

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL FROM A DECISION CONCERNING  
TEMPORARY RESTRICTED LICENCE QUOTA ALLOCATION

**BETWEEN:**

ELKVIEW ENTERPRISES LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA EGG MARKETING BOARD

**RESPONDENT**

**PRELIMINARY DECISION**

**APPEARANCES:**

(by written submission)

For the British Columbia Marketing Board

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

For the Appellant

Mr. Michael Le Dressay, Counsel

For the Respondent

Mr. Robert Hrabinsky, Counsel

## **INTRODUCTION**

1. This appeal arises from a decision of the British Columbia Egg Marketing Board (“the Egg Board”) concerning the Appellant, Elkview Enterprises Ltd. (“Elkview”), and an amendment of Elkview’s existing Temporary Restricted Licence Quota (“TRLQ”) Permit to produce free-range eggs.
2. The Egg Board’s TRLQ Permit Program was an attempt to allow specialty or niche market producers a way of getting into the egg production business on a small scale without the requirement to purchase quota. The British Columbia Marketing Board (the “BCMB”), acting in its supervisory capacity, issued directions modifying the Program on August 15 and October 26, 2000. The impact of the BCMB directions on Elkview’s right of appeal is an issue in this preliminary application.
3. On January 19, 2001, the Egg Board, in response to an application by Elkview to amend its TRLQ Permit to reflect the terms of the recently amended TRLQ Program, conferred upon Elkview the option to bank 8 cents of its current licence fee on a maximum of 5000 layers of TRLQ, retroactive to December 3, 2000.
4. By way of a letter dated February 1, 2001, Elkview appealed this decision to the BCMB.
5. On February 27, 2002, the Egg Board applied to the BCMB for summary dismissal of this appeal.

## **ISSUE**

6. Should the Appellant’s appeal be dismissed pursuant to s. 8(8.3) of the *Natural Products Marketing (BC) Act*, (the “Act”) as “frivolous, vexatious or trivial”?

## **DOCUMENTS RECEIVED**

7. The Panel has received and reviewed the following documents from the parties:
  - February 27, 2002 letter from Counsel for the Egg Board with supporting documents;
  - March 13, 2002 letter from Counsel for the Appellant with a Book of Documents and Brief of Authorities; and
  - March 18, 2002 letter from Counsel for the Egg Board.

## DECISION

8. The Egg Board seeks to have this appeal dismissed as “frivolous, vexatious or trivial”. The basis for this application is as follows:
  - a) the Appellant has failed, refused or been unable to particularise the issues under appeal;
  - b) further, the sole issue identified by the Appellant concerns a “decision” of the Egg Board taken at the specific direction of the BCMB and as such is not appealable to the BCMB.
9. Section 8(8.3) of the *Act* was enacted in December 1999. The purpose of this amendment is to grant the BCMB the authority to dismiss an appeal on the application of a party where that appeal was “frivolous, vexatious or trivial”. This power can only be exercised in limited situations, where it is clear on its face that an appeal cannot possibly succeed or that it is devoid of merit.
10. In its recent decision in *Northern Interior Dairyman’s Association v. British Columbia Milk Marketing Board*, February 25, 2002, the BCMB considered the meaning of frivolous, vexatious and trivial:
  28. In a related argument, the Milk Board argues that this appeal should be dismissed pursuant to s. 8(8.3) as being “frivolous, vexatious or trivial”. The BCMB’s ability to summarily dismiss an appeal of an aggrieved or dissatisfied person is understandably narrow. Having given a broad remedy of appeal to the BCMB, it would be inconsistent for the Legislature to easily allow for summary dismissal without the benefit of a hearing on the merits. Looking to the *Act*, s. 8(9) sets out the BCMB’s remedial power on appeal. After hearing an appeal, the BCMB can make an order confirming, reversing, or varying a commodity board decision, refer the matter back to the marketing board with or without directions or make another order appropriate in the circumstances.
  29. The BCMB’s authority to dismiss an appeal, without the benefit of a hearing on the merits, is found in s. 8(8.3). Thus, the Milk Board must satisfy the Panel that this appeal is frivolous, vexatious or trivial. *The Canadian Oxford Dictionary* (1998) defines frivolous as meaning “silly or wasteful...having no reasonable grounds...not sensible or serious”. The Panel finds that this appeal raises serious issues. It was Mr. Jacobson’s position that this appeal directly impacted on the livelihood of northern producers. “Vexatious” is defined as meaning “not having sufficient grounds for action and seeking only to annoy the defendant”. While the Panel recognizes that the Milk Board would rather not have this appeal proceed, the Panel does not accept that the purpose behind filing the appeal was to annoy the Milk Board or other producers. Finally, “trivial” is defined to mean “of little importance or consequence; trifling”. To the extent that the \$4.00/HL freight rate presents a significant increase in the previous freight charges paid by northern producers, it cannot be said that this appeal is trivial in nature.
11. The Egg Board argues that this appeal should be dismissed under s. 8(8.3) as the Appellant has failed, refused or been unable to particularise the issues under appeal. The Panel disagrees with the Egg Board on this point. The Appellant has advised that it takes issue

with the Egg Board's decision of January 19, 2001. In letters dated January 11, February 15 and March 13, 2002, the Appellant particularised its grounds of appeal and the remedy sought. Specifically, in the March 13, 2002 letter, Counsel for the Appellant states:

This appeal concerns an application by the Appellant to the Egg Board to incorporate the terms of the amended TRLQ program arising from the October 26 Supervisory Decision of the BCMB into its existing TRLQ. The Egg Board responded by partially incorporating elements of the October 26 Supervisory Decision into the Appellant's existing TRLQ. The Appellant says that the Egg Board did not go far enough in this regard.

The Egg Board's position is to the effect that they have no discretion to offer the Appellant any other aspects contained in the October 26 Supervisory Decision and that to do so would amount to an appeal of the October 26 Supervisory Decision itself.

It is the position of the Appellant that the Egg Board erred in failing and refusing to exercise the discretion that it has to amend the Appellant's TRLQ.

12. The Panel finds that the above statement of the issues on appeal is adequate and satisfies the obligations imposed on the Appellant by s. 8 of the *Act*. Accordingly, the Egg Board's application to dismiss the Appellant's appeal on this ground fails.
13. The Egg Board's second argument is that to the extent that the January 19, 2001 decision of the Egg Board is based on the BCMB's Supervisory Decision of October 26, 2000, the Appellant is seeking to appeal a decision of the BCMB and not a decision of the Egg Board. The Egg Board argues that this appeal is similar to *Salmon Arm Poultry Farm Ltd. et al v. British Columbia Egg Marketing Board*, May 16, 2001, where the BCMB, after raising the issue of its jurisdiction to hear the appeals, dismissed the Appellants' appeals of the TRLQ Program: The BCMB stated:
  34. Based on the plain language of section 8(1), it is not enough for an appellant to show that he or she is aggrieved and dissatisfied with something the commodity board has done. The right of appeal turns on the existence of an "order, determination or decision of a marketing board."
  35. What does the legislation mean when it uses this language? Can an appeal be filed simply by a person showing, as the Appellants seek to do here, that there exists a commodity board order they disagree with? Alternatively, does the legislation's reference to an order, determination or decision "of" a commodity board require that the order, determination or decision in question actually be attributed to choices made by the commodity board, rather than imposed upon it by the BCMB? In our opinion, the latter interpretation is correct. The reference to decisions "of" the commodity board necessarily implies the exercise of judgment by the commodity board, rather than the issuance of such orders resulting from required adherence to specific directions from above.
  36. The proposition that a commodity board must have a degree of independent ownership over an order, determination or decision before it can be appealed to the BCMB is not a technical or legalistic requirement. The fundamental purpose of a right of appeal to the BCMB is to ensure that commodity boards remain accountable to the independent and specialised BCMB for *their* exercises of judgement. Where action taken by a commodity board is not "their" decision, but is rather an administrative action taken pursuant to a specific BCMB direction imposed upon them and which allows for no discretion on their part, the purpose of the appeal power is absent. It would be absurd

and contrary to the legislation if the BCMB, in its appellate capacity, was effectively required to hear an appeal from its own supervisory decision. The absurdity is even more pronounced when one considers that, if the BCMB was required to hear such an appeal, the commodity board, which is supposed to appear to defend “its” decisions on BCMB appeals, would simultaneously have a right to seek judicial review of the very same BCMB substantive supervisory direction at issue on the appeal. This is not what the legislation intended.

37. The *Act* confers both a supervisory and appellate jurisdiction on the BCMB. The sections conferring these powers must be read so as to allow the BCMB the fullest exercise of both powers, in harmony with one another. Where the BCMB has, as here, exercised its uncontested supervisory authority to issue specific directions to a commodity board to issue orders, the appropriate remedy is to challenge the BCMB by way of judicial review. It is not to appeal those very same decisions to the BCMB under the fiction that they are decisions “of” the commodity board merely because that board has carried out that which the BCMB, after due supervisory deliberation, required it to do.
14. The Panel disagrees with the Egg Board’s argument. This appeal is quite different from the *Salmon Arm Poultry Farm* appeals. In *Salmon Arm*, the Appellants sought to appeal terms of the TRLQ Program, which had been imposed on the Egg Board by a Supervisory Decision of the BCMB. The Egg Board did not have any independent discretion over the terms with which those Appellants took issue. As there was no independent discretion exercised by the Egg Board in enacting those terms, there was no Egg Board decision appealable to the BCMB. However, it was contemplated in the *Salmon Arm* decision that when the Egg Board began implementing allocations under this program, it would in effect be exercising independent discretion that would properly be the subject of an appeal.
15. In this case, the Appellant does not appeal the terms of the new TRLQ Program. Rather, the Appellant is the holder of a permit to grow specialty eggs entered into in 1999. The 1999 contract sets out the terms of the permit, including its duration, clawback provisions and levies to be paid. In its Supervisory Decision of August 15, 2000, the BCMB recited some relevant history, as follows:

On May 19, 1999 the BCMB approved the Egg Board’s decision to prescribe terms and conditions for the allocation of quota to registered and unregistered producers on a temporary lease basis (the existing Temporary Restricted Licence Quota program), as follows:

  - Up to 14,000 layer temporary permit to be granted to Elkview Enterprises, subject to an agreement between the Egg Board and Elkview which provides for the incremental return of permit to be held for issuance to producers of certified organic eggs.
  - Up to 5,000 layer temporary permit to be held for issuance to producers of certified organic eggs.
  - Up to 3,623 to be issued as permits for free range production.
16. When the new TRLQ Program came into effect as a result of the BCMB’s Supervisory Decision of October 26, 2000, the Appellant decided that it wanted the benefit of that Program. There is no reference in the October 26, 2000 Supervisory Decision to the Appellant. There is also no suggestion that his 1999 arrangement with the Egg Board was exempt from the decisions the Egg Board is empowered to make according to the terms of the TRLQ program as outlined in that Supervisory decision.

17. The Egg Board in fact considered the Appellant's request and determined that it would incorporate a new Program option, to bank 8 cents of the current licence fee on a maximum of 5000 layers of TRLQ, into the Appellant's existing permit. The Appellant appealed this decision arguing in effect that it was entitled to more.
18. Although it appears that the Egg Board did in fact exercise its discretion as to what elements of the new TRLQ Program, if any, it would grant to the Appellant, for the purposes of this application, the Egg Board denies exercising any discretion. It argues that the decision to allow Elkview to bank 8 cents of its licence fee on 5000 layers of TRLQ was, in effect, a decision of the BCMB and not a decision of the Egg Board.
19. To the extent that the Egg Board considered that it had no independent discretion in determining what elements, if any, of the new TRLQ Program should as a matter of fairness and good public policy be granted to the Appellant, the Panel finds that the Egg Board made an error of fact and of law in understanding the BCMB's Supervisory directions.
20. In view of this finding, the appropriate course of action is to adjourn this appeal to allow the Egg Board the opportunity to make its own decision in this matter. The Egg Board must in this instance, and in the future, exercise its discretion as to how best to allocate quota within the TRLQ Program. The Egg Board is directed to provide reasons for its decision. Should the Egg Board decide that the decision at issue should be confirmed, the appeal will proceed. If the Egg Board modifies its decision and Elkview remains dissatisfied, it has the right to appeal that decision to the BCMB. If the Egg Board modifies its decision to the satisfaction of Elkview, the parties can advise the BCMB that the appeal is no longer necessary.
21. We cannot leave this matter without noting that the Egg Board brought its application to dismiss this appeal as being frivolous and vexatious approximately one year after the appeal was filed. During that period of time, the parties attempted to resolve this dispute both informally and through a mediation process. If the subject matter of an appeal is indeed frivolous and vexatious, the BCMB would anticipate that such an application would be made within a reasonable time after the filing of the appeal.
22. This is not unlike the situation that arose in *Van Nuys v. British Columbia Egg Marketing Board*, July 24, 2000, where the Egg Board sought to have an appeal dismissed as being out-of-time. In that appeal, the Egg Board had lengthy settlement discussions with the Appellant prior to applying to have the appeal dismissed summarily. The BCMB held that having confirmed the appeal through settlement discussions, the Egg Board could not rely on the out-of-time defence as to do so would work a significant injustice on the Appellant. The Panel is of the opinion that to allow the Egg Board to raise the issue of this appeal being frivolous, vexatious or trivial at this late date would work a similar injustice to this Appellant.

**ORDER**

23. Subject to the direction in paragraph 20, this appeal is adjourned pending a decision by the Egg Board regarding what elements, if any, of the new TRLQ Program, should be conferred upon the Appellant.
24. The Egg Board is directed to provide written reasons for its decision.

Dated at Victoria, British Columbia this 8<sup>th</sup> day of July, 2002.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

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