producer-vendor program. He notes that the change in the definition of producer-vendor from "all or any" to "a minimum of 75%" was a massive jump and would take time to manage. He pointed to the abrupt market shift from what he initially thought to be a good option with free range production to organic which would require organic certification. He indicated he had been unable to purchase quota or quota credits for the remaining 3000 birds that that his barn was built for but indicated his willingness to work with the Egg Board to find a solution.

42. On July 23, 2018, the Egg Board again wrote to Mr. Les about major issues regarding his production. The Egg Board clarified the quota credit issue indicating that it could have fined J&E \$10,944.53 and the associated risk that its quota licence may have been revoked. The Egg Board explained that being a producer-vendor requires more work as producers are responsible for developing their own markets to sell their production. For this reason, the producer-vendor category had a much smaller pool of applicants and as such much greater odds of an applicant being selected by random draw. The Egg Board expressed its responsibility to hold producer-vendors accountable to their business plan and its concern at J&E's lack of progress as a producer-vendor. In 11 months, only 11% of total production had been self-marketed and the number of purchasers (7) remained unchanged. The Egg Board again asked for an actionable plan to achieve producer-vendor status and advised that it would not approve any quota credit licences in excess of 3% of total allowable hens. Mr. Les was invited to the August 2018 board meeting.
43. On August 9, 2018, Mr. Les met with Egg Board staff (Ms. Lowe, Executive Director, Mr. Aebig, now Manager, Operations and Logistics and staff member, Amanda Brittain). Mr. Les was asked for a new marketing plan in advance of the board meeting; he indicated there was not enough time to develop a new plan and disagreed that the amended definition of producer-vendor should apply to him. There are no minutes of this meeting beyond an email from Mr. Aebig to James Dick at Golden Valley confirming the meeting with Mr. Les and his intention to convert to organic production and the need for a sign off from Golden Valley.
44. The Egg Board's minutes of the August 16, 2018 board meeting confirm that Mr. Les attended and provided a timeline of the steps taken regarding his business and his partnership with Vitala. He explained J&E was responsible for production and supplying eggs to BC under the Free Bird brand while Vitala was responsible for marketing, branding, and sales. He confirmed his goal to change to organic production and that he was reviewing options for partnering, branding, marketing and sales "with a more local touch." The Egg Board expressed willingness to offer guidance and the importance of marketing eggs to retailers instead of through the partnership arrangement and discussed reducing chick placement and selling eggs at local farmers' markets. The Egg Board reiterated the importance of improving vendor sales to meet the requirements and asked for an updated timeline by the beginning of September 2018.

45. In response to the Egg Board's August 17, 2018 request for retail sales information for eggs sold under the Free Bird label, on September 17, 2018 Mr. Les submitted a progress report and an updated plan as to how J&E would bring its self-marketed product to greater than 75% of hen placement summarizing his efforts. He closed his report stating:

At this point, we don't believe it is feasible to estimate how quickly our sales will grow. Other vendors we have spoken with have suggested it may take a few years to reach the 75% of production sales goal. We are optimistic that we will reach this goal and are actively working towards it.

46. In October and November 2018, Mr. Les reported to the Egg Board on his work expanding his range, establishing an organic Free Bird brand, identifying a potential new customer and construction of a farmgate egg stand.

47. Egg Board staff prepared a November 28, 2018 briefing note, draft letter and SAFETI analysis which the appellants characterize as misleading. It describes the issue as NPP winner under the producer-vendor category not fulfilling the producer-vendor requirements in the Consolidated Order with a goal of ensuring that the producer is progressing towards compliance with their producer-vendor requirements in a timely manner. Under "Accountable" in the SAFETI analysis, the note states:

This decision is consistent our Consolidated Orders and further supported by previous decisions which has established precedence to hold all producers accountable within the rules that are stipulated in each individual New Producer Program draw.

The expectation for J&E Eggs to self market his production has not changed from when he was selected in the 2015 NPP draw as the one producer-vendor amongst 64 other applicants.

48. On December 7, 2018, the Egg Board wrote to Mr. Les, after reviewing his September report and November update at its December meeting, to advise that he was not in compliance with the Consolidated Order:

Upon further consideration of the progress made to date, the Board has determined that as of the date of this letter going forward, #2584 - J&E Egg Farm is deemed not in good standing, as you are not achieving the 75% Producer-Vendor requirement as per the Consolidated Orders. Any producer not in good standing is ineligible to earn quota credits, utilize the production sleeve, and will permanently forfeit any quota allocations issued in that time.

In order to come into compliance and be deemed in good standing with our Consolidated Orders, you will be required to vend a minimum of 75% of your production for three consecutive months and maintain the percentage on a weekly rolling average above 75% thereafter. If the 75% self-vending requirement is not reached within 24 months of this letter, the Board maintains the right to cancel your quota license.

Going forward, the Board has requested to see a more detailed sales and marketing plan illustrating how you will achieve the 75% Producer-Vendor requirement. The plan should include the steps you will take within the next six months, 12 months, and 24 months, along with specific benchmarks for each timeframe that will demonstrate how you plan on marketing your eggs to achieve the 75% minimum with the 24 month target.

The Board's expectation is to see a major movement in your marketing of eggs. They have also requested that you provide us with an updated sales and marketing plan by December 31, 2018. Starting in 2019, the board expects for you to automatically send a monthly update to BC Egg before the end of each month.

The Board and BC Egg staff are here to assist you and want to see you succeed as an egg producer-vendor. If you have any questions, please do not hesitate to contact us.

49. In response, Mr. Les provided a vending plan and monthly updates as requested which were reviewed at the Egg Board's January and February 2019 meetings.
50. On March 5, 2019, the Egg Board wrote to Mr. Les acknowledging his efforts but reiterating that J&E was not in good standing and as such would forfeit any further quota allocations, be unable to earn quota credits or utilize a production sleeve. To be deemed in good standing, J&E would need to vend 75% of its production for three consecutive months and failure to meet this requirement could result in the Egg Board withdrawing his quota license.
51. In a July 4, 2019 email, Mr. Les elaborated on his relationship with Vitala and the marketing of Free Bird eggs. He confirmed that sales, promotion, and customer service were handled jointly with Vitala, technical expertise, questions from retailers and administration were handled solely by Vitala, J&E was responsible for farm operations and flock management and Vitala managed grading, packaging, and distribution in collaboration with Golden Valley. Strategy including budgets and forecasting, and marketing strategy and operations were handled jointly. In specific response to questions, Mr. Les identified the marketing company that was involved and confirmed Vitala managed social media with J&E providing content (photos), feedback on social media and attending promotional events with Vitala. Vitala was the main point of contact for new retailers as it has the experience and relationships with buying managers. J&E indicated it would be reaching out to small retail locations in Chilliwack directly to promote the brand and provide sales. He confirmed that most of the listing process goes through Vitala as they have experience managing large retail accounts.
52. On July 8, 2019, Mr. Les wrote to the Egg Board advising that Star Eggs (a Saskatchewan based grader, marketer and distributor of shell eggs) was interested in buying eggs wholesale from J&E and inquiring about whether this arrangement would count towards his vending requirements.

53. On July 23, 2019, the Egg Board advised Mr. Les that selling to Star Eggs in Saskatchewan would not be an acceptable vending avenue to meet his producer-vendor requirements as the intent of the Consolidated Order is for producer-vendors to market their eggs directly to the consumer or retailer. Star Eggs as a grading station and not a direct consumer or end retailer did not meet the producer-vendor requirements. In addition, Mr, Les was advised that as BC is a short province, every effort should be made to sell BC eggs to BC consumers.
54. On July 29, 2019, the Egg Board wrote to J&E and advised, as it was not in good standing, it was ineligible for an issuance of layer quota.
55. On August 5, 2019, Mr. Les wrote to the Egg Board acknowledging that J&E was not in good standing and not eligible to receive the allocation. He asked that the allocation be held for him.
56. On August 29, 2019, the Egg Board responded in a lengthy letter confirming its original decision that J&E was not in good standing and ineligible to earn quota credits or utilize the production sleeve, and would permanently forfeit any quota allocations issued while it was not in good standing.

As the intent of allocations is to have the quota put into production as quickly as possible, the allocation was fully issued to all producers in good standing and any quota earmarked for programming has been put towards the Temporary Allotment programs. There was no quota set aside for any producer deemed not in good standing.

The Board would like to remind you that in order to be in good standing, you must comply with the definition of a producer-vendor as per the Consolidated Orders, which is “a Producer who produces and Markets, offers for sale, sells, stores or transports a minimum of 75% of the Regulated Product produced by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced by any other Person”. Based on the information that you provided in your July 4, 2019 update, J&E Egg Farm relies primarily on third parties to market, sell and transport the eggs. Vitala Foods has been responsible for generating new business and selling to existing clients, while Golden Valley Foods has been transporting the eggs.

While we recognize your beneficial relationship with Vitala Foods, BC Egg must ensure that all producer-vendors are held to the same standards. As J&E Egg Farms have not been directly responsible for building the client relationship with Otter Co-op, Lepp Farm Market, Nature’s Pickin’s, Donald’s Market, Lee’s Market, Langley Farm Market, Meridian Market, Stong’s Market, Wholefoods, and any other retailer obtained through Vitala Foods, sales through these retailers will not count towards your 75% vending requirement. Only sales generated by J&E Egg Farms will be counted and proof, in a form satisfactory to the Board, must be provided for all new business sales to be counted towards your vending requirement. The Board would like to remind you that the intent of a producer-vendor is

to market and sell directly to consumers and farmers markets, not just retailers. Any retail business must be obtained through a producer-retailer relationship.

On December 31, 2018, BC Egg received your vending plan, which included a six-month, 12 month, and 24 month plan to reach the 75% vending requirement. Based on your plan, you expected to be selling a minimum of 50% of production within 12 months. As of your July update, J&E Egg Farm vended 2.56% of its production that month with a rolling three-month average of 1.74%.

The Board has expressed concern regarding your ability to self market 75% of your production and requests that you provide a detailed vending plan in person at 2pm on September 19 during the regularly scheduled board meeting. The vending plan must include a detailed plan to reach new customers, increase sales with current customers, and meet the 75% vending requirement. Failure to provide a detailed and achievable plan may result in additional restrictions.

The Board and BC Egg staff are here to assist you and want to see you succeed as an egg producer-vendor. If you have any questions, please do not hesitate to contact us.

57. In a letter dated September 13, 2019, Mr. Les set out a timeline of events, a 6, 12 and 24 month plan, described challenges of vending, discussed Free Bird, time management, and provided a summary of actions taken since August 29, 2019 letter. He then made the following request to the Egg Board which has led to this appeal.

I was under the impression that there was no minimum vending requirement for a Producer-Vendor. Furthermore, I also understood that the avenue in which a Producer-Vendor sells their eggs was flexible, with no specific examples of acceptable methods.

On November 3 I met with BCEMB staff and we discussed what was required. I was not advised that there was any expectation that a producer-vendor would market any minimum of his or her production. The “intent” of a producer vendor was not communicated to me as it has recently been in the August 29, 2019 letter from the Board, which is “to market and sell directly to consumers and farmers markets, not just retailers. Any retail business must be obtained through a producer-retailer relationship.” . . .

If we are personally responsible for distribution, we will have to put a mark-up on Golden Valley’s pricing which places stress on the price and margin for the retailers. We do not see personally distributing eggs to be effective or financially possible for us or our customers.

I would like the Board to understand that being personally responsible for farm management, sales and distribution on top of working full-time is not possible.

58. Mr. Les attended the September 19, 2019 Egg Board meeting (for approximately 40 minutes according to the minutes of meeting) to provide an update on his business plan and answer board member questions.
59. The Egg Board's response to the appellants' request (the decision under appeal) is set out in an email dated October 7, 2019:

Thank you for attending the September 19 board meeting to provide additional details regarding your business plan. In your September 13, 2019 letter, you asked the Board consider two requests:

1. That the Producer-Vendor definition in the 2010 Consolidated Orders, amended to 2015 when you entered and won the producer-vendor license, be upheld for your farm.
2. That all Free Bird Organic sales count towards your vending requirement.

As a follow up to the discussion at the board meeting, we would like to reiterate that the Board and all producers are expected to uphold the most recent version of the Consolidated Orders no matter the producer's start date or date of the approved changes. Changes made to the Consolidated Orders are done in the best interest of the industry and must be upheld. A typical producer has their eggs picked up by a grading station and then is paid for that product by the grading station, through the BC Egg Marketing Board. In order to be classified as a producer-vendor, you must be able to provide documentation showing that you are vending your product in a manner that is different from the traditional producer and grader relationship. The Board is willing to consider sales through Free Bird Organic if J&E Egg Farms continues to be the only producer supplying Free Bird Organic and J&E Egg Farms can prove that you are vending Free Bird Organic product directly to the retailers in a manner satisfactory to the Board.

As a reminder, in order to come into compliance and be deemed in good standing with our Consolidated Orders, you will be required to vend a minimum of 75% of your production for three consecutive months and maintain the percentage on a weekly rolling average above 75% thereafter. If the 75% self vending requirement is not reached within 24 months of our December 7, 2018 letter, the Board maintains the right to take additional steps which may include cancellation of quota as per Part IV, section 6, subsection 1 of the Consolidated Orders

- (1) Layer Quota issued under the New Producer Program may be held for production by the entrant only for so long as the entrant:
  - (a) permits Board audits of the farm operation to ensure compliance with Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;
  - (b) is in good standing with all applicable Board orders and all applicable legislation, including all terms and conditions of the New Producer Program;

- (c) is actively engaged in egg production;
- (d) continues to own an Independent Production Unit conforming to all applicable requirements under the Consolidated Order;
- (e) continues to be actively engaged in the production type and region as outlined in their original application; failing which the Layer Quota so Issued shall thereupon be subject to immediate cancellation on notice by the Board to the entrant.

60. The foregoing places the appeal in context. We will now deal with our analysis of the appellants' grounds of appeal and discuss the evidence and position of the parties within that context. The panel has carefully considered all of the evidence and submissions, even though we do not intend to refer to it all in the course of this decision.

## **LEGAL ANALYSIS & CONCLUSION**

61. Despite the way the appellants have approached their arguments in this appeal, the panel has determined that the first issue to consider is whether or to what extent the 2017 Consolidated Order imposes any minimum vending requirement on producer-vendors. The answer to this question necessarily informs our consideration of whether the Egg Board erred in its October 7, 2019 decision to refuse to honour the original definition of producer-vendor for these appellants.

62. Our decision framework is as follows:

- I. Statutory Interpretation – 2017 Consolidated Order and Minimum Vending Requirement
- II. Law with respect to exemption from quota rule changes.
- III. Application of the appropriate duty of fairness to the circumstances of this case:
  - (a) Reliance on original rules/representations
  - (b) Improper delegation/procedural fairness concerns
  - (c) Egg Board's failure to exercise discretion
  - (d) Application of sound marketing policy/SAFETI principles
- IV. Request for corollary relief

### **I. Statutory Interpretation – 2017 Consolidated Order and Minimum Vending Requirement**

63. The appellants argue that the producer-vendor "rules" in the 2017 Consolidated Order are so broad that there is no actual requirement to self-market and, even if there is, they are meeting any such requirement. They argue that the 2017 amended definition of producer-vendor is descriptive but does not impose any requirements on persons who fall within that classification to do anything:



**“Producer-Vendor”** means a Producer who produces and Markets, offers for sale, sells, stores or transports a minimum of 75% of the Regulated Product produced by him or her, but does not process, Market, offer for sale, sell, store or transport the Regulated Product produced by any other Person.

64. The definition does not say what a producer-vendor “shall do”, “must do” or “is required to do.” The word “means” used in each definition under Part 1 of the Consolidated Order is not used elsewhere in the Consolidated Order to indicate the imposition of a requirement on any industry participants and there is no proper interpretation of the definition that would permit the reading in of mandatory language where it is not present in the provision.
65. Further, the appellants point to Part XIII of the Consolidated Order which contains some rules which apply specifically to producer-vendors (relating to reporting of eggs produced and sold in the preceding week). These rules do not set any minimum vending requirement.
66. The appellants go further and say, even if the 2017 definition could be taken to impose a 75% minimum requirement, any such requirement is not limited to vending given the use of “or” in the definition and the inclusion of a variety of other activities beyond actual sales such as “markets” and “offers for sale.” The appellants argue that the fact that they offer 100% of their eggs for sale directly to consumers on their website (whether in fact any consumer actually buys any eggs from the website) is enough to satisfy the “offer for sale” aspect of the definition.
67. The appellants also argue that “a number of principles of statutory interpretation” require the 2017 amendment to be strictly construed against retroactive application so as not to take away existing “rights”. But in this case and on a plain reading, they say there is no ambiguity in the provision to be resolved as the Consolidated Order does not impose the requirement that a producer-vendor self-market a minimum of 75% of its production.
68. Despite having the benefit of the appellants’ arguments on this issue, the Egg Board did not respond to this statutory interpretation argument. The appellants suggest that this should be taken as the Egg Board conceding the point.
69. The panel agrees with the appellants’ position that the 2017 definition of “producer-vendor” and its 2015 predecessor contained in the Consolidated Order are definitions. While these definitions demonstrate the Egg Board’s intentions at certain points in time about who is a “producer-vendor”, they do not set out the specific requirements a “producer-vendor” must meet. Further, we observe that to the extent the Scheme defines the term “producer-vendor”, it is not entirely clear how the Egg Board can substantively alter this definition through its Consolidated Order. This point was not raised by either party and given our conclusion that the definition does not impose requirements, it is not necessary for us to comment further.

70. To the extent that the Egg Board felt it was necessary to tighten up the rules around producer-vendors and to the extent that its views were informed by its difficulties getting J&E to self-market a significant portion of its NPP quota, the panel finds that such actions are within the scope of the first instance regulator under the *NPMA* and Scheme. The Egg Board, looking at its experience with this producer-vendor, concluded that its regulations were not supporting sound marketing policy outcomes and decided to enact amendments to better achieve a desired result.
71. However, in the panel's view what was needed here was not an amendment to the definition of who is a producer-vendor in the Consolidated Order (particularly where the amendment substantively alters a defined term in the Scheme). Rather what was needed was the actual rules or requirements around what constitutes self-marketing. Just as other commodity boards have set out their requirements for self-marketing that fit their respective industries, the Egg Board needs to consider what is enough self-marketing, whether there is a need for a marketing or vending threshold (be it more than 25%, 50%, 75% or 100%) and what constitutes self-marketing over a particular time period. In order to require effective and meaningful compliance, particularly if there is any intention to cancel or revoke quota for not being in good standing with board orders, the Egg Board's rules need to be clear so a producer-vendor knows what compliance looks like.
72. While we agree with the appellants that the Egg Board needs to have clear rules or requirements in place, for the reasons set out below, we do not agree that principles of statutory interpretation require any such amendment to be strictly construed against retroactive application so as not to take away existing "rights."

## **II. Law with respect to exemption from quota rule changes**

73. The panel must consider whether a producer can or should be required to change production and/or marketing practices to conform to rule changes made by the industry regulator. Here, the producer entered the industry under one set of rules for producer-vendors which did not set any minimum vending or self-marketing requirements. The definition was amended in 2017 to add a reference to producing and marketing 75% (instead of all or any) of the regulated product produced but that change in definition, we have found, does not create a minimum vending requirement enforceable against the appellants.
74. Generally, the law is clear that quota and licensing are privileges and not rights and are subject to change as the regulator deems appropriate. It is important to understand the distinction between rights and privileges as it is so central to the ability of a commodity board to regulate in the broader public interest as well as the best interests of the particular industry.
75. The seminal case on this point is the decision of Mr. Justice Macdonald in *Sanders v. British Columbia Milk Marketing Board (1991)*, 53 B.C.L.R. (2d) 167 (C.A). This

case involved a producer challenging a rule change which created a requirement to surrender 10% of quota to the Milk Board as part of a transfer as “expropriation without compensation”. In rejecting this argument, Mr. Justice Macdonald stated at page 178:

..[a] quota, a license to produce, which may be issued on prescribed terms and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions”. In summary, the situation is “the board giveth and the board taketh away”.

76. In *Hallmark Poultry Processors Ltd v. British Columbia Chicken Marketing Board*, June 27, 2003, BCFIRB was asked to “grandfather” producers who had built barns for export production under the old export program rules either indefinitely or for at least 20 years. In rejecting this argument, BCFIRB held at paragraph 48:

....there is no question that the affected growers did in fact take a calculated risk when they made investments to grow this production. While many (but not all) invested in barns, they had no ongoing right to grow chicken in those barns, let alone to keep their barns full. The chicken was being grown under a licence to produce. Neither licences nor quota constitute property that fetter a regulator in making decisions in the best interests of the industry: *Sanders v. Milk Board* (1991), 77 DLR. (4th) 603 (BCCA), *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd. et al*, [1993] BCJ No. 1748 (SC).

77. Similarly in *Ponich Poultry Farm Inc. v. British Columbia Chicken Marketing Board*, (December 17, 2001), the appellant sought to be grandfathered under old rules relating to his permit production. In that case, the appeal panel held:

In supply-managed commodities such as chicken, production is a privilege and amount produced is finite. As noted by the Court in *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.*, [1993] B.C.J. No. 1748 (S.C.) at para. 171: “There was no obligation on the Board to adapt its conditions of licensing to the producers -- as Mr. Harding argued, “It is up to the would-be producer to fit himself into the regulations.” As noted in *Sanders v. British Columbia (Milk Board)* (1991), 77 D.L.R. (4th) 603 (B.C.C.A.) “Under cases which we ought to regard as authoritative, it is not property as against the Milk Board. Rather, it is merely a license to produce.”

78. In *Van Herk v. British Columbia Milk Marketing Board*, June 19, 2006, the appellant was appealing the decision of the Milk Board to cancel his new entrant quota (TPQ) for non-compliance related to not being actively engaged in milk production:

The Panel agrees that the Milk Board owed Mr. Van Herk, as the holder of restricted TPQ, a duty of fairness in determining whether to cancel his TPQ and licence. We also agree that the content of this duty of fairness is attenuated by the fact that quota and licencing are privileges and not rights. (relying on *Sanders, supra*)

79. In our view, the general application of the law would be to deny the appellants' request for exemption or grandfathering from present or future rules changes unless, on a consideration of the duty of fairness and principles of natural justice, an exercise of discretion in their favour is warranted. We turn now to consider those issues.

### **III. Consideration of Duty of Fairness Owed to Appellants**

#### **a) Reliance on original rules/representations**

80. The appellants' argument appears to be that they relied on a strict interpretation of the rules as they existed at the time of application when making the decision to apply as a producer-vendor and preliminary conversations with Egg Board staff which did not disclose any specific requirements or minimum vending requirements for a producer-vendor.
81. Mr. Les says he was aware that the producer-vendor was a different category than a conventional registered producer and that the expectations of the Egg Board for a producer-vendor were different than that from a registered producer. Mr. Les says both he and his father made diligent efforts to understand the rules that were applicable to the producer vendor category including reviewing the Consolidated Order in force at that time and significantly they identified no particular vending or other requirements. His father says that the fact that the producer-vendor category did not impose any specific or hidden vending requirements was pivotal in his decision to support and finance his son's operation. Apart from being told to make "best efforts to self-market his eggs", there was no indication from the Egg Board or its staff that there was a minimum vending requirement or that it be met by sales of a particular type.
82. The Egg Board submits that the purpose of the NPP draw under which these appellants were successful was to start a new entrant who would self-market their own production. When the draw was conducted, business plan scores were not used to determine draw entrance as happens now but the application had to show a real intention to operate as a producer-vendor which, the Egg Board argues, J&E's did.
83. The Egg Board says that despite the language used in the definition for producer-vendor and the evidence of the appellants to the contrary, Ms. Lowe's evidence is that she would not have made any comment to suggest that the appellants need only pay perfunctory lip service to their standing as a producer-vendor. It has always been her understanding that the appellants were obliged to self-market the majority of their production and any comments she may have made would have been consistent with that understanding.
84. The appellants' argument seems to be that having got through the door on the original definition of producer-vendor (which they say is capable of being interpreted so broadly as to allow a producer-vendor to in fact not vend anything at

all), they should be exempted and allowed to pursue a business model of their choosing.

85. We see several problems with the appellants' argument.
86. First, the Egg Board's Consolidated Orders clearly reflects that different business models are contemplated under the three categories of licenced producer described in paragraph 21 above. It does not appear to be in dispute that the appellants understood the distinction between these business models in 2015 given that the appellants' application acknowledges that a producer-vendor self-markets eggs and the need to use best efforts to self-market. The business plan also sets out:
  - As producer-vendor they would be in touch directly with suppliers and consumers in community;
  - Free-Range eggs are a small but growing portion of the BC egg market;
  - Buy-local movement has created a consumer base capable of supporting producer-vendors to network with the community and supply Free Range eggs directly from the farm.
  - Removing one step in the process of getting eggs from the chicken to the table enables consumers to better understand where their food comes from, which is very important.
87. While not explicit, the third and fourth bullet points above seem to acknowledge that J&E recognized a benefit to direct marketing their eggs to end users, rather than marketing through a grader.
88. The appellants' position seems to be that while a producer-vendor self-markets eggs, there was no minimum vending requirement to do so in 2015 and, had they understood that they were intended to self-market most or all of their eggs, they "might have done things differently."
89. Second, we do not agree that there must be a historical reason for the lack of a minimum vending requirement in order to give credence to the Egg Board's expectation that a producer-vendor self-markets their production. We also do not agree that a producer-vendor should be free to use whatever business model it prefers for marketing its eggs. In this situation, J&E received new entrant quota on the basis of a business model that it would be self-marketing its egg production. J&E is now arguing it should be free to market its eggs without restriction.
90. As covered in paragraph 18, because quota is limited, who gets it and how much becomes a strategic question for the Egg Board. The Egg Board is responsible for fulfilling BCFIRB's directions that some quota be prioritized for new entrants and other public policy objectives.

91. The intent of the broad “producer-vendor” definition (as per the Scheme and the Consolidated Orders) would appear to allow self-marketers considerable flexibility to produce and market, offer for sale, sell, store or transport all or any of their regulated product but not the product of other producers. The use of "all or any" and the term "offer for sale" would appear to reflect an intentionally flexible definition that recognizes the challenges and variability associated with self-marketing. A producer-vendor in the process of building a self-marketing business model or who suffered losses of customers or local markets would not necessarily be offside the Scheme or Consolidated Order in the short term as long as the intention to self-market in the long term remained.
92. The intent and concept of producer-vendors and the opportunity to self-market in the regulated marketing system is well established. Defined and distinct self-marketer/direct-marketer license categories are a clearly established, long-standing regulatory practice by BC’s regulated and supply-managed commodity boards and have been directed and upheld by BCFIRB as sound marketing policy<sup>9</sup>. For example, there is a self-marketer designation for chicken growers. In turkeys, there is a direct-vendor grower license that restricts a grower to marketing at the farm gate, farmers’ markets, butcher shops, or restaurants but not through conventional commercial market chains.
93. These types of designations do not contemplate “producer-vendor” type producers making their own decisions without recourse to the first instance regulator as to whether they chose to self-market or not. It would not be sound marketing policy for a commodity board to allow this to happen as it would:
  - a. create a risk to orderly marketing; and,
  - b. remove the opportunity for access to new entrant quota for those producers with a true intent and ability to self-market.
94. The Egg Board’s producer-vendor rules could be more explicit, per the examples given in other industries, as to marketing restrictions. This could aid applicants in understanding the Egg Board’s self-marketing expectations, but it would also remove flexibility. However, any “lack of clarity” does not override the intent of the producer-vendor licence category which appears to have been understood by the appellants, as per their business plan, at the time they applied for the new entrant quota.
95. Third, it is also significant in our view that the appellants do not point to any specific representation from any particular person on behalf of the Egg Board to the effect that a producer-vendor is not expected to self-market eggs. Rather, they seem to be saying no one said anything about any minimum self-marketing requirement in 2015. This is not surprising as there was no “requirement” in the

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<sup>9</sup> Specialty Markets and New Entrants Submissions: Policy, Analysis, Principles and Directions Decision September 1, 2005 (insert link),

Consolidated Order in 2015 beyond what appears to have been the acknowledged view by all concerned that a producer-vendor self-markets. The panel finds this view was consistently reflected in the correspondence between the appellants and the Egg Board over many years.

96. Fourth, 2015 was the first time the producer-vendor category was part of the NPP. It is not unreasonable to expect that the Egg Board would look at the performance of its producer-vendor new entrants just as it looks at the performance of any new entrant to the industry. The Egg Board has an interest in ensuring that any new entrant is meeting the policy objectives of the NPP. In the case of a producer-vendor, it is reasonable to expect that the Egg Board would be interested in how well the producer-vendor was performing at being a self-marketer. This would help inform the Egg Board whether its particular policy objectives (e.g. supplying specialty product to regional or local markets) were being met or whether regulatory changes were needed to meet policy goals.
97. Fifth, the appellants had the option to apply to receive new entrant quota in three other categories in the 2015 NPP selection process and develop a business plan based on marketing through a grader, rather than self-marketing. In submitting a business plan for the opportunity to receive quota, all applicants are taking a calculated risk should they be successful. In this instance, the appellants may have taken a calculated risk by applying to the category with the better odds of success to receive quota while expecting more leeway on their marketing avenues given the broad definition of “producer-vendor”. However, in our view it is not accountable for the Egg Board to guarantee business success to new entrants at the cost of orderly marketing and BCFIRB’s policy requirements.
98. The appellants’ argument appears to be that they are entitled to operate under the 2015 rules in existence at the time of their application. We have already discussed the general principle above that a regulated producer has no ongoing “right” to grow regulated product (see Section II above). Quota is a license to produce and the regulator must be able to change rules as, and when, it determines it is appropriate to achieve policy goals and objectives. This is especially so where the regulator and the producer appear to be at cross purposes wherein the regulator is seeking greater compliance in support of its sound marketing policy objectives and the producer is seeking greater flexibility in how the program operates.
99. In this case, our review of the evidence demonstrates that the Egg Board repeatedly advised the appellants of its expectations around self-marketing for the producer-vendor business model. Mr. Les repeatedly acknowledged the obligation to self-market and expressed an intention to do so. He developed several different plans for how he intended to meet targets. Unfortunately, the plans have not led to a material change in the appellants’ self-marketing. This appears to be due to the fact that “self-marketing” does not mean self-marketing to the appellants. While the appellants have repeatedly described their “self-marketing” plans, these plans appear to involve conventional relationships with grading stations and/or

distributors (Golden Valley, Vitala, Star Eggs) who use J&E's production to fulfill their markets as opposed to J&E's markets. The July 2019 update for J&E's production disclosed 2.56% self-marketed production with a three month rolling average of 1.74%. This means that approximately 98% of J&E's production is being marketed by graders or distributors.

**b) Improper delegation/procedural fairness concerns**

100. Much of the appellants' argument dealt with procedural fairness concerns. They say the Egg Board has produced a limited decision record with no evidence from any directors about what interests the Egg Board considered in rejecting the request for an exemption and imposing new requirements on J&E's sales counted towards its vending requirement. They are critical of Egg Board staff and accuse them of being misleading throughout 2018 and 2019 when they advised the Egg Board that J&E was failing to comply with the minimum vending requirements and not being accountable to the vending requirements they "signed up for" in the lottery. They are also critical of the affidavit filed by Egg Board member Matt Vane as it says almost nothing about the Egg Board's decision-making process or reasons for the decision under appeal.
101. In response, the Egg Board says it invested considerable time and effort to help and encourage the appellants. Ms. Lowe's evidence is that she cannot recall the Egg Board spending more time with any other NPP entrant. In response to the allegation that Egg Board staff "mischaracterized" the appellants' request, it says Mr. Les attended in person before the Egg Board on August 16, 2018 and September 19, 2019 to express his position. Further, Mr. Vane's evidence is that the Egg Board was consistently and fully briefed by staff with respect to their interactions with Mr. Les.
102. Our finding above that the amendment to the producer-vendor definition in 2017 did not create a new requirement supersedes many of these procedural fairness arguments and as such, it is unnecessary to address them in detail. We do agree however, that for many years the Egg Board and the appellants have been at cross purposes. The Egg Board and its staff appear to have adopted a consistent view that a producer-vendor self-markets a significant portion of his egg production and they have continued over many years to message that to the appellants. From 2017 onwards, the Egg Board was persistent in its efforts to get the appellants to self-market more (75%) of their eggs.
103. The appellants, on the other hand, while repeatedly acknowledging the need to self-market and developing aspirational plans to self-market, have in fact chosen not to self-market. The appellants have preferred to establish business relationships with third parties to grade and market their eggs which are not self-marketing. The panel does not believe that the appellants think they are in fact self-marketing. The appellants say "being personally responsible for farm management, sales and distribution on top of working full-time is not possible" and



“to personally run a farm, market, sell, and distribute a large volume of eggs is not feasible” and a relationship with a grader/distributor is the most effective use of their time. Presumably the appellants have pursued this arrangement in the belief that, despite the position of the Egg Board that a producer-vendor self-markets eggs and the appellants’ apparent agreement with that proposition, in the absence of enforceable requirements to self-market in the Consolidated Order, the appellants do not have to self-market.

104. The panel does not find evidence that the Egg Board improperly delegated its decision making to staff nor do we find any intention on the part of staff to mislead the Egg Board. Rather, it appears that the Egg Board and its staff were proceeding on the understanding that producer-vendors self-market a significant proportion of their eggs. When faced with an ongoing situation where the producer-vendor was not self-marketing, the Egg Board focused on establishing a benchmark for what was enough self-marketing instead of focusing on the requirements a producer-vendor had to fulfill as a matter of certainty and enforceability.

**c) Egg Board’s failure to exercise discretion**

105. The appellants argue that the Egg Board had the discretion to grant J&E an exemption from the minimum vending requirement and had a duty to treat J&E fairly, and list the following examples of unfairness:
- (a) failing to consider the interests of J&E in applying the “requirement”;
  - (b) basing decisions on the interests of other producer-vendors impacted by the minimum vending requirement when in fact no such producer-vendors existed;
  - (c) failing to consider J&E’s request for exemption and/or improperly delegating the decision to staff; and failing to consider decisions impacting J&E through a lens of SAFETI and/or sound marketing policy generally.
106. The appellants rely on two previous decisions of this board dealing with exemptions and grandfathering of specialty producers. In *K&M Farms v. BC Chicken Marketing Board*, (May 17, 2019) the Chicken Board was found to have erred in not exercising its discretion in the appellant’s favour by confining its gaze too narrowly to an existing leasing policy and not considering the broader policy implications and sound marketing policy justification (including SAFETI) in support of an exemption. Similarly, in *Hong v. BC Chicken Marketing Board*, (July 26, 2001), the Chicken Board was found to have erred by not taking into account the impact of its past actions, where it failed to enforce regulations to support a specialty producer in good standing, when considering whether to exercise discretion in the appellant’s favour.

107. The appellants here argue that the Egg Board was required to consider the interests of J&E and other small producers requiring accommodations to promote viability of their operations, enhance market differentiation and to consider the interests of customers who purchase directly from J&E or from the Free Bird Organic joint venture. The Egg Board was required to consider the historical regulatory context and J&E's efforts to ensure compliance, heightened by the fact that no other industry participants were impacted by the imposition of the minimum vending requirement.
108. The Egg Board did not respond to this argument.
109. While the panel acknowledges that our findings above (see Section I) that the Egg Board made an error when it sought to impose a 75% "requirement", it is important to address the appellants' arguments related to what is an appropriate exercise of discretion on the facts of this case.
110. In our view, the appellants' reliance on the *Hong* and *K&M* decisions is misguided. Both of those decisions are distinguishable because in both appeals the commodity board (and ultimately BCFIRB) was being asked to exercise its discretion to support a niche specialty producer whose farm operation was being negatively impacted by the decisions of the commodity board. Mr. Hong sought to obtain a specialty permit to produce 1500 birds/week as if he had been in production on July 1, 2000 (in the same manner as other specialty producers) when new rules came into effect. *K&M* was seeking to have its seasonal production of pasture-raised chicken annualized as opposed to being required to meet period-by-period compliance rules for conventional production.
111. In both cases, the appeal panels decided in favour of the appellants and concluded that an exercise of discretion was warranted to support these small specialty producers and self-marketers. These exercises of discretion were found to reflect sound marketing policy and in the case of *K&M*, were supported by a SAFETI analysis.
112. In the case of these appellants, there does not appear to be any dispute that, even at the time of application, a producer-vendor, as distinct from a conventional producer, is a business model where the producer self-markets eggs. The appellants' business plan discloses this understanding. The Egg Board's communications disclose the same understanding. The appellants' pre and post application investigations confirm this understanding. While we agree the NPP was silent on the specific requirements of what would be enough self-marketing, we find that there has always been an expectation that a producer-vendor self-markets eggs.
113. The problem for these appellants is what they are seeking is an exercise of discretion which would, in effect allow them to act like conventional producers, where a grader or distributor does the marketing (whether that be Golden Valley,

Vitala Foods or Star Eggs in Saskatchewan). The appellants expressly did not apply as conventional producers or as enriched cage producers; instead they applied under the new producer-vendor category. Despite years of discussion and aspirational targets for self-marketing, the appellants have chosen not to self-market in any meaningful way. They have chosen a business model where a grader or distributor is primarily responsible for finding and filling markets. We acknowledge that this decision may be in part based on the rightly held belief that the Egg Board cannot enforce requirements that do not exist.

114. However, the central question, and the one we now turn to is a consideration of whether, taking into account SAFETI and sound marketing policy, the Egg Board ought to have exercised its discretion in favour of the appellants?

**d) Application of sound marketing policy/SAFETI principles**

115. The appellants argue that the record discloses that the Egg Board failed to consider SAFETI principles and the sound marketing impact of its decisions on J&E. The appellants say that J&E, a small new entrant producer, has been prevented from expanding in part due to the erroneous determination that it was not in compliance with a “requirement” that is not set out in the Consolidated Order. Apart from criticizing the actions and records of the Egg Board, the appellants do not explain how exempting J&E from any self-marketing fits within a SAFETI analysis or reflects sound marketing policy.
116. The Egg Board argues that regardless of whether the appellants’ beliefs regarding their obligations as a producer-vendor are reasonably held, it is not sound marketing policy to allow persons with priority access under the NPP on the basis of a stated intention to self-market a material amount of their own production, to not market any material amount of their production or to outsource their marketing or vending to a third party.
117. The panel has discussed sound marketing policy above and the overriding policy directives coming out of the Ministry of Agriculture’s 2004 Regulated Marketing Economic Policy and the 2005 Specialty Review. These directives encourage commodity boards to be responsive to specialty, niche and other innovative marketing opportunities and to use new entrant programs to prioritize those persons seeking to produce specialty product or serve a regional markets over those seeking to produce mainstream production in the highly concentrated lower mainland. They also support the need for diversity in production practices and farm differentiated practices to meet market demand. As recently as 2018, BCFIRB in its Quota Assessment Tools Supervisory Review confirmed the continuing objective that commodity boards be responsive to niche market demands.

118. The panel sees the Egg Board's addition of the producer-vendor category in the 2015 NPP as a way of targeting new entrants to support specialty and regional niche markets. The appellants' own application speaks to their support of these same policy objectives including the desirability of direct contact between producer, suppliers and consumers, product differentiation (free range eggs), supporting the buy-local movement, networking with the community to supply free range eggs directly from the farm, and removing one step in the process of getting eggs from the chicken to the table to help consumers understand where their food comes from. These are, in our view, all worthwhile policy objectives.
119. The panel has conducted our own SAFETI analysis in the following paragraphs.
120. Strategic: In considering whether to exempt J&E from any future self-marketing requirements, the panel's expectation is that the Egg Board would consider how any such exemption fits within the context of any overall marketing board policy directions established by the NPMA, relevant government goals and directions, relevant supervisory directions of BCFIRB, and its strategic plan, in order to assess and determine if exemption from self-marketing would support Egg Board strategic priorities. In the panel's view, it is difficult to see how exempting J&E from any self-marketing obligation would support any strategic direction of the Egg Board. While exemption would allow a new entrant to expand and grow, that expansion would not promote the policy objectives of the Egg Board in adding the producer-vendor category to the NPP in the first place which include producing differentiated product to meet consumer demands for niche products and serve regional markets.
121. Accountable: In considering whether a decision to exempt J&E is accountable, we have considered who the decision should be accountable to. There were in excess of 100 applicants for the 2015 draw and the number of eligible applicants was 64. Four new entrants were started. In our view, to exempt J&E from any future self-marketing requirements and permit them to act like a conventional producer in the Lower Mainland Region (something that was not even contemplated by the 2015 NPP) would not be accountable to those who applied under the categories of the 2015 lottery. We agree with the Egg Board that there is no reasonable basis to assert that the appellants cannot be compelled to adapt to new regulatory requirements, as long as they are given reasonable time to do so. Another consideration is the need for the Egg Board to be accountable to those it regulates and those who seek to be regulated. As we have identified above, there is a need for the Egg Board to enact clear rules so those who are within the system and those who seek to enter the regulated system can know and understand the rules.
122. Fair: Fairness refers to the process followed and is not limited to common law procedural fairness. A fair process to follow when considering amending the requirements for producer-vendors would, at a minimum, require the Egg Board to consult with the appellants to clarify their business model, identify any historical contribution to a particular niche or regional sector of the market and determine

how best to recognize and/or accommodate that contribution. Given our conclusion that the current Consolidated Order is inadequate and there is a need for the Egg Board to amend the producer-vendor category of the NPP, fairness dictates that it engage with J&E to set clear expectations on its policy objectives, identify requirements to help meet those objectives, and set reasonable timelines for J&E to meet those requirements.

123. **Effective:** A decision to exempt J&E from any self-marketing, while it may support an objective of supply management for orderly production, does so at the expense of an actual producer-vendor self-marketing a farm differentiated product into a local or regional market. In the panel's view, this is not effective.
124. **Transparent:** We have discussed above that the Egg Board made an error by thinking its 2017 amendment to the definition of producer-vendor in the Consolidated Order imposed a 75% minimum vending requirement on the appellants. While J&E does not appear to have been following the spirit of the producer-vendor category, it cannot be said that it failed to meet a particular requirement. Transparency here requires the Egg Board to create clear rules especially when the consequence of not following rules could result in the cancellation of quota.
125. **Inclusive:** Given our conclusions above, inclusivity here really speaks to how the Egg Board should go about amending its producer-vendor rules. Direct engagement with the appellants is a must but so is engagement with the broader egg industry to determine how much regulation is necessary to achieve the Egg Board's desired policy objectives.
126. On the basis of the foregoing analysis and discussion, the panel concludes that the Egg Board did not err in deciding not to exempt J&E from self-marketing requirements. While it would have been better had the Egg Board done its strategic thinking before adding the producer-vendor category to the NPP in the first place, it will now have to consider how to balance strategic priorities with reasonable expectations for how J&E conducts itself going forward.

#### **IV. Appellants' request for corollary relief**

127. In addition to their request for an exemption from minimum vending requirements (which we have dismissed), the appellants seek a declaration that there has never been a minimum vending requirement applicable to it or, alternatively, an order exempting J&E *nunc pro tunc* from any applicable minimum vending requirement such that previous decisions based on non-compliance with the non-existent requirement are vacated as nullities.
128. The Egg Board did not respond to this request for relief.

129. The panel declines to make the order sought by the appellants. This appeal relates to a specific request by the appellants in September 2019 to be exempted from the 2017 amendment to the definition of producer-vendor in the Consolidated Order. The Egg Board initially challenged this appeal as out-of-time arguing that its email response to the appellants' request was not a "decision" but merely a reiteration of the Consolidated Order as amended in 2017. Relying on *Saputo v. British Columbia Milk Marketing Board* (May 29, 2008), the Egg Board argued that an appellant cannot, simply by writing a letter to a commodity board objecting to a given order, generate a right of appeal.
130. While this argument was not successful in the summary dismissal application, it does have some application to this request for corollary relief. The appellants seek to use their September 2019 letter and the Egg Board's October 7 response to create rights of appeal for separate decisions made by the Egg Board in relation to J&E's good standing. However, it is notable that J&E did not challenge the decisions related to good standing within statutory time limits and in fact agreed with these decisions at the time.
131. This appeal proceeded by way of written submission and affidavit. The parties chose not to cross examine on the affidavits filed. Good standing with the Consolidated Order is a broad concept and involves a consideration of specific rules in light of specific facts. Good standing was not at issue in this appeal. We heard some evidence related to the appellants' over production due to insufficient quota credits and Free Bird marketing another producer's production as well as J&E's production, in addition to the allegations of non-compliance related to the 75% "requirement." However, the record of whether the appellants were or were not in good standing with the Consolidated Order at the time decisions were made to deny them eligibility to quota allocations is incomplete.
132. With the benefit of hindsight and legal advice, the appellants seek a ruling which falls squarely within the analysis in *Saputo*, supra where the presiding member stated:
- In my view, it is improper for aggrieved persons to attempt to "breathe life" into an appeal merely by requesting that a board reconsider an issue. If a person has a legitimate complaint about an order, decision or determination of a commodity board, the proper course is to commence an appeal within the statutory time period. This is especially important where it is the regulatory framework that is challenged. Certainty and stability require that appeals be heard on a timely basis. Where the time to appeal is missed, it is incumbent on the Appellant to show special circumstances why the time to file the appeal ought to be extended.
133. In the panel's view, it would not be appropriate to allow the appellants to use their appeal related to a request for an exemption to go back in time to raise matters which were not appealed within the statutory time limit and not raised in the Notice of Appeal or the pre-hearing conference.

## CONCLUSION

134. This appeal was framed as a challenge to the Egg Board's refusal to exempt the appellants from the 2017 amended definition of producer-vendor and honour the 2015 definition in place when the appellants' were successful in the NPP lottery. The panel has concluded that while the Egg Board's Consolidated Order defines a producer-vendor, neither the 2017 amended definition or the 2015 definition of producer-vendor create an enforceable self-marketing requirement (see Section I). Therefore, we conclude that the appellants' request for an exemption from the existing definition is not a meaningful remedy.
135. The panel has concluded that the Egg Board needs to amend its Consolidated Order to properly reflect the rules and or requirements for the producer-vendor category of the NPP in order to ensure fairness and transparency to those who apply under this category and those who are chosen. We see the producer-vendor as a distinct business model (from a conventional producer who ships to a grader or a producer-grader who produces and grades his own eggs) where the producer produces and markets a significant portion of their own egg production. As a matter of sound marketing policy, the panel supports the underlying purpose of the producer-vendor category to target new entrants to support new and changing specialty and regional niche market demands and provide flexibility to support innovative production.
136. The panel does not see any sound marketing policy justification to exempt the appellants from future amendments and allow them to operate as conventional producers in the Lower Mainland (shipping through a grader or distributor) especially when the appellants themselves spoke of similar policy goals (related to the desirability of direct contact between producer and their community to supply free range eggs direct from the farm) in their application.
137. Prior to amending its Consolidated Order, the Egg Board will need to engage with the appellants and make a determination as to whether there is a need to accommodate J&E within its new regulation either through an exercise of discretion or a timeline to come into compliance.
138. Any proposed revision to the NPP and the producer-vendor category is subject to BCFIRB prior approval (s. 37(c) of the Scheme). This panel is not seized with the prior approval of any proposed amendments but, at the discretion of the Chair, may participate in any future supervisory decision.

## **COSTS**

139. The appellants seek their costs in this appeal arguing that the Egg Board deemed them not in good standing on the basis of an erroneous view of the Consolidated Order. As a result, the appellants lost out on certain quota allocations. We note that the appellants did not appeal findings that they were not in good standing within the statutory time limit or at all. Indeed, if they had, perhaps the issues identified in this appeal may have come to light earlier. An order for costs is unusual and in our view, the circumstances here do not justify assessing costs against the Egg Board.

## **ORDER**

140. The appellants' application to have the 2015 Consolidated Order definition of producer-vendor honoured, so as to eliminate any present or future self-marketing requirement being imposed on their operation, is dismissed.
141. Pursuant to s. 8(9)(c) of the NPMA, the panel is referring the issue of the necessary and/or appropriate requirements, including licensing, for producer-vendors and any related changes to the NPP in the Consolidated Order back to the Egg Board with the following directions:
- a) Within 30 days of this decision, the Egg Board is to advise BCFIRB of its consultation plan setting out the transparent, inclusive, fair and accountable process it will follow before recommending potential amendments to the producer-vendor category, including licensing and NPP application requirements of the Consolidated Order.
  - b) As part of its consultation plan, the Egg Board is to advise BCFIRB of how it intends to consult with the appellants and its other stakeholders.
  - c) The Egg Board is to provide its recommendations on potential amendments to the Consolidated Order and NPP not later than 120 calendar days from the date of this decision, fully supported by a process consistent with the SAFETI principles.
  - d) Revisions to the producer-vendor category and NPP are subject to BCFIRB prior approval (s. 37(c) of the Scheme). As part of that prior approval process, BCFIRB will determine what further steps, if any, the Egg Board is required to undertake and any additional process it determines is necessary before any amendment can be enacted.



142. There is no order as to costs.

Dated at Victoria, British Columbia this 14<sup>th</sup> day of August 2020

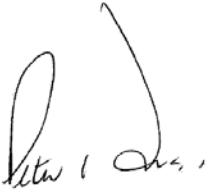
**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**



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Pawanjit Joshi, Presiding Member



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Peter Donkers, Chair



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Al Sakalauskas, Vice Chair