IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING A FLOCK SEIZURE

BETWEEN:

BILL POTTRUFF

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Hamish Bruce, Member
For the Appellant	Mr. Bill Pottruff
For the Respondent	Mr. Robert P. Hrabinsky, Counsel
Date of Hearing	June 12-13, and September 15, 2000
Place of Hearing	Nanaimo and Victoria, British Columbia

INTRODUCTION

1. On July 14, 1999, the British Columbia Egg Marketing Board (the "Egg Board") obtained a Search Warrant for the production facility of Mr. Bill Pottruff (the "Appellant") at Ladysmith, British Columbia. After confirming that the Appellant had in excess of the 99 laying hens permitted without quota and was thus in contravention of section 2(a) of the Egg Board's Standing Orders, the Egg Board issued a Seizure Notice on the Appellant's flock.

2. This appeal has been heard in two parts. The Appellant took issue with the process used by the Egg Board and its Field Representatives in obtaining and enforcing the Search Warrant. That aspect of this appeal was dismissed: see *Potruff Decision* November 12, 1999.

3. The parties agreed to adjourn the issue of whether the Appellant should have his operation legitimised as a result of special circumstances, in order to have that issue considered as part of a specialty egg review on Vancouver Island facilitated by the British Columbia Marketing Board (the "BCMB"). The purpose of this review was to assist the Egg Industry Advisory Committee ("EIAC") in making recommendations to the Egg Board regarding specialty egg production on Vancouver Island. The Appellant withdrew from that process and requested that this remaining issue be heard as an appeal before the BCMB.

4. The hearing proceeded on June 12 and 13, 2000. Closing arguments were heard on September 15, 2000.

ISSUES

5. As a result of special circumstances, including:

    a) the Egg Board's prior awareness and/or;

    b) its implicit permission of the Appellant's activities; or

    c) as a matter of sound administration of specialty egg production;

    should the Egg Board not have seized the Appellant's flock?

FACTS

6. In approximately 1994, the Appellant, Bill Pottruff and his wife Phyllis Pottruff, purchased two acres of agricultural land at 3259 Hallberg Road in Ladysmith, British Columbia. The Appellant built a barn on the property and some time in 1995 began raising laying hens.

7. On July 14, 1999 after obtaining a Search Warrant for the Appellant's barn, Egg Board Field Representatives confirmed that there were in excess of the 99 laying hens allowed by the

British Columbia Egg Marketing Scheme, 1967 (the "Scheme") for producers without quota. As a result, they posted a Seizure Notice on the door of the barn. At the time of the seizure, the Appellant had approximately 900 hens in his flock. By the time of this hearing, the Panel heard varying numbers for flock size between 1200-1500 birds.

8. The Appellant appealed the Egg Board decision to seize his flock. The issues relating to the Egg Board's conduct in respect of the seizure were dealt with in the earlier appeal: *Potruff Decision*.

9. The remaining issue under appeal, whether the Appellant should have his operation "legitimised" as a result of special circumstances, was initially adjourned in order to allow the Appellant to have this issue considered as part of a review of the specialty egg production situation on Vancouver Island. As mentioned earlier, the Appellant was not satisfied with that process and by letter dated February 20, 2000, he withdrew and asked to have his remaining issue set for hearing.

10. Subsequent to the first appeal, the Appellant's grading station operator, Mr. Gordon Galey, transferred quota credits to the Appellant to legitimise his unregulated production. As a result, by letter dated May 24, 2000, the Egg Board released its Seizure Notice on the Appellant's flock.

11. In that same letter, the Egg Board offered the Appellant a permit for the production of 1200 layers, under the Temporary Restricted Licence Quota ("TRLQ") Program. The Appellant did not accept the TRLQ Permit as a means of legitimising his production. Instead he reiterated his request to reset his appeal to have his operation legitimised, whether through the issuance of quota or alternatively through exemption.

ARGUMENT OF THE APPELLANT

12. The Appellant seeks an order that the Egg Board issue quota to his operation. The Appellant maintains that he is a supporter of the supply management system; it is a positive thing and must be there for the industry to prosper. However, in his case, he argues that the Egg Board has used supply management as a weapon to single out two Vancouver Island unregulated producers of free run eggs for enforcement. Other unregulated producers have not been subject to the same type of treatment

13. The Appellant maintains that the Egg Board has been aware of his operation for a lengthy period of time and yet chose to allow him to produce eggs outside the regulated marketing system. The Appellant points to a chick placement order for 1100 chicks disclosed by the Egg Board. He argues that as of the date on that order form, May 9, 1997, the Egg Board should have had notice that his laying operation consisted of 1100 birds, well in excess of the 99 layers allowed without quota. The Egg Board made no attempt to initiate a shut down of the Appellant's operation until June 1999.

14. The Appellant argues that the Egg Board has not properly managed the specialty egg market on Vancouver Island. He maintains that there are at least 89 flocks in excess of 99 birds on Vancouver Island. Apart from the Appellant and his father, Peter Pottruff, the Egg Board has subjected none of these other producers to enforcement action. The Appellant believes he was singled out because he ships his eggs through a licensed grading station.

15. The Appellant argues that the Egg Board is well aware of the number of unregulated producers on Vancouver Island as a result of the pullorum outbreak census that was performed in 1998. Yet, it chose not to investigate these flocks and bring them within their regulations. Based on this inaction by the Egg Board, the Appellant asserts that it is reasonable to assume that unregulated specialty production is a "grey" or unenforceable area of Egg Board regulations. It is not fair or within the realm of reason to single out only two of 89 flocks for enforcement.

16. The Appellant argues that a lot of resources have been expended over the past year or so looking at the specialty egg production on Vancouver Island. There have been supervisory reviews, hearings, appeals and public meetings throughout the province. The Appellant points to the difficulties that Island Egg Sales Ltd. ("Island Eggs"), a Vancouver Island grading station, has had obtaining product. He argues that Island Eggs has tried for years to get enough specialty egg production from the Egg Board to satisfy its markets. It had to turn to unregulated production in order to satisfy its market demands. The Appellant argues that the Egg Board has failed to enforce its regulations and address the needs of the market place. As a result, unregulated producers have begun to fill market demand.

17. The Appellant argues that the Egg Board has not fulfilled its mandate to manage egg production on Vancouver Island. It has not ensured that grading station operators have the product they need. It has not ensured that the grading station operators are able to prosper. Due to that fact, the Appellant argues that grading station operators have turned to unregulated producers, such as him. He argues that he took the ball, ran with it, developed a business and now four years later he is being told he is outside the regulations and should reduce his flock size to 99 birds. Such a request is basically the same as being told to shut down entirely.

18. The Appellant argues that this type of specialty egg production is a new form of production that has not been effectively managed by the Egg Board. The sector has grown largely outside the regulated system. The Appellant argues that the Egg Board should legitimise this form of production through the issuance of quota. Egg production operations in existence prior to the creation of the *Scheme* were "grandfathered" in 1967. The Appellant argues that his specialty operation can be likened to those earlier operations and as such, if specialty production is going to be regulated, it should be "grandfathered" with an issuance of quota.

19. The Appellant argues that as a result of the Egg Board's lengthy inaction, the Egg Board is subject to the principle of "*laches*". As such, the Appellant argues that the Egg Board is estopped from taking action to enforce its regulations against the Appellant.

20. The Appellant further argues that the Egg Board does not apply its regulations consistently to all producers. He maintains that he has been subjected to singular treatment. The Egg Board has chosen to pursue 2 out of the 89 unregulated producers on Vancouver Island. In trying to resolve the issues on appeal, the Egg Board offered the Appellant a permit under the TRLQ Program. This offer was made despite the fact that the Appellant did not qualify for TRLQ as he produces free run eggs. The TRLQ Program is limited to free range and organic specialty production. Other free run producers who have requested permits under this program have had their requests denied by the Egg Board. The Egg Board has also not taken any enforcement action against the Galey Brothers Grading Station, despite the fact that the Galey's have failed to remit levies on unregulated production. Thus, the Appellant argues the Egg Board applies its policies and regulations inconsistently among producers and grading stations.

21. The Appellant argues that he is the only one who has been treated punitively by the Egg Board. He is the only one who is being asked to throw away a $40,000 investment. He argues that this is not reasonable, legal, ethical or fair.

22. The Appellant has been offered TRLQ Permit. He maintains that TRLQ is not the answer to his problem. He has calculated his costs of production under the TRLQ Program and has determined that he will actually lose $9.70 per bird per year. If he accepted the Egg Board's offer he would be bankrupt before the end of the first year. He does not believe TRLQ is a viable option; it does not meet provincial government criteria that new entry programs be at little or no expense to the small producer.

23. The Appellant argues that the Egg Board has violated the following statutes and as such its conduct should not be condoned:

    a) *Farm Practices Protection (Right to Farm) Act* s. (1): applies to protect farms from court orders and injunctions;

    b) *Civil Rights Protection Act* which defines a prohibited act as any conduct or communication by a person that has as its purpose interference with the civil rights of a person by promoting hatred or contempt or a person or class of persons;

    c) *Canadian Bill of Rights* guarantees to the right of an individual to life, liberty security of the person and enjoyment of property and the right not to deprived thereof except through due process of law; and

    d) *Charter of Rights and Freedoms* s. 6(2)(b): which guarantees the right of any citizen of Canada the right to pursue the gaining of a livelihood in any province.

24. The Appellant also argues that the Egg Board and the *Scheme* violate the intent of the *Competition Act* and the *Natural Products Marketing (BC) Act*. The Egg Board is actively

protecting the organic farming sector farmers while at the same time it is taking action against the non-organic specialty sector.

ARGUMENT OF THE RESPONDENT

25. Before addressing the substance of the appeal, the Egg Board argues that it is necessary to consider the nature and scope of this hearing. Mr. Pottruff originally commenced his appeal by letter dated July 27, 1999. The bulk of the issues under appeal were dealt with by a different Panel of the BCMB in its Decision released November 12, 1999. In that decision, the BCMB held:

> 66. The Egg Board is empowered by the *Scheme* to ensure the orderly production and marketing of a regulated product, eggs. Its Standing Orders allow for a size exemption for unregulated production from 99 or less laying hens. Above that number, producers must obtain quota and be subject to Egg Board regulations with respect to that quota. In this case, the Egg Board had reasonable grounds to believe that the Appellant was in breach of the size exemption under the Standing Orders. The Egg Board had the legal authority under the *Act* and *Scheme* to enforce its orders. After spending three days attempting to contact the Appellant in a non-confrontational manner, the Egg Board acted reasonably and within its authority to use its power to obtain and exercise a Search Warrant.

26. The issue of singular treatment was also dealt with by the earlier Panel of the BCMB:

> **Singular Treatment by the Egg Board**
>
> 61. The Appellant has argued that the process followed by the Egg Board in seizing his flock was different than other seizures on Vancouver Island. He believes that he has been singled out for unusually harsh treatment. On the evidence before the Panel, it does not appear that the Egg Board has had to obtain many Search Warrants over the past ten years. However, according to Mr. Friesen, he has periodically been required to forcibly enter a barn. The seizure of Mr. Pete Pottruff's flock and the Douglas Lake flock are not readily comparable as both were done with the co-operation of the producer. In the Appellant's case, the Egg Board perceived it was being avoided and thus, a Search Warrant was necessary. The "singular treatment" complained of by the Appellant appears to be a direct result of his conduct and his belief that the onus remained on the Egg Board to contact him in some manner before taking any action.

27. Thus, it is the Egg Board's submission that the BCMB has already decided that the Egg Board had reasonable grounds to apply for a Search Warrant, that it acted reasonably within its authority in obtaining and executing the Search Warrant and that the singular treatment complained of by Mr. Pottruff is the direct result of his own conduct.

28. The Egg Board cautions that this appeal cannot be used to reargue the issues in the earlier appeal. After the November 12, 1999 decision, Mr. Pottruff applied to the BCMB to revisit a few points from his first hearing. On April 20, 2000, the Panel ruled as follows:

> The ground of appeal here, as we understand it, is that the seizure ought not to have taken place as a result of the Appellant's special circumstances including the Egg Board's prior awareness of and implicit permission of his activities, and as a matter of sound administration of specialty egg production under the British Columbia Egg Marketing Scheme, 1967 (the "Scheme").

> The remedy the Appellant seeks is an order setting aside the seizure notice and, attendant on that, an order from the BCMB that his operation be "legitimized" by the Egg Board.
>
> In our view, these grounds do not entitle the Appellant to ask the BCMB to amend the NPMA or the *Scheme*, or to launch a broadside political attack on supply management generally. It will be open to the Respondent to make appropriate objections if the Appellant's case deviates from the appeal as we've laid it out....
>
> The BCMB is not prepared to reconsider any aspect of its previous decision. If the Appellant was dissatisfied with the decision, his remedy was a statutory appeal to the Supreme Court of British Columbia within 30 days of receiving that decision.

29. The Egg Board maintains that this ruling is correct and is consistent with the doctrine of issue estoppel. The Appellant is barred, by operation of law, from re-litigating the appeal from the decision to seize, save only for the issue described and limited in its scope by the Ruling of the BCMB of April 20, 2000.

30. As to the scope of the appeal process, the Respondent argues that if the doctrine of issue estoppel is to be respected, the scope of this appeal must be limited. Neither party can tender evidence as to:

    a) any matter already heard and determined by the BCMB; and

    b) any other matter, which, although not already heard and determined by the BCMB, is beyond the scope of the issue described and limited in its scope by the BCMB's April 20, 2000 decision.

31. Stated in the converse, the Respondent argues that only "fresh" evidence, not previously tendered, relating to the remaining issue should be tendered to the BCMB.

32. As to the merits of the appeal, the Respondent maintains that this appeal is moot. From the time of his appeal to just before the commencement of this hearing, the Appellant had sought the following remedies:

    a) that the Seizure Notice be set aside; and

    b) that the Appellant's operation be legitimised either by exempting it from regulation or granting it quota or permit for his production.

33. The Egg Board dealt with the first branch of the request on May 24, 2000 when on its own initiative, it released the Seizure Notice. Thus, this request for relief is moot. As for the second branch of the relief sought, the Egg Board offered the Appellant his sought after relief by letter dated May 24, 2000. The Egg Board advised the Appellant that he only need to apply to the Egg Board for a TRLQ permit and it would be granted. Thus, prior to the hearing, the Appellant was made aware that there was no impediment to his obtaining all that

he was seeking in this appeal. That being said, one cannot reach any other conclusion than this appeal is now moot.

34. The Appellant, however, argues that this appeal is not moot. He now indicates that the relief he seeks is not permit, rather it is free quota. The Respondent argues that the Appellant's change in this regard underscores that absence of any real issue existing between the parties to this appeal.

35. As to the substance of the appeal, the Appellant has argued that the seizure ought not to have taken place as a result of his "special circumstances", including the Egg Board's prior awareness of and its implicit permission of his activities.

36. In this regard, the Respondent argues that the Appellant's submission is completely without foundation. The Respondent, relying on *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.* [1962] 1QB 416 and *Maritime Electric Co. Ltd. v. General Dairies, Ltd* .[1937] 1 WWR 591 (PC) maintains that it is trite law that estoppel cannot be relied on to release a person from a statute imposing a positive duty. It is immaterial whether the obligation is onerous; the obligation remains for the person to obey the law.

37. The Respondent argues that it is equally clear that *laches*, or estoppel by delay, cannot apply against the Crown: *Western Vinegars Ltd. v. Minister of National Revenue*, [1938] 2 DLR 503.

38. Thus, the Respondent argues that even if the Egg Board was dilatory in enforcing its rules, which of course it denies, there is no principle of law that would operate to excuse Mr. Pottruff from complying with Egg Board regulations. Thus, the Respondent argues that there is no legal basis for this appeal.

39. The Respondent also argues that there is no factual foundation for this appeal. There is no evidence that the Egg Board had prior awareness of, or had given implicit permission to the illegal activities of Mr. Pottruff. The evidence points to the contrary conclusion:

    a) while there was information suggesting the presence of 80,000 unregistered birds on Vancouver Island, there was no indication as to the identity of the producers;

    b) a grading station audit revealed two identifiable unregistered producers, Mr. Bill Pottruff and his father Mr. Peter Pottruff;

    c) timely enforcement action was taken against these two producers once identified;

    d) due to limited resources, the Egg Board relies upon grading stations and producers to cooperate and give it information relating to unregistered producers;

    e) Mr. Pottruff when specifically asked to identify unregistered producers refused; and

f) the Egg Board is aware of unregistered organic flocks but has been asked by the Ministry of Agriculture and the BCMB to forbear taking enforcement action against them.

40. The Respondent argues that the Appellant in this appeal has focussed on the relief sought by him, namely – free quota. The extent to which he has focussed on this relief is untenable. It would be an error for this Panel to concern itself with the relief sought by the Appellant except insofar as it is connected with this appeal. When the hearing is placed in its proper context, the Appellant's plea for free quota is wholly unconnected to or at least wholly inappropriate to the appeal. If one were to accept hypothetically, that the search and seizure should not have taken place, the only sensible relief would be to release the Seizure Notice. This has already occurred.

41. It runs contrary to common sense that the Appellant, if successful on this appeal, should receive free quota. In fact, it is offensive to common sense that where an Appellant who has engaged in production contrary to the rules in place governing all producers, now appears before this Panel demanding free quota. In essence, the Appellant is demanding free quota because he has violated the rules. If producers are going to be rewarded for breaking the rules, the Respondent argues that there is no point in having rules at all.

42. In order to give the Appellant free quota, the Panel must recognise that quota has to come from somewhere. Whether directly or indirectly, that quota would come from those producers who abide by the regulated system and be given to the Appellant who does not. This defies common sense. If there were any doubt on this point, the Respondent argues that in *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.* (August 11, 1993), Doc. Vancouver C912303, C916944, A920840, C920977, C921462, A921498, A924725, C925921, A911114 (BCSC); aff'd (1996) 26 BCLR (3d) 279 (BCCA), the British Columbia Supreme Court and Court of Appeal have rejected the notion of grandfathering producers into an existing quota system. Madame Justice Newbury states at page 160:

> Further, I know of no means by which a Court of law could order that quota be "created" or allotted out of thin air: it exists only as a bundle of rights under the scheme, and its essence is that it is limited in quantity.

43. The Respondent argues that the circumstances for "grandfathering" in the *Bari* cases were certainly more favourable than in the Appellant's case. His only basis for claiming entitlement to free quota or grandfathering is that he has been engaged in illegal production where others have not.

44. Finally, the Appellant has argued that the Egg Board has failed to properly manage specialty egg production. In essence, the Appellant argues that if he is not entitled to free quota as a result of the Egg Board's decision to seize his flock, perhaps there is some other reason why he should get free quota. The Respondent argues that this issue does not flow from the matter under appeal and as such the Panel ought not to pronounce on new policy as a means of disposing of this appeal.

45. The Respondent further argues that the remedy sought by the Appellant should not be confused with the issue under appeal. A person cannot arbitrarily pick a decision to appeal purely as a means of getting before the BCMB to ask for relief in the hope that the BCMB might pronounce on a policy which has the effect of granting relief wholly unconnected with the matter under appeal. The Respondent argues that the relief sought cannot be the "gravamen" in any proceeding.

46. It is the Egg Board's decision to seize the Appellant's flock that is the focus of this appeal. That is the only question which can and must be dealt with on this appeal.

47. The Respondent argues that the Appellant cannot be permitted to argue his entitlement to relief beyond the scope of the issue under appeal as the Respondent must know the case it has to meet. This concept is at the root of procedural fairness for natural justice. Although the BCMB exercises quasi-judicial powers on appeals and has plenary supervisory jurisdiction over the activities of various commodity boards, the exercise of these powers must be kept separate. In support of this proposition, the Respondent relies on the case of *Kingcome Navigation Co. v. Nanaimo Harbour Commission* (1983) 70 FTR 35 (FCTD).

48. The Respondent argues that the Panel cannot determine the issues under this appeal by reference to a policy that has yet to be pronounced by the Egg Board. To do so would deny the Appellant and the Respondent the opportunity to present a meaningful case. In every respect, the appeal would cease to have any real connection with the Appellant, the Respondent or the issue raised by the Appellant against the Respondent. The Panel has a duty to act judicially, dealing with the issue before them without bias and they must give each of the parties the opportunity of adequately presenting their case.

49. The Appellant cannot use a decision of the Egg Board merely as a vehicle to obtain standing before the BCMB in its quasi-judicial capacity and then effectively ignore the decision under appeal and invite the Panel to create some new policy that might have the effect of granting the relief sought by the Appellant. There is good reason why an appeal should not be used as a springboard to pronounce upon new policies; appeals are not consultative, they are adversarial. Appeals cannot form a sound basis for policy formulation.

50. The Respondent argues that the TRLQ Program and its potential application to the Appellant is exactly the kind of policy matter that should not be brought into the Panel's decision-making process. Broad industry stakeholders' interests have not been represented here. There is only a single Appellant with a single decision under appeal.

51. In the event that the Panel does not find the Respondent's arguments persuasive, the Respondent cautions that the specialty egg program has already been the subject of a Vancouver Island supervisory process. Out of this process came the recommendations of the EIAC that were then adopted by the Egg Board. The Respondent argues that these types of

policy questions have no place in the determination of the narrow point under appeal between the Appellant and the Respondent.

52. Returning to the issue under appeal, whether the seizure ought to have taken place as a result of the Appellant's special circumstances, including the Egg Board's prior awareness or its implicit permission, on the evidence, the Respondent submits there can only be one answer. The appeal must be dismissed. In addition, even if there is fault on the part of the Egg Board, there is no rational basis to find that the Appellant should be gifted free quota as a result of his illegal production.

REPLY OF THE APPELLANT

53. On Reply, the Appellant reiterated that the offer of TRLQ Permit which was made to him on the "doorstep" of this appeal, has not been extended to his father who applied for Permit back in May 1999. He reiterates that the Egg Board does not operate in a transparent manner. The only reason it made him the offer was the pending appeal.

54. The Appellant also asks how is it possible that the Egg Board can, on a whim, release a Seizure Notice on illegal layers? If the birds are illegal, the Seizure Notice should be enforced and the layers removed. The Egg Board is aware that grading station operator, Mr. Galey, has transferred quota credits from his operation to the Appellant's operation to bring it within regulation. However, this is not a long-term solution as Mr. Galey has indicated that these quota credits will be transferred to another farm in the fall. This transfer of quota credits was never intended to bring the Appellant's operation within regulation, rather it was a stop gap measure. The Appellant asks what happens when the quota credits are removed? Do his layers become illegal again?

55. The Appellant also asserts that there is clear evidence in the form of the Chick Placement Permit from 1997 that the Egg Board had prior awareness of his operation. In addition, the Egg Board was selective in that it did not audit all Island grading stations. The Appellant argues that perhaps the Egg Board was aware of his operation and thus chose to audit the grading station that would provide information about his operation. They chose to ignore another grading station that would have provided information about other unregulated producers. The Appellant asserts that the Egg Board should either audit all grading stations or audit none. They must treat every one fairly.

56. The Appellant also disputes the Egg Board's position that to provide the Appellant with free quota is to take quota from regulated producers as the national system allocates quota to the unregulated producer first. Further, if the Egg Board was to allocate the Appellant quota, the number of unregulated birds on Vancouver Island would decrease by 1500 birds and the number of regulated birds would increase by the same amount. Nobody would lose anything. The quota required to do this is already in the system.

57. The Appellant also takes issue with the argument that he is asking the Panel to pronounce on a new policy. He argues that the power to issue or revoke quota exists with the Egg Board. In the past, the Egg Board has issued small amounts of new quota to new entrants. The Appellant is seeking a re-enactment of that policy. The Appellant also argues that his appeal should not be narrowed as suggested by the Egg Board. Well in advance of the hearing of this appeal, the Appellant clarified the remedy he was seeking with the BCMB's Manager of Dispute Resolution Services. The Egg Board thus had received ample notice.

58. Finally, the Appellant argues that the Egg Board's TRLQ Permit Program is not adequate. He cannot afford to operate under this program. He is also not convinced the program is legal, as the *Scheme* does not authorise the Egg Board to lease quota. The Appellant maintains that while he is seeking free quota, he does so to legitimise his operation at little or no cost so that he can continue to operate.

DECISION

59. The Respondent has taken issue with what precisely is the issue under appeal. It argues that the Panel must be very careful not to allow the Appellant to expand the grounds of appeal beyond that set out in his original Notice of Appeal. The Respondent argues that principles of fairness and natural justice require it to know the case it has to meet. Allowing the Appellant to expand on his appeal or the remedy he seeks works a prejudice on the Respondent.

60. The Panel will deal with this issue before dealing with the merits of this appeal. First, we must place this appeal in context. This appeal originally arose out of the Egg Board's decision to obtain a Search Warrant and seize the Appellant's flock on July 14, 1999. The issue relating to the Egg Board's conduct in obtaining the Search Warrant was dealt with separately from the issues relating to whether special circumstances existed whereby the Appellant's operation should be legitimised. It was felt that this second issue could be best dealt with as part of a review that the BCMB was facilitating and in which the broader issue of specialty egg production on Vancouver Island was being considered by the EIAC for recommendations to the Egg Board.

61. The appeal on the first issue proceeded. The BCMB upheld the decision of the Egg Board to obtain a Search Warrant to seize the Appellant's flock. After that decision was rendered the Appellant withdrew from the supervisory process and asked that his appeal on the remaining issue be heard.

62. The remaining issue on appeal before the Panel was defined in our April 20, 2000 decision, quoted above at paragraph 28. We consider that, for the most part, the Appellant was able to keep his arguments and evidence focused on this issue.

63. In addition, the Panel was mindful of the somewhat complicated and circuitous route by which this issue came before us. The interests of fairness dictate that Mr. Pottruff, who was

unrepresented, not be hamstrung by virtue of the fact that his appeal was heard in two separate hearings. Although the BCMB ruled that it would not revisit those issues decided in the earlier appeal, it was well recognised that overlap between the two appeals may in fact occur. The Panel gave considerable latitude to the Appellant in order to ensure that he was able to put forward the evidence that he felt was relevant to the issue before the Panel. The Panel is also satisfied that the appeal proceeded in such fashion that the Respondent knew the case it had to meet.

64. Finally, the Respondent made arguments regarding the appropriateness of the BCMB hearing appeals relating to broad policy matters and cautioned the BCMB from pronouncing new policies as a result of an adversarial proceeding. Section 8 of the *Act* provides a right of appeal to persons aggrieved or dissatisfied with an order, decision or determination of a board or commission. This is a broad right of appeal that cannot be narrowed or limited in the fashion argued by the Respondent.

65. As to the merits of this appeal, the Appellant seeks to have his layer operation legitimised. He does not want TRLQ Permit but rather he seeks free quota for his now 1500-bird operation. He argues that the Egg Board has been aware of his operation since 1997 and has allowed him to continue to operate. This inaction by the Egg Board has lead the Appellant to conclude that specialty egg production fell within a "grey" area and as such was not regulated by the Egg Board.

66. The Egg Board argues that this appeal is moot. The Appellant has had his Seizure Notice lifted and an offer of TRLQ Permit has been made. The Appellant does not want Permit instead he wants free quota to legitimise his operation. The Egg Board argues that the Appellant's position can be summarised thus: I broke the rules, you took too long to catch me, and therefore I deserve free quota. The Egg Board asserts that this is not a compelling argument.

67. The Panel agrees with the Egg Board. The Appellant has operated illegally for approximately five years. He has not paid for quota nor has he paid levies. It is no wonder that the TRLQ Program is not attractive to the Appellant. There is no legitimate way that the Appellant could match the profits he has made on his business while operating illegally. This is not justification for the granting of free quota.

68. The Egg Board has referred the Panel to the *Bari* decision in which Madame Justice Newbury expressly denounces the concept of grandfathering a producer into a pre-existing quota system. This decision applies to the present case. Egg quota is in scarce supply in BC. The province does not have sufficient quota to meet its needs. It would be unfair to those producers who operate within the regulated system and who seek to expand legitimately, to reward in the fashion suggested by the Appellant, a producer who has operated illegally. The unfairness is amplified in circumstances such as these in which the producer who has operated illegally has been offered a reasonable alternative by which he could legitimise his operation without the purchase of quota.

69. The Egg Board, to its credit, has developed a program to try and bring new and/or unregulated producers into the system. Producers have already requested and been granted permits under this Program. There is a considerable waiting list of producers who wish to take advantage of the program. While the TRLQ Program may not be perfect, it is according to the General Manager of the Egg Board, a good start. It is not fixed in stone and will continue to evolve over time depending on producer and market needs.

70. The Appellant argues that he was "singled out" for enforcement action and the seizure was therefore invalid. We are not persuaded that the seizure notice was motivated by bad faith, an intent to discriminate or any other colourable purpose. This issue was dealt with in the November 12, 1999 decision where the circumstances surrounding the seizure were addressed.

71. Cogent evidence about the existence and circumstances of other unregulated flocks allegedly known to the Egg Board at the time but not acted upon was not placed before the BCMB. Even if it could be shown that the Egg Board did know about other illegal producers and should have taken enforcement action against them, this does not assist another illegal producer against whom the Egg Board did enforce the law. While the Egg Board may well need to consider the extent to which it will address other illegal flocks by way of TRLQ, enforcement action against producers and graders, or by other means, we find that the seizure notice was appropriate in the circumstances of the Appellant.

72. As with any illegal activity carried out over a lengthy period of time, a person who produces eggs illegally takes a chance that they will be at or close to the front of the line when enforcement activities take place. For such persons, it is no answer to enforcement to suggest that they came first; even less is it open to say that a period of illegal activity without enforcement creates a right to an amnesty, and thereafter to free quota.

73. As reflected in other appeal and supervisory decisions of the BCMB, there have been difficulties in the management of Vancouver Island egg production that have required correction. However, it has never been suggested, and we do not suggest today, that the solution is to grant free quota to illegal producers.

74. The Egg Board has offered the Appellant access to the TRLQ Program despite the fact the Appellant, as a free run producer, did not at the time of the appeal fall within the ambit of the Program. The Appellant argues that this is yet another example of singular treatment. The Panel disagrees. The Egg Board has recognised that the Appellant has a market and has tried to find a way to legitimise his operation. The offer of TRLQ Permit is a creative way to resolve the problem and is probably a recognition on the part of the Egg Board that the TRLQ Program may in fact need to be expanded to include free run production.

75. However, despite the relief sought in the Appellant's original appeal, he does not want TRLQ Permit. Instead, he has opted to pursue a remedy of free quota before this Panel. The Appellant has argued that to gift him free quota does not really change things. When BC

receives its national allocation, unregulated production is taken off the top and the balance is allocated to registered producers. If his operation is legitimised, it would simply result in 1100 birds (or 1500 depending on which number is used) being moved from unregulated production to regulated. There would be no net change. That may be so. However, it is difficult to understand how this argument assists the Appellant. It would appear that the Appellant is confusing the notion of allocation with quota. Simply because gifting the Appellant quota does not alter our national allocation does not mean that such a gift is appropriate or desirable. This is especially so in circumstances where a producer has operated illegally for a number of years.

76. Free quota is not an option for this Appellant. If he wishes to operate an egg laying facility within the Province of British Columbia, he must do so in accordance with the *Scheme* and the orders and policies of the Egg Board. If the Appellant is not prepared to apply for TRLQ Permit, his options are to purchase quota, downsize his flock to 99 birds or cease production altogether.

77. With benefit of these reasons, it is now up to the Egg Board to determine the time line for bringing the Appellant into compliance. However, if after the passage of a reasonable amount of time as determined by the Egg Board, the Appellant has refused to bring his operation into compliance, the Egg Board has the authority to shut down the Appellant's operation.

78. The Egg Board has acted reasonably in the circumstances. Throughout the time this matter has been under appeal, the Appellant has continued to operate and thus continued to benefit from his production. In fact, the size of the Appellant's flock is now much larger than when the Seizure Notice was placed on his barn in July 1999.

79. The Panel recognises that some portion of the Appellant's production has been covered by Gordon Galey's quota credits and as such not all of his production has been illegal. However, as recognised by the Appellant himself, transfer of quota credits is not a long-term solution. The only long-term solution is compliance.

80. Finally, the Appellant has relied on a whole host of statutes to attempt to impugn the Egg Board's conduct, these include the *Farm Practices Protection (Right to Farm) Act*, the *Civil Rights Protection Act*, the *Canadian Bill of Rights*, and the *Charter of Rights and Freedoms.* He also argues that the Egg Board and the *Scheme* violate the intent of the *Competition Act* and the *Natural Products Marketing (BC) Act*. Although the Appellant did not strongly press this argument, it is appropriate that the Panel deal with the arguments raised.

81. The *Farm Practices Protection (Right to Farm) Act* is intended to protect farmers who are found to be carrying out normal farm practices from nuisance complaints from their neighbours. It has no application to this appeal.

82. As for the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms,* to the extent that the supply management system interferes with ability of producers of certain regulated products to operate in the free market system, that interference is justifiable in a free and democratic society: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 1st, Archibald Canada, [2000], FCJ No. 857 (CA). In addition, had the Appellant wished to seriously challenge the constitutionality of the regulated marketing system, he would be required to give formal notice of this fact to the BCMB, the Respondent and the Attorneys General of Canada and British Columbia: *Constitutional Question Act*, RSBC 1996, c. 68.

83. The Appellant baldly asserts that the "Egg Board and the *Scheme* violate the *Competition Act* and the *Natural Products Marketing (BC) Act*". The Egg Board derives its authority from the *Scheme*. The *Scheme* is a regulation enacted pursuant to the *Act*. If the Appellant wishes to argue that the *Scheme* is somehow beyond the authority granted in the *Act*, or alternatively, that the Egg Board has acted outside the authority granted by the *Scheme*, he must do so expressly and give notice to the Attorney General of British Columbia. He has not done so. Even if it were true that the *Scheme* was beyond the authority of the *Act* or the Egg Board had acted beyond the authority of the *Scheme*, it is difficult to understand how this assists the Appellant with his argument that he is entitled to free quota to legitimise his operation.

ORDER

84. The Appeal is dismissed.

85. The Appellant shall have a reasonable period of time, as determined by the Egg Board, to bring his operation into compliance with Egg Board regulations, orders and policies.

86. If the Appellant refuses to bring his operation into compliance, the Egg Board may enforce its regulations, orders and policies, and shut down the Appellant's operation in excess of 99 birds.

COSTS

87. As to the issue of costs, the Appellant has sought "costs" in this appeal that could be more properly characterised as damages. Given our decision on the merits of the appeal, his claim is denied.

88. The Egg Board has not sought costs in this appeal.

89. An award of costs can be made in circumstances where the Panel finds that the position taken on appeal by a party was particularly onerous and unjustified and as such, deserving of sanction. In that case, the Panel could award costs payable by one party to another. However, in other cases, where the Panel finds misconduct, costs of the proceeding may be payable, not to the other party but to the Minister of Finance. The purpose of this type of order would be to sanction a party's misconduct. In such a case, it is not necessary for the

Panel to find that the misconduct disadvantaged another party but rather that the conduct itself is deserving of rebuke.

90. That situation presents itself here. The Appellant, Mr. Bill Pottruff, requested an opportunity to review a copy of the transcript obtained by the BCMB from the first Pottruff hearing. This transcript was given to him as a matter of courtesy, in order to allow him to fully prepare for his second hearing. The transcript was to be returned at the conclusion of the day of hearing, June 13, 2000. On that date, Mr. Pottruff advised that he had not brought the transcript with him and took the position that "on legal advice" he was not returning the transcript. Legal advice, which counsels a party to a proceeding to wrongfully withhold property of the tribunal, is suspect at best.

91. On the day of closing arguments, Mr. Pottruff was again asked to return the transcript. On the record, he promised to deliver it to the BCMB office following the hearing. Despite repeated requests for the return of the transcript, he has not returned the transcript to the BCMB.

92. The BCMB regularly obtains transcripts of its appeals, the cost of which is significant. In this case, the transcript cost including transcription and two copies totalled $1260.05. As BCMB staff had previously advised Mr. Pottruff on how to obtain a transcript, had he wanted to purchase a transcript he could have done so. It could likely have been obtained for significantly less than the BCMB paid as he could simply have purchased a copy from the Court Reporter. Instead, he chose to appropriate BCMB property.

93. Had such conduct occurred in a court in British Columbia, we are satisfied that a Judge would not hesitate in awarding costs against the party. As a result, the Panel directs that Mr. Bill Pottruff pay costs of the proceeding, in the amount of $630.00. This represents half the cost incurred by the BCMB in obtaining the transcript. Should Mr. Pottruff decide, at this late date, to return the transcript, this order for costs will not be waived.

Dated at Victoria, British Columbia this 17th day of January, 2001.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Hamish Bruce, Member