

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND APPEALS CONCERNING QUOTA ALLOCATION

**BETWEEN:**

ROBERT HOPCOTT d.b.a. MEADOWS FEEDLOT  
CLOUDBURST CRANBERRIES LTD.

**APPELLANTS**

**AND:**

BRITISH COLUMBIA CRANBERRY MARKETING BOARD

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Richard Bullock, Member
For the Appellants Meadows Feedlot Cloudburst Cranberries Ltd.	Mr. Robert Hopcott Mr. Don Middleton
For the Respondent	Mr. Jeff Hamilton, Chair Ms. Barb Lawson, Member
Date of Hearing	February 1, 2002
Place of Hearing	Abbotsford, British Columbia

## **INTRODUCTION**

1. During the early summer of the 2001 crop year, the British Columbia Cranberry Marketing Board (the “Cranberry Board”) issued a quota allocation to all producers in order to accommodate a “set aside” to reduce production to a level established by the Cranberry Marketing Commission in the United States. The set aside was necessary to deal with an oversupply of cranberries in North America.
2. The Cranberry Board informed producers that if they were unhappy with their allocation, they could “appeal” the decision to the Cranberry Board, and a crop estimation would then be done. Thirteen producers appealed and the Cranberry Board arranged for a crop production specialist to visit each farm and do a production estimate. As a result, further quota allocations were issued to the thirteen disputing producers.
3. For eleven of the producers, the crop estimate proved to be higher than actual production. For the remaining two producers, for whatever reason, the production estimate was significantly below actual production. As a result, both producers were unable to sell a large portion of their crop to their processor, Ocean Spray Cranberries Inc. (“Ocean Spray”), resulting in a considerable loss of income. These two producers, Robert Hopcott d.b.a. Meadows Feedlot (“Mr. Hopcott”) and Cloudburst Cranberries Ltd. (“Cloudburst”) appealed the Cranberry Board’s 2001 allocation to the British Columbia Marketing Board (the “BCMB”).
4. The appeals were heard on February 1, 2002.

## **ISSUE**

5. Was the basis on which the Cranberry Board calculated 2001 marketing allocations for new producers, and/or producers who have not been in full production the last seven years, accurate and fair as a matter of sound marketing policy?

## **FACTS**

6. Cranberries grow wild in British Columbia. In the late 1950’s, commercial cultivation began and during the 1960’s the industry expanded with more cranberry bogs being established.
7. In 1968, the Cranberry Board was established to regulate the industry in British Columbia. In the United States, several years previously, a Federal Marketing Order created the Cranberry Marketing Commission under the United States Department of Agriculture.

8. Throughout the 1970's, there was relative stability in the industry with expansion and rising returns. By 1980, there were 1200 acres of cranberries in British Columbia. Currently, there are over 5000 acres planted in cranberries. British Columbia production is approximately 500,000 barrels. This is expected to increase in the short term with new acreages coming into full production and renovations to old acreages underway.
9. Virtually all of British Columbia's production is exported to the United States and over 90% of the crop is delivered to Ocean Spray, an agency of the Cranberry Board. Ocean Spray controls approximately 70% of the industry in North America.
10. In the 2000 crop year, cranberry production was very high. As a result, 60% of the cranberries required for the market in 2001 were already in storage at Ocean Spray at the start of the 2001 crop year. In order to limit production in the United States, the Cranberry Marketing Commission established a set aside to restrict production for 2001. A system was developed to determine the amount of set aside for established and new growers in the United States.
11. Canada's production is a significant part of Ocean Spray's total poundage. The BC industry recognised that in order to "keep the borders open" it was important to "play the game". The Cranberry Board decided to put a provincial set aside in place. For established producers, it adopted a system similar to that used in the United States, basing the production allocation on a percentage of the best four of the past seven production years.
12. As had occurred in the United States, the Cranberry Board struggled with how to establish a set aside that was fair for new acreages. It takes a number of years for a cranberry vine to begin producing. There is some production from new vines in the fourth year and production increases in the fifth and sixth years. Generally vines are not in full production until the seventh year. The percentage method used to determine quota allocations for established acreages does not work due to the range of conditions in new bogs.
13. The Cranberry Board consulted with a number of experts in the field of cranberry production and appointed an Advisory Committee. The Cranberry Board was concerned that whatever system was used be justifiable in order to address any trade concerns. A model was developed based on average production in the fourth year with a ramp up formula to determine production. The Cranberry Board realised that although this system might not work for all producers, it was a reasonable starting point. Producers were given the right to appeal to the Cranberry Board if dissatisfied with their allocation.
14. Throughout the determination of the set aside for British Columbia, the Cranberry Board kept producers informed. Producers generally supported going along with the United States in an attempt to reduce production through a set aside. The Advisory Committee also concurred. A meeting was called in early July and quota allocations were issued. Producers were informed at the same time that if they were dissatisfied with their allocation they could appeal to the Cranberry Board.

15. The Appellants were two of the thirteen producers who disputed their allocation. The Cranberry Board asked Mr. Brian Mauza, Crop Production Specialist for Ocean Spray in British Columbia, to conduct crop estimations. Mr. Mauza developed a crop estimation method in consultation with Mr. Jim Matheson, of the Ministry of Agriculture, Food and Fisheries (“MAFF”) Crop Insurance Program, and Mr. Tom Baumann of the University College of the Fraser Valley.
16. This “ring toss” method involves a counter dropping a PVC rectangle in front of him in a predetermined sampling pattern for each field to be estimated. Berries larger than a “pinhead” are counted inside the rectangle at each drop site. The average count per acre is calculated and a field weight per acre of the berries at harvest is estimated. From that, the number of barrels of production per acre is calculated.
17. A producer’s total bog acreage is determined by their “Exhibit A” (a legal document certifying acreages in production for Ocean Spray) or confirmation of acreage from the Cranberry Board. Adding all the barrels per acre gives the total field weight for the acreage sampled. An adjustment is made to the field weight allowing for losses due to trash, unusable fruit, etc. to determine the number of useable deliverable barrels.
18. The estimates of production for the thirteen producers who appealed allocations were completed in late August. In early September, the Cranberry Board issued additional quota based on the results. Following harvest, it was evident that for eleven of the producers who had appealed, the estimation was higher than the actual production. As a result, these producers were able to deliver all their fruit. In the case of the two Appellants, the estimation was significantly lower than the actual production. There does not appear to be an explanation for this variance.
19. At the end of the 2001 season, total actual production in British Columbia was under the total provincial allocation.
20. As to the specific circumstances of Mr. Hopcott’s appeal, by letter dated August 14, 2001, he disputed his allocation of 3588 barrels to the Cranberry Board. Mr. Hopcott expressed dissatisfaction with the estimate method of determining the allocation for new producers. Mr. Mauza did a crop estimation and adjusted the allocation to 5088 barrels.
21. During harvest, on October 26, 2001, Mr. Hopcott again wrote to the Cranberry Board expressing dissatisfaction with the “ring toss” method used to estimate production as his production was proving to be considerably more than the adjusted allocation.
22. In a letter dated November 14, 2001, Mr Hopcott wrote again to the Cranberry Board advising that the estimation for his production was 25% low while he knew that the estimation on other farms was high. He gave the example of Highland Redi-green Turf (“Highland”) whose estimation was 38% high. Mr. Hopcott also stated that he was aware

of “dozens of loads of cranberries where switching of allocations have taken place”. This is a reference to a producer in an over-production situation arranging to ship his excess berries through another producer who is under-produced.

23. On the advice of Mr. Will Jesse, Ocean Spray’s Langley Plant Manager, Mr. Hopcott continued to ship cranberries over his allotment. Mr. Jesse advised him that Ocean Spray would reallocate his allotment to another producer, Highland, later. Unfortunately this was incorrect. According to Ocean Spray’s Cooperative Marketing Agreement, producers can only deliver cranberries from acreages identified in their Exhibit “A”. Mr. Hopcott’s cranberries sit cleaned and washed in Ocean Spray’s cold storage. Mr. Hopcott has not been paid for this production and it is his evidence that Ocean Spray wants this production and is prepared to pay for it.
24. The second Appellant, Mr. Don Middleton of Cloudburst, is an established producer. However, in the past he has mowed his vines to sell vine stock. He received an initial allocation of 3801 barrels, based on the average of the best four of the past seven years. By letter dated August 3, 2001, he appealed this allocation to the Cranberry Board. Given that he had been mowing his vines and that this, in his opinion, affected berry production for a number of years, the average of his best four years was not representative of his 2001 production.
25. In his August 3, 2001, letter Mr. Middleton informed the Cranberry Board that Mr. Mauza, in an informal berry count, had estimated the crop at 7000 barrels. Later that month Mr. Middleton requested that Mr. Matheson of MAFF conduct a Pre-Harvest Appraisal. Mr. Matheson and Mr. Baumann conducted the count on August 31, 2001. Although the preliminary result was 5374 barrels, at the hearing Mr. Matheson’s evidence was that his final estimate was 7151 barrels.
26. On September 18, 2001, the Cranberry Board informed Mr. Middleton by letter that his adjusted allocation for 2001, based on Mr. Mauza’s late August count, would be 4526 barrels. Mr. Middleton was informed of his right to appeal the decision to the BCMB.
27. Mr. Middleton decided to ship his extra berries through other producers who were under produced. He thought the Cranberry Board would allow this.
28. Mr. Middleton discussed how the transfers should proceed with Mr. Will Jesse, the Plant Manager at the Ocean Spray plant in Langley. Mr. Jesse advised Mr. Middleton to continue to ship his berries under his own grower number and Ocean Spray would look after the transfers at the plant. Mr. Jesse indicated there was unofficial approval from Ocean Spray for this advice.
29. In a letter dated December 19, 2001, Mr. Jack Crooks, Director of Grower Relations for Ocean Spray, informed Mr. Middleton that the transfers were not allowed because of the Cooperative Marketing Agreement and Cranberry Board orders.

30. Mr. Middleton contacted the Cranberry Board for assistance. In a letter dated December 12, 2001, Mr. Middleton was advised that following consultation and consideration of a number of options, the Cranberry Board determined that the transfers should not occur. Mr. Middleton was informed that if he was dissatisfied with the decision, he could appeal to the BCMB.
31. As with Mr. Hopcott's berries, Mr. Middleton's excess berries are in storage at Ocean Spray. It is his understanding that Ocean Spray is willing to pay for the fruit.
32. Mr. Middleton and Mr. Hopcott joined their appeals to the BCMB.

## **DECISION**

33. The Appellants argue that the Cranberry Board's method of calculating the 2001 set aside worked a particular hardship in their case. For long-term producers, the Cranberry Board averaged the four best years of cranberry production over a period of seven years, then reduced the average by 15%. This formula creates a high average and results in most long-term producers being able to ship all of their 2001 production.
34. The Cranberry Board recognised that the same formula would underestimate production for new producers or producers just getting back into production. However, the Appellants argue that the formula adopted by the Cranberry Board for new producers was inadequate. Further, the Cranberry Board's method of reassessing the allocation, using Mr. Mauza's "ring toss" method, seriously underestimated the production on both Appellants' farms.
35. The Appellants argue that like the other eleven producers who appealed their production, they too should be entitled to deliver all their production to Ocean Spray. This is especially so, given that BC did not meet its production levels for 2001. The Appellants proposed to transfer their excess production to under-produced producers and have those producers deliver the berries to Ocean Spray.
36. The Cranberry Board considered the Appellants' request to approve the transfer of the over-production to under-produced producers. However, the Cranberry Board argues that approving such a transfer would violate its Orders and would be unfair to those producers who entered into informal arrangements with under-produced producers perhaps at less than market value. The Cranberry Board also points out that even if Ocean Spray is directed to purchase the cranberries by the BCMB, there may be complications as the pool is now closed.
37. Section 8(9)(c) of the *Natural Products Marketing (BC) Act* allows the BCMB to make an order it considers appropriate in the circumstances where it concludes that a commodity board has erred as a matter of fair and sound marketing policy. Here the Appellants have excess production, harvest has passed and the production pool is closed. The reason for the

excess production has little if anything thing to do with the Appellants but rather results from a miscalculation of crop production. It is evident that the crop estimation technique used is unreliable. Better estimation techniques are available but time and budget constraints dictated the method used.

38. Should the Appellants be subject to the consequences of a miscalculation of their crop estimation? The Panel has concluded that this result is unfair – in other words, it is contrary to fair and proper marketing policy. Neither does the Panel agree that the Appellants should be penalised for failing to enter into “informal” arrangements with under-produced producers when such arrangements are contrary to Cranberry Board orders and a violation of contractual arrangements with Ocean Spray.
39. What is the appropriate remedy in this situation? The BCMB is not prepared to interfere with the contractual terms between these producers and their processor. Nor does this appear to be necessary as the evidence tendered before the Panel is that Ocean Spray is prepared to accept the cranberries in question. Moreover, in this case the producer contract restricts a producer to shipping only those berries grown on the bog set out in a producer’s Exhibit “A”. In the case of both Appellants, they do not seek to ship someone else’s product. Rather they seek an order allowing them to ship all the product grown on their Exhibit “A” bogs to Ocean Spray and not the reduced allocation allotment based on crop estimation.
40. As an aside, it should be noted that although Ocean Spray was not a party to these proceedings, it was aware of the appeals and its Crop Production Specialist was called as a witness at the hearing.
41. Of the thirteen producers who appealed their initial allocation to the Cranberry Board, the crop estimation technique was, for eleven of those producers, on average 28% higher than actual shipped volumes. This does not necessarily mean that in all cases except the two Appellants, the crop estimation was too high. As set out earlier, some producers who knew they were going to be over-produced sought out informal arrangements whereby an under-produced producer shipped their product. Thus, for these over-produced producers, the actual reported production by Ocean Spray was lower than what was actually grown. This results in the appearance of a high crop estimation. However, the end result for these eleven producers was that when the reduction formula was applied to their estimated production, they were able to ship most if not all of their crop.
42. To place the Appellants in a similar situation, their actual production figure should be increased by 28%, (the average amount the crop estimation exceeded actual production). This figure would then be subject to the set aside formula used by the Cranberry Board. The resulting adjusted allocations are as follows:

$$\text{Hopcott: } 6585.72 * 1.28 = \underline{8429.72} * .65 * 1.25 = \underline{\mathbf{6849.15}}$$

$$\text{Middleton: } 7815.63 * 1.28 = \underline{10004.01} * .65 * 1.25 = \underline{\mathbf{8128.25}}$$

## **ORDERS**

43. The appeals are granted.
44. In accordance with paragraph 42 above, the Panel directs the Cranberry Board to adjust the 2001 quota allocation of Mr. Hopcott d.b.a. Meadows Feedlot to 6849 barrels and to adjust the 2001 quota allocation of Cloudburst to 8128 barrels.
45. The Panel is prepared to leave the mechanics of implementing this direction to the Cranberry Board in consultation with the Appellants and Ocean Spray. If difficulties arise in carrying out this direction, the parties have liberty to apply to the Panel for further directions.
46. There will be no order as to costs.

Dated at Victoria, British Columbia this 1<sup>st</sup> day of March 2002.

**BRITISH COLUMBIA MARKETING BOARD**

Per

*(Original signed by):*

Christine J. Elsaesser, Vice Chair

Karen Webster, Member

Richard Bullock, Member