IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION CONCERNING
ENFORCEMENT OF THE BRITISH COLUMBIA EGG MARKETING BOARD
STANDING ORDER

BETWEEN:

ALFRED REID D.B.A. OLERA FARMS

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

REASONS FOR DECISION – PRELIMINARY ISSUES

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Hamish Bruce, Member
For the Appellant	Ms. Wendy A. Baker, Counsel
.	
For the Respondent	Mr. Robert P. Hrabinsky, Counsel Mr. Peter Whitlock, General Manager
Date of Hearing	November 9, 2001
Place of Hearing	Vancouver, British Columbia

INTRODUCTION

1. Alfred Reid d.b.a. Olera Farms ("the Appellant") is appealing an August 1, 2001 decision of the British Columbia Egg Marketing Board (the "Egg Board") to enforce the Egg Board's Standing Order regarding marketing of regulated product outside the regulated marketing system, contrary to the *British Columbia Egg Marketing Scheme*, 1967, B.C. Reg. 173/67 (the "*Scheme*").

2. The appeal was filed on September 10, 2001. The grounds of appeal are set out in a pre-hearing conference report dated October 16, 2001. They may be summarised as follows:

    a) The Egg Board does not have jurisdiction to regulate certified organic production: certified organic growers have not consented to being part of the regulated system, and the organic product they produce is a distinctive natural product, different from conventional eggs, and not covered by the *Scheme*.

    b) If the *Scheme* does apply to the Appellant's eggs, the Egg Board's decision to backdate marketing fees owed by the Appellant to February, 2001 is unfair and arbitrary because (i) the February, 2001 date used by the Egg Board precedes the point in time when the Egg Board asserted jurisdiction, and (ii) the Egg Board, in its enforcement, has singled out or targeted the Appellant.

3. This decision addresses two preliminary issues which have arisen in the appeal. Before dealing with these issues, some background is necessary.

4. On August 1, 2001, the Egg Board convened a hearing into a series of suspected contraventions of its Standing Order by the Appellant. At the heart of that hearing was the question whether the Appellant has been marketing eggs outside the regulated marketing system and contrary to the *Scheme*.

5. Upon receiving notice of the Egg Board's proposed hearing, the Appellant's legal counsel, in a letter dated July 30, 2001, advised that the Appellant would not attend or participate in the hearing on the basis that "the Egg Board has no jurisdiction over them or any certified organic producer". The Appellant did not provide any argument or rationale in support of that position.

6. In its decision of August 1, 2001, the Egg Board found it did have jurisdiction over the Appellant, that the Appellant had contravened the Egg Board's Standing Order and that the Egg Board should take action in Court to compel the Appellant to comply with its Standing Order and to recover marketing levies.

7. On August 9, 2001, the Egg Board notified the Appellant of its August 1, 2001 decision and then subsequently on September 20, 2001, commenced a Supreme Court action against the Appellant. The Statement of Claim alleges a contravention

of the Standing Order, and seeks injunctive relief, together with judgment in the amount of $93,400 in marketing fees, plus interest.

8. In his Statement of Defence filed November 1, 2001, the Appellant alleges at Paragraphs 4 and 7:

> 4. The Defendant Alfred Reid produces organic eggs, certified in accordance with the *Agri-food Choice and Quality Act*, and markets certified organic eggs under the label of Olera Farms.
>
> 7. In reply to paragraphs 5-12 of the Statement of Claim, the Defendants deny that the authority with which the Plaintiff is vested pursuant to the British Columbia Egg Marketing Scheme, 1967…includes any authority over certified organic egg production, and the layers kept for such production, and deny that such eggs and layers fall within the definition of Regulated Product as defined by the Plaintiff.

9. Before moving to the preliminary issues, we briefly address the Egg Board's November 5, 2001 submission regarding the significance of the above litigation to this appeal. The Egg Board points to the October 25, 2001 decision in *Pottruff v. British Columbia Egg Marketing Board* where the British Columbia Marketing Board (the "BCMB") ruled that a decision by a commodity board to initiate litigation is not a "decision" or "determination" subject to appeal under s. 8 of the *Natural Products Marketing (BC) Act* (the "*Act*"). It is important to note, however, that the sole issue in the *Pottruff* appeal was the Egg Board's discretion to take enforcement action by commencing litigation. The issue here is different – namely, whether the Egg Board's August 1, 2001 determination of regulatory authority over the Appellant is lawful and appropriate. This decision is clearly appealable to the BCMB.

PRELIMINARY ISSUES

10. Each party has raised one issue that it regards as being preliminary to a consideration of the merits of this appeal:

    (a) The Appellant argues that the BCMB, in hearing this appeal, is subject to a reasonable apprehension of bias arising from its involvement in and statements made in relation to various egg industry issues over the past three years touching on organic egg production.

    (b) The Respondent Egg Board argues that, if the appeal proceeds, the BCMB should not permit the Appellant to call lay evidence in support of his legal argument regarding the Egg Board's jurisdiction to regulate certified organic production.

11. The Panel has received written submissions, issued an October 19, 2001 process direction and conducted an oral hearing on November 9, 2001.

APPELLANT'S SUBMISSION - REASONABLE APPREHENSION OF BIAS

12. The Appellant submits that to the extent his appeal concerns the legal question whether the *Scheme* applies to certified organic production, there is a reasonable apprehension of bias on the part of the BCMB as it has already pre-judged this issue against him. The Appellant further submits that the only remedy for the prejudice caused by such bias is to allow the appeal and reverse the decision appealed from.

13. In support of this bias argument, the Appellant asserts that the BCMB has made numerous public statements to the effect that certified organic production is subject to regulation by existing boards and commissions, including the Egg Board. We will consider the evidence tendered in support of this argument in some detail.

14. The Appellant points to a June 9, 1998 letter from the BCMB Chair to the various marketing boards, Industry Advisory Committees and stakeholder groups in the context of an extensive review of BC's regulated marketing policy by the BCMB. One of the issues discussed in the Chair's letter concerned the need for stakeholder input into the review process from the organic sector. The Chair wrote:

> I wish to clarify a question that arose at the COMB [Council of Marketing Boards] meeting, regarding certified organic production and its application under the *Natural Products Marketing (BC) Act*. Any organic product produced or marketed is subject to the authority delegated in the marketing board Scheme for that commodity and the Act and it's [sic] Regulations

15. The Appellant also points to a February 19, 1998 letter from the BCMB Chair to the Minister of Agriculture and Food suggesting a meeting between the BCMB and an umbrella organisation for certified producers, Certified Organic Associations of British Columbia, ("COABC") to help resolve the conflict between certified producers and the regulated marketing system. In a letter which the Appellant argues represents the views of the BCMB as a whole, the Chair wrote in part:

> The BCMB supports the development of niche and specialty markets. We believe that the needs and interests of these producers can and should be addressed within the regulated marketing system. We do not believe that the interests of organic producers should supersede the interests of the thousands of BC producers and marketers who operate successfully within the established system. Production and marketing for organic and specialty markets are being addressed by several boards and commissions. The Chicken, Egg and Milk Marketing Boards have established policies and programs for organic and specialty products. The Mushroom Board has completed a review and will continue to exempt specialty and certified organic mushrooms from its Orders.

16. The Appellant also tendered a series of documents demonstrating that, during the period in which the above statements were made, a significant policy question had emerged regarding whether and how persons producing "organic" or "specialty" natural products should be subject to the regulated marketing system.

17. The record shows that in 1998-99, certain members of the BCMB, acting in its supervisory capacity, attempted to facilitate discussions between the commodity boards and representatives of the organic industry. There was recognition of the

growing numbers of unregistered producers in various commodity sectors. There was a recognition that discussion and consensual resolution of issues might be preferable to enforcement action and litigation.

18. On July 28, 1999, the Minister of Agriculture and Food wrote to the Appellant emphasising the need to reconcile the issues between organic growers and the regulated marketing system:

> …a reconciliation of issues between the two groups, based on consultation, would be preferable to a solution which I might impose as Minister…it was hoped that issues could be dealt with in the context of a series of meetings jointly convened by the British Columbia Marketing Board (BCMB) and the ministry.
>
> From the correspondence I have received from you and others, it appears that the meetings that took place did not lead to a solution. As Richard Bullock, the BCMB representative, cannot continue with these negotiations, I am prepared through my ministry to provide an independent mediator to continue where Mr. Bullock left off.

19. On April 4, 2000, a Ministry official wrote to Mr. Reid, COABC and others noting the mediator's recommendation that the Egg Board tender its view of how it could accommodate organic egg production within its *Scheme*. This proposal would then be responded to by the organic sector. By the end of April 2000, competing proposals were before the Ministry. By late August 2000, the Ministry official advised that alternative legislative options would be placed before the Minister for decision. However, the Appellant has not included in his material any decision by the Minister that was communicated to the parties. No legislative change has been made to date.

20. In oral submissions, Counsel for the Appellant asserted that, during this period, COABC's position was they were not under the jurisdiction of the Egg Board. The evidence tendered on this point is substantially more equivocal. Significantly, COABC's April 30, 2000 written proposal to the Ministry does <u>not</u> state that certified organic natural products are not subject to the jurisdiction of commodity boards. COABC simply did not put that matter in issue. While emphasising the distinctive nature of certified organic eggs, a full and fair review of the COABC's document shows that it is drafted to seek an exemption from the law for policy reasons:

> COABC requests that B.C. Certified Organic Egg Producers be excluded from the B.C. Egg Marketing Scheme…
>
> COABC had offered (during mediation) to provide a limit to the exemption in terms of time frame or production level. A time frame of 5 years or a production level of 50,000 birds was suggested. The ignoring of this request by the BCEMB coupled with its attempts to set up an alternative structure to COABC have caused such an unfavourable environment for cooperation that COABC has come to the realization that a complete exemption is necessary….
>
> When considering exclusion of the B.C. Certified Organic egg producers from the regulated marketing scheme it should be noted that COABC member farms are already highly regulated through the certification program….

> Exclusion of B.C. Certified Organic production from regulated marketing is not a new concept, nor one developed by the organic industry itself….
>
> For example as far back as 1998 the "Review of Regulated Marketing" published by the MAF stated that "If it is determined that a Marketing Board or Commission cannot devote adequate time and resources to regulating a specific organic product in a manner which is suitable for the organic industry and strengthens the industry, it may be more appropriate that COABC certified organic product be excluded from the relevant NPMA scheme."
>
> In a letter to David Matviw (November 29 1999) mediator Robin Junger recommends that, "If the minister believes the proposal is not sufficiently fair and reasonable he should recommend to the Lieutenant Governor in Council that a regulation be passed exempting COABC certified organic production from the egg and chicken marketing board regimes".

21. The Appellant seeks further support for his bias allegation by referring to another supervisory process of the BCMB in the second half of 2000 – commonly referred to as the Egg Quota Allocation Review ("EQAR"). That BCMB supervisory review flowed from the BCMB's duty under s. 37(c) of the *Scheme* to prior approve any change in egg quota. The EQAR review gave rise to various BCMB letters and reports during the second half of 2000 resulting from the BCMB's refusal to allow the Egg Board to allocate the entirety of a new provincial egg quota allocation to existing registered producers. A principal concern of the BCMB, acting in its supervisory capacity, was that this new quota should in part be made available to unregistered producers, such as certified organic producers.

22. The Appellant argues that the BCMB's various EQAR directions given in June, August and October, designed to benefit unregulated producers, actually demonstrate bias for this appeal because these directions carry the implicit judgment that such producers were subject to Egg Board regulation as a matter of law. An example relied on by the Appellant is a letter from the BCMB Chair on June 26, 2000, which stated as follows:

> Egg Board's June 8, 2000 decision to allow for TRLQ of 17,000 birds for organic/specialty production, and 5,000 birds TRLQ for Vancouver Island is conditionally approved by the BCMB, without prejudice to any further allocations that may be issued….

23. The Appellant also refers to the BCMB's August 15, 2000 EQAR Report and its October 26, 2000 EQAR Supervisory Decision which, while directing improvements to the Egg Board's program for accommodating unregistered producers, implicitly accepted its application to certified organic producers.

24. In this context, the Panel notes that on July 25, 2000, COABC submitted a brief to the BCMB as part of the EQAR. That brief, like COABC's April 30, 2000 brief, made no claim that the *Scheme* did not, in law, apply to certified organic producers. It did not advance the legal position or argument now being raised on this appeal, that organic eggs were not "eggs" within the meaning of the *Scheme*.

The COABC's July 2000 letter, like its April, 2000 letter, is decidedly policy oriented:

> ...Since we have not asked to be part of the regulated marketing system we have no reason to appear before this committee….
>
> …the COABC members have no problems with the NPMA. We have serious problems with the schemes, orders, and coercive compliance sought by the BCEP. If their "its [sic] our way or no way" attitude is eligible for consideration, then the same should apply for groups asking for a clear statement endorsing their legitimate exemption.

25. The Appellant also refers to events following the Egg Board's December 12, 2000 letter encouraging certified organic producers to comply with the *Scheme*. The Egg Board's letter states:

> We requested a meeting with your organization in our letter of November 14 to discuss the distribution of the 17,000 birds of quota that have been directed to your producers by the British Columbia Marketing Board…
>
> We urge you to encourage your producers to both accept the direction of the British Columbia Marketing Board to use TRLQ as a way to enter the regulated egg sector…

26. Following the Egg Board's above letter, the COABC wrote to the BCMB Chair requesting that the BCMB initiate a process to create a separate "British Columbia Certified Organic Marketing Commission". On January 4, 2001, the BCMB Chair replied, stating that if such a step were to be taken, "the first step in the process would be for the Certified Organic Associations of British Columbia to obtain the support of the Minister of Agriculture, Food and Fisheries".

27. The Appellant also tenders the BCMB Chair's January 8, 2001 replies to the Appellant's counsel, and to a producer, both of whom objected to the Egg Board's December 12, 2000 letter which included the following:

> The British Columbia Marketing Board…supervisory decision is referred to in both your letter and Mr. Whitlock's letter. The BCMB's directions to the Egg Board included the following:
>
> 1. Establish a pool of quota *(the Market Responsive Allocation Pool, from which quota would be allocated for specialty production – including organic – as TRLQ, or for white/brown caged production as Market Responsiveness Quota – MRQ);*
> 2. Identify various sources from which quota will be collected for use in the pool (*including 17,000 layers for organic production which has been set aside by the Egg Board in 3-4 decisions since 1998 and prior approved by the BCMB)*, and
> 3. Proceed immediately to establish and implement the TRLQ and MRQ programs.
>
> The BCMB has not set a limit on the amount of quota that may be deposited in the Market Responsive Allocation Pool or as to how many layers will be allocated as TRLQ or MRQ. Nor has the BCMB commented to date on enforcement issues pertaining to growers who maintain flocks but decline to apply for TRLQ. These are properly issues for the Egg Board to determine at this time.
>
> Also referred to in your letter are negotiated positions that the organic industry understood to be before the Minister. Various consultation and negotiation processes between the COABC and marketing boards have taken place since 1998. Whether or in what fashion the best interest of organic producers can be served through the existing boards and commissions or through a new

> commission is a policy question ultimately for Government to decide. As I understand it, there have to date been no relevant amendments to egg marketing legislation.

28. Finally, the Appellant relies on a March, 2001 article published in "Westcoast Farmer" magazine, where the following quote is attributed to the BCMB: "Our position right from the start is that we wanted everything under one system, but we wanted to see a mechanism that would allow for a fair transition, and we think that is now in place with the Egg Board". The Appellant says that these comments, and other statements by the Chair, are properly attributed to the BCMB as a whole.

29. The Appellant also called Vancouver Island organic egg producer, Mr. Brian Hughes, who testified that various BCMB members, including two members of this appeal panel, visited his farm on August 30, 2001. According to Mr. Hughes, the purpose of this visit was to show the BCMB how an integrated farm works and how various animals are incorporated into the production system. The Appellant says that this is evidence that there does not appear to be any separation between the appellate members of the BCMB and those who exercise supervisory jurisdiction.

DECISION REGARDING THE APPELLANT'S BIAS SUBMISSION

30. It is appropriate for the Appellant to raise the bias issue with this Panel: *Flamborough (Township) v. Canada (National Energy Board)*, 1984] F.C.J. No. 526 (C.A.). As noted by Blake in her text *Administrative Law* (1997) at p. 187, courts do not ordinarily entertain judicial review applications filed before administrative proceedings are complete, particularly where there is a statutory right of appeal:

> Premature applications are not encouraged because they have the effect of fragmenting and protracting proceedings before the tribunal. They defeat one of the purposes of tribunal proceedings which is to provide expeditious and inexpensive proceedings to deal with certain types of issues or problems. Often by the end of the proceeding, preliminary complaints are no longer of importance. A party may succeed in the result after having lost a number of preliminary challenges. In addition, courts prefer to consider all issues at once, rather than piecemeal, on the basis of a full record of the proceeding before the tribunal and the reasons for decision of the tribunal.

31. Having considered the Appellant's objection, the Panel does not agree that the evidence tendered by the Appellant demonstrates that the Panel is tainted in its ability to fairly consider the Appellant's argument, advanced for the first time on this appeal, that certified organic eggs are not "eggs" within the meaning of the *Scheme*.

32. To properly assess the Appellant's bias argument, it is important to understand the relevant legislative background. Among other factors, the intent of the legislature must be taken into account in determining whether a particular situation gives rise to a reasonable apprehension of bias in law. As noted in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 at pp. 309-310:

> As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue…
>
> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.

See also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623 at p. 635:

> Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

And see *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] S.C.J. No. 17 at para. 42:

> Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias.

33. The marketing of natural products in BC is governed by the *Act*. The *Act*'s purpose, as stated in s. 2(1), "is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing."

34. "Natural product" is defined in s. 1 of the *Act* as meaning, *inter alia*, "a product of agriculture". "Regulated product" is defined in s. 1 as meaning "a natural product the regulation of the marketing of which is provided for in a scheme approved or established under this Act."

35. The *Act* is designed to enable the creation of a series of regulations, called schemes, enacted by the Lieutenant Governor in Council. Schemes have been enacted in a number of commodity sectors, including chicken, mushrooms, vegetable, hogs, turkeys and eggs. Each Scheme defines the "regulated product" to which it applies, and creates an individual commodity board to exercise first instance regulation. In the context of eggs, reference can be made to ss. 15 and 16 of the *Scheme*:

> s. 15 In this scheme, unless the context otherwise requires:
>
> "board" means the British Columbia Egg Marketing Board
>
> …
>
> "regulated product" means layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed
>
> s. 16 The purpose and intent of this scheme is to provide for the effective promotion, control and regulation of the production, transportation, packing, storage and marketing of the regulated product within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part.

36. Schemes grant commodity boards significant power and significant flexibility. As reflected in s. 37 of the *Scheme*, commodity boards have legal authority to regulate any person engaged in the marketing of the regulated product in the first instance and the discretion to decline to exercise powers of regulation or to exempt any person or class of persons from regulation. This is, of course, separate from the Lieutenant Governor in Council's own power to exempt particular natural products from regulation.

37. Collectively, commodity boards are subject to the authority of BCMB, an independent administrative tribunal consisting of not more than 10 members. The BCMB has explicitly been granted two key functions under the *Act*. Since 1974, the BCMB has acted as an appeal body from commodity board decisions: s. 8. Since the 1930's, the BCMB has had, as its more proactive mandate, general supervision over all commodity boards, which power is reinforced throughout the legislative framework:

Act:

> s. 3(5) The Provincial board
>
> (a) has general supervision over all marketing boards or commissions constituted under this Act

Natural Products Marketing (BC) Act Regulations, B.C. Reg, 328/75:

> s. 4 The Provincial board shall have a general supervision over the operations of all marketing boards, commissions or their designated agencies constituted or authorized under the Act…

Scheme:

> s. 37(c):
>
> The [Egg] board shall have authority within the Province to promote, control and regulate … the regulated product … and without limiting the generality of the foregoing shall have the following authority … to issue quotas … and, subject to prior approval of the Provincial Board, to vary such quotas and prescribe the terms and conditions upon which they shall be issued or transferred….

38. Four important points arise from this legislative review. First, the legislature has assigned the BCMB dual functions: a supervisory role that is primarily proactive and policy oriented, and an appellate role that is designed to be reactive to individual grievances. Both roles are important to the effective functioning of the regulated marketing system. It is noteworthy that the legislature has not given one function priority over the other, nor has the legislature sought to segregate the subject matter of supervisory action and appellate action. The legislature has assigned these dual functions to one body, with one Chair. With no more than ten members (and at Cabinet's pleasure, as few as its quorum of three), the BCMB is required to exercise both its supervisory and appellate functions effectively to ensure economic stability and sound marketing policy in the 11 regulated marketing sectors for which it is responsible.

39. These considerations make it obvious that the BCMB is intended to be a single, highly specialised body with a contemplated overlap of functions and personnel. The case law above, and the long established principle that the test for bias is examined from the perspective of an informed person, with the necessary information, viewing the matter realistically and having thought the matter through (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394), makes clear the test for reasonable apprehension of bias must take legislative and practical realities into account. The test cannot be applied as if the BCMB were a court, or even a single function administrative tribunal.

40. Second, the test for reasonable apprehension of bias in this context must take into account the reality that for BCMB members to exercise their supervisory and appellate functions effectively, they must be acquainted with the agricultural sectors affected by their decisions. This is especially so since BCMB members also sit as members of the Farm Practices Board, which has a mandate to make determinations about "normal farm practices": *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131, s. 9(1). To these ends, BCMB members have found it appropriate and necessary to participate in farm visits. This is not bias. It is responsible practice.

41. Counsel for the Appellant implied that the BCMB visit to the Hughes operation in August 2001 tainted the Panel because it reflected Panel members' involvement in supervisory matters involving eggs. However, her witness more accurately described the purpose of this visit, which took place after the BCMB supervisory decisions and before the present appeal. Mr. Hughes testified that the purpose of the visit was for BCMB members to see how an integrated farm works. Such knowledge is important for BCMB members in both the appellate and supervisory roles. The farm visit is simply irrelevant to any argument relating to reasonable apprehension of bias.

42. Third, application of the test for bias in this case must take into account that, even with the legislature's authorisation of overlap of personnel and functions, the BCMB has in practice made every reasonable effort to minimise overlap of personnel where practicable in the circumstances. With respect to egg industry issues, the BCMB has deployed its membership so that members of the Panel have not participated in any of the EQAR supervisory actions, decisions and letters to which the Appellant refers in support of his argument. The Panel members did participate in the February 1999 Review of the Regulated Marketing System which assumes that organics, in general, are encompassed in the regulated marketing system. However, we have not in any capacity, until this appeal, been aware of or been asked to consider the argument that certified organic eggs are not "eggs" within the meaning of the *Scheme*.

43. Fourth, the test for bias must recognise that it is in the nature of the BCMB's supervisory mandate to act promptly, creatively and independently to protect the public interest. The BCMB's supervisory attempts to facilitate a more consensual and favourable environment between organic producers and the Egg Board illustrate this aspect of the supervisory role. The record shows that the BCMB,

exercising its supervisory mandate, provided two members to facilitate discussions with organic producers in 1998, and issued EQAR directions in 1999 and 2000 designed to provide favourable terms for organic growers to obtain quota. These supervisory efforts may be contrasted with past bitter experience demonstrating that, if allowed to fester, conflicts between dissident producers and commodity boards can spawn enormous conflict and cost (see for example, *British Columbia (Milk Board) v. Bari Cheese Ltd.*, [1991] B.C.J. No. 2444 (C.A.), where Southin J.A. referred to the conflict in that industry as a "war").

44. In taking important supervisory action in the public interest, BCMB members must necessarily proceed on their best understanding of the relevant legislation. However, this does not prevent an appeal panel from arriving at its own decision after argument and deliberation, particularly where, as here, new arguments are made. In this instance, the BCMB Chair, and supervisory panels, have indeed proceeded on the view that the regulated marketing system includes organic production, and that the *Scheme* applies to organic eggs. Given that the *Scheme* expressly states that it applies to "all classes of eggs", it will suffice to observe that this view was not unreasonable, or reflective of a bias against organic producers, particularly since a significant purpose of the EQAR reports was to benefit such producers.

45. The Appellant has not provided any evidence that, during the supervisory process, he or any other party attempted to advance the novel legal argument he now seeks to advance. COABC's briefs never took issue with the view that the *Scheme* applies in law; but rather focused on getting organic production generally exempted from the law. Significantly, at least one organic producer has taken just the opposite position from these Appellants. That producer has come before BCMB on appeal, on the implicit premise that the *Scheme* does apply and sought the benefits of quota and the Temporary Restricted Licence Quota discussed in the BCMB's EQAR reports.

46. The Appellant is of course entitled to advance this argument now, and his argument may well, in the end, prevail. However, the Appellant's attempt to advance a new and novel argument at this stage cannot give rise to "bias" in the Panel simply because the BCMB has, in its supervisory and appellate role, been proceeding on the premise that certified organic eggs fall within the meaning of "all classes of eggs".

47. Even if the correspondence relied upon by the Appellant could be regarded as reflecting decisions of the entire BCMB made after competing submissions (which is not so), previously expressed views on a question of law do not amount to a disqualifying bias provided the Panel is (as we are) prepared to listen to someone with something new to say. The law is clear that the concept of *stare decisis* does not apply to administrative tribunals. As succinctly stated in *Transcanada Pipelines Ltd. v. Beardmore (Township)*, [2000] O.J. No. 1066 (C.A.) at para. 129:

> Moreover, there is a well-accepted principle of administrative law that *stare decisis* does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar

> issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it. See, e.g., *Evans v. Public Service Commission Appeal Board,* [1983] 1 S.C.R. 582; *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionelles) (1993),* 105 D.L.R. (4th) 385 (S.C.C.).

48. In *Domtar v. Quebec*, the Supreme Court of Canada quoted from its earlier decision in *Tremblay v. Quebec*, [1992] 2 S.C.R. 952 at para. 45:

> Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it is particularly important for the persons responsible for hearing a case to be the ones to decide it.

49. Administrative tribunal panels are not bound by the legal conclusions of other panels, or by the legal views they may have previously expressed. Just as tribunals are entitled to announce and apply policy provided they are not fettered by it, tribunals are, on questions of law, entitled to "repent and recant": *TED - 100 Holdings Ltd. v. British Columbia (Minister of Labour),* [1990] B.C.J. No. 1995 (S.C.). As noted by the Court of Appeal in *Finch v. Assn. of Professional Engineers*, [1996] B.C.J. No. 743 (C.A.) at para. 23:

> I think we may take notice of the fact that many adjudicative tribunals validly re-hear matters that have been heard by other members of the same tribunal, when it must be assumed that everyone is aware of the previous findings. In fact, although the situation has become rarer in recent years, there are older authorities holding that a tribunal that may have been found to have acted in breach of its authority or otherwise improperly, have itself validly heard the matter afresh: see e.g. *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330. At p. 340 of its judgment in that case, the Court quoted with approval Lord Reid's comment in *Ridge v. Baldwin*:
>
> > I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a valid opportunity to present his case, then its later decision will be valid.

50. Administrative decision-makers are entitled to depart from previous decisions or conclusions of law and policy, or alternatively may accept them if they seem sound and "consensus" develops. Accepting the Appellant's bias argument would totally undermine this line of authority. Rather than being free to consider a new argument and render a decision that reflects either consensus or disagreement, tribunal members would be subject to taint and paralysis simply because they have considered a question before. This would be a nonsensical result. It ignores the dual roles of the BCMB, authorised by statute. It ignores the fact this Panel has had only limited involvement with the "organics" issue generally, and was not involved in the specific EQAR reports and letters. It ignores the fact that the argument the Appellant wishes to make has never before been advanced before the BCMB and has never been considered by the Panel.

51. Objection to judges hearing cases because they have "prejudged" a question of law in a previous judicial decision does not often arise in Canadian courts. This may be in part due to the doctrine of precedent that applies to courts as reflected in cases such as *Re Hansard Spruce Mills*. However, it may also be because it is recognised

that the system would simply break down, particularly in appellate courts, if a justice were disqualified from hearing a case simply because a justice had, in his or her judicial capacity, decided a question of law, or aspects of the issue, previously. This has been recognised in a number of cases, including *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369, a case cited by the Appellants. In that case, de Grandpre J. dissented in the result, but his statements of law have been accepted ever since as being the basis for the Canadian law of bias: see generally *R. v. S. (R.D.),* [1997] 3 S.C.R. 484. In outlining the law, de Grandpre J. quoted with approval from a decision from the United States dealing with marketing boards (*New Hampshire Milk Dealers Assn. v. New Hampshire Milk Control Board* (1966)) and in which the following general principle was expressed:

> It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s. 12.01, p. 131. There is no doubt that the latter would constitute a cause for disqualification. However, "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification."… If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issues of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts.

52. The same point was expressed much more recently by Binder J. in *R. v. Kochan,* [2001] A.J. No. 555 (Q.B.) at para. 13:

> Counsel has not cited, nor has this court been able to locate, any case in which a determination of law which does not involve the hearing of evidence crucial to the guilt or innocence of an accused, findings of fact based on such evidence or an assessment of credibility of witnesses, has given rise to a finding of a real likelihood of bias or a breach of an accused's right to receive a fair trial.
>
> This is not surprising, given the consequences of such a principle if accepted. Such an extension would prohibit judges and courts from hearing a multitude of cases, thereby unnecessarily and unreasonably curtailing their duties and function. Further, it would not adequately reflect, and in fact would undermine, the integrity of the administration of justice.

53. The Supreme Court of Canada has set out this test where reasonable apprehension of bias allegations are made against judges: "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind": *R. v. R.D.S.,* [1997] 3 S.C.R. 484, cited in *Authorson (Litigation Guardian of) v. Canada (Attorney General),* [2001] O.J. No. 4352 (S.C.J.) at para. 37.

54. The Appellant having, for the first time, sought to advance argument on the point, the Panel is fully prepared to consider it. This is just the opposite of bias.

55. The Appellant has relied on six cases in support of his submission: *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369; *International Union of Operating Engineers v. Newfoundland (Labour Relations Board),* [1995]

N.J. No. 354 (T.D.); *Newfoundland Telephone Co. v. Newfoundland (*Board *of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623; *Lee v. Canada (Deputy Commissioner, Correctional Service)*, [1994] 3 F.C. 629 (T.D.); *Ringrose v. College of Physicians and Surgeons*, [1977] 1 S.C.R. 814 and *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.). None of these authorities assists the Appellant, however each will be addressed briefly.

56. The first case is *Committee for Justice and Liberty v. National Energy Board*. As noted above, de Grandpre J.'s statement of the law in that case, which has subsequently been accepted by courts and is consistent with the other cases referred to at paras. 47-53 above, does not assist the Appellant. Further, that case is factually very different from this one, since it involved reasonable apprehension of bias based on prior association between a decision-maker and a party, and involvement by the decision-maker in the very application he was later required to decide. As noted by Chief Justice Laskin for the majority at pp. 12-13 (Q.L.):

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. A fortiori, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in a statement of claim or statement of defence and nothing else. There is, at the lowest, a parallel here between being involved in taking instructions or drawing up pleadings for litigation and being involved in helping to plan the terms of a contemplated s. 44 application which is in fact made.

57. *International Union of Operating Engineers v. Newfoundland (Labour Relations Board)* is also very different from the present case. In that case, the evidence disclosed that a Labour Relations Board Chair privately advocated a change in the law to Government, and a specific outcome as part of that amendment, on an issue that had been argued, and was on reserve before him in his quasi-judicial capacity. That exercise in advocacy on the very issue under reserve clearly gave rise to a reasonable apprehension of bias. As noted by the trial judge: "I considered that an administrative board conducting a hearing should not seek a legislative amendment to defeat the effect of a submission it has taken under reserve".

58. Counsel for the Appellant argued by analogy that while the COABC was seeking to put its position for an exemption and its own commission before the Minister, the BCMB directed the Egg Board to regulate organic production, and thereby "shut off" an available option. The Panel disagrees with this characterisation. The Lieutenant Governor in Council was (and remains) entirely free to make a favourable decision regarding the COABC's policy request for an exemption from regulation. The BCMB cannot second-guess or control Executive decision-making. BCMB supervisory directions cannot prevent Government from acceding to COABC's request if it supports that request. The BCMB has not "shut off" any Government action. There is no analogy to an adjudicative panel seeking to change the law while a matter is under reserve.

59. *Newfoundland Telephones* is also unhelpful to the Appellant. In that case, the Board convened a hearing to consider, among other things, whether an enhanced

pension plan for certain senior utility executive officers should be permitted and charged to ratepayers. After the hearing into that question had commenced, and before all the evidence was heard, a panel member publicly expressed a concluded opinion before the hearing was complete and the facts were in. That is very different from this case where a new legal argument had been raised for the first time and the Panel is prepared to consider it.

60. The Appellant relies on *Lee v. Canada* for the proposition that a reasonable apprehension of bias arises where a subordinate (in that case, a Deputy Commissioner in the correctional system) is charged with deciding a matter previously decided by his superior (the Commissioner). The difference here, of course, is that the Panel is not subordinate to the Chair, or any other BCMB member. As is the case with a Chief Justice of a court, the Chair of an administrative tribunal is "first among equals". The Panel has a statutory and common law duty to make its own decision, and to do so independently: *Tremblay v. Quebec, supra*. Nor can this situation be seen as asking the Panel to "overrule" a superior, since the argument has never been before other board members.

61. The Appellant cites the dissenting judgment of Dickson J. (as he then was) in *Ringrose* to the effect that, even in cases of statutory overlap, bias might arise if a member considers an issue previously considered by another body with which he was associated. The majority in *Ringrose* rejected Dickson J.'s dissenting statement of law. De Grandpre J. for the majority, concluded that where a statute authorises a duplication of functions, the statute's direction must be respected. The majority's statement of the law in *Ringrose*, which is consistent with the view of de Grandpre in *Committee for Justice and Liberty v. National Energy Board*, has been followed in British Columbia: *Finch v. Assn of Professional Engineers*, *supra*; *Gagnon v. College of Physicians*, [1997] B.C.J. No. 1362 (C.A.). Further, as noted above, this argument as it relates to the *Scheme* has never been raised before the BCMB. Even if it had, the BCMB could reconsider it, given the absence of *stare decisis*, and this Panel's commitment and duty to consider this argument independently and in good faith.

62. *MacBain* is also very different from this case. In *MacBain*, decided under the Canadian *Bill of Rights*, the Court held that a reasonable apprehension of bias arose where the agency prosecuting a human rights complaint appointed the hearing panel. Thus, not only did the *Bill of Rights* override the bias authorised by the statute, but the bias flowed from the relationship between the prosecutor and the decision-maker. In this case, neither of the parties appoints the Panel, and there is no reliance on a document such as the *Bill of Rights* to override the statute.

63. Finally, the Appellant has raised the question of remedy, even if the Panel finds a reasonable apprehension of bias. From the valid submission that the *Act* contemplates that the Appellant is entitled to the "fullness" of his statutory right of appeal, the Appellant makes the unreasonable argument that the remedy for such bias is to have the biased Panel allow his appeal on that account.

64. We dismiss the Appellant's submission that such a remedy would be akin to a court dismissing a charge under the *Charter* for undue delay. Appeal rights are purely statutory. An appeal can only be allowed in law if a tribunal within its jurisdiction finds error on the part of the tribunal appealed from. The Appellant's bias submission against the BCMB has nothing to do with the validity of the Egg Board's decision. It would be illogical, unjust and illegal for a biased appeal tribunal to allow an appeal for no other reason than the fact that it is biased.

65. At most, a successful bias allegation results in the biased members being required to recuse themselves. In this case, however, the Appellant's challenge is against the entire tribunal. The Appellant's valid observation that the *Act* entitles him to a right of appeal in fact means that, based on the doctrine of necessity, we ought to proceed even if there were a reasonable apprehension of bias. As noted in Blake, *Administrative Law* (1997) at p. 97 "If all eligible adjudicating officers are subject to the same allegation of bias, out of necessity they will not be disqualified, because the legal requirements of the statute they enforce must be carried out." This makes good sense. The rules of natural justice cannot be used to paralyse an entire administrative tribunal from carrying out its statutory duties.

66. This is particularly applicable to a question of law such as whether certified organic eggs constitute "eggs" within the meaning of the *Scheme*. It is, after all, the merits of those submissions that lie at the heart of this appeal. Resolution of this type of question is an essential part of the specialised function and jurisdiction of the BCMB. To prevent the BCMB from considering new arguments on this point, in the circumstances outlined in detail above, would undermine the statutory framework and deprive the Court of the benefit of the BCMB's reasoning on this issue in the event of an appeal.

67. For the reasons given above, the Appellant's bias objection is dismissed. The appeal will proceed.

RESPONDENT'S SUBMISSION – ADMISSIBILITY OF EVIDENCE TO ASSIST IN STATUTORY INTERPRETATION

68. The Appellant has given notice that he intends to call witnesses to support his legal argument that the *Scheme* does not encompass certified organic eggs. The Appellants' argument may be summarised as follows:

- Section 15 of the *Scheme* is ambiguous in its application to certified organic eggs:

  "regulated product" means layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed.

  "layer" as applied to chickens means laying hens and layers and any class of female chicken hatched for the purposes of egg production.

- The words “chicken” and “hen” in these definitions are not themselves defined. In the *Concise Oxford English Dictionary*, “chicken” may include a pheasant, and a secondary definition of “hen” can include a female lobster or salmon.

- The only way in which the BCMB can properly decide if pheasant eggs, salmon eggs – or, in this case, certified organic eggs – come within the *Scheme*, is to consider evidence of the surrounding circumstances and the effect of the legislation. In this case, the Appellant wishes to present the following evidence:

    - Certified organic eggs are a distinct natural product from conventional eggs;
    - Certified organic eggs did not exist at the time the *Scheme* was enacted;
    - Certified organic eggs have historically been treated as being distinctive;
    - The impact of including certified organic eggs in the *Scheme* is so detrimental to the industry as to be incompatible with the purposes and objects of the *Scheme*.

69. The Egg Board argues that evidence in support of these points is inadmissible to support the Appellant’s legal argument. It says lay opinion evidence about the proper construction of a statute is inadmissible. It also says that evidence showing an exception to the *Scheme* cannot be relevant unless it is first decided that the exception is plausible in the language of the *Scheme*. The Egg Board submits:

> The use of a general term (such as, “all classes of eggs”) reveals an intention to include all classes of eggs. In fact, it is easily seen that the use of such general terminology is the **only** means by which the Legislature can express an intention to include all items, including items that might not be in existence at the time of enactment or promulgation.

70. The Egg Board submits that the language of the *Scheme* is clear. Before allowing the Appellant to proceed as he intends, the BCMB should first decide whether, based on the language of the *Scheme*, the legislature intended to exclude certain classes of eggs. The Appellant, on the other hand, submits that it is not possible to arrive at a considered opinion regarding statutory interpretation without first considering his evidence.

71. The parties raise fundamentally competing submissions about how the task of statutory interpretation ought to be approached. That such conflict has arisen in this case is not surprising since the case law sometimes shows differences in approach, particularly in determining when the legislation is sufficiently “ambiguous” to justify considering the effects of legislation, and determining the weight to be given to the grammatical meaning of legislation to the exclusion of other factors: see for example, *Haida Nation v. British Columbia (Minister of Forests)*, [1997] B.C.J. No. 2480 (C.A.); *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *MacMillan Bloedel Ltd. v. Ministry of Forests*, [2000] BCCA 351.

72. Despite differences in approach and emphasis, courts have held that even where the plain words of legislation appear to encompass a particular set of facts, it is still necessary for the decision-maker to determine whether there is any basis for rejecting the plain meaning of legislation. In *Haida Nation* for example, the Court of Appeal held that there was no reason for excluding aboriginal title from the plain meaning of "encumbrance" in the *Forest Act*. Importantly, however, the Court asked and analysed the question as part of a complete analysis. As noted by Esson J.A. in that case (para. 30):

> In the language of Lord Atkinson, is there anything in the context or in the object of the Act or in the circumstances with reference to which the words were used to show that those words were used in a special sense which would exclude aboriginal title from being an encumbrance on Crown title?

73. The Supreme Court of Canada took the same approach in *Rizzo Shoes, supra*. In that case, the Court held that while the plain meaning of a statute pointed in one direction, that interpretation was in fact the incorrect one as it was incompatible with the statute's purposes in that case. As noted by the Court at para. 27:

> In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

74. *Macmillan Bloedel*, on the other hand, represents a recent statement that "effects" and "absurdity" are irrelevant where legislation is clear. Even here, however, the Court went on to comment on whether the result in the particular case was absurd, and held that it was not.

75. The Appellant has made clear that he does not intend to have his witnesses give opinions about what the *Scheme* says, or what it should say. That would clearly be improper and will not be permitted. The Appellant does wish to tender evidence in support of factual assertions that certified organic eggs are distinct natural products, that they did not exist when the *Scheme* was enacted, that they have always been treated as distinct and that serious impacts attend their inclusion in the *Scheme*. We do not find evidence going to these points inconsistent with the type of factually objective evidence regarding the "effect of the statute" and "surrounding circumstances" deemed admissible in *British Columbia Medical Assn v. British Columbia* (1983), 144 D.L.R. (3d) 374 (B.C.S.C.), para. 11.

76. The Egg Board will no doubt argue that, even if all these assertions are true, it makes no difference to a proper construction of the *Scheme*. However, that is an argument for the merits of the appeal, and not before us on this preliminary application. It would not be possible to categorically exclude the Appellant from

tendering his evidence without categorically ruling on the proper construction of the *Scheme* at this preliminary stage. There is a live issue between the parties as to the law, and the Egg Board has, for what may be very legitimate reasons, declined to proceed on the basis that the facts the Appellant intends to allege are true.

77. The Egg Board submitted that it might be appropriate for the Panel to make another preliminary decision regarding whether the language "all classes of eggs of the domestic hen" intends to exclude certain classes of eggs. We are not inclined to do this. As recognised in our discussion of the first preliminary issue, the Appellant seeks to advance a legal argument not previously been made. In our view, the primary consideration here is ensuring that the Panel arrives at the best and most considered answer to this question. From this perspective, it makes more sense to answer the question of statutory interpretation in light of the evidence as a whole.

78. In coming to this decision, we have taken into account *British Columbia Egg Marketing Board v. Douglas Lake Cattle Company* (October 2, 2001, unreported, B.C.S.C.). In that case, the Court refused the Defendant's application that the Egg Board produce documents relevant to its defence to an Egg Board action seeking to enjoin it from marketing eggs. At paragraph 8, the Court stated as follows:

> The Ranch says that such documents may serve to support the contention that, as a matter of statutory interpretation, the Board's jurisdiction was not intended to extend to special niche markets such as the market for free range ranch brown eggs. But the Ranch does not say what aspect of the governing legislation (apart from the phrase "normal regulatory markets" that is no longer included in the definition of quotas) is open to the interpretation for which it contends, and no authority is cited that would support the production to assist in statutory interpretation in any event.

79. *Douglas Lake* differs from this case in two respects. First, the Court stated that the Ranch had not advised the Court of what aspect of the legislation was open to the interpretation it was asserting. The Appellant has done so here. Second, there is a difference between a coercive order requiring a party to produce documents (in that case, every single document, dating back 30 years, mentioning free range ranch brown eggs) and evidence tendered by a party itself in support of its argument.

80. In reaching our conclusion, we wish to make it clear that we do not intend to permit evidence that is unduly lengthy or repetitive. We also do not intend this issue to become the source of inordinate cost and expense to the parties. The hearing must be manageable.

81. The Panel therefore directs that unless a party can satisfy the Panel to the contrary on application, all evidence on this appeal will be completed in no more than 5 hearing days, leaving a 6th day for oral argument. The parties ought to manage their preparation accordingly. To this end, the Panel also issues the following directions:

- no later than January 28, 2002, the Appellant will tender a list of the witnesses he intends to call, and a brief description of the evidence each witness intends to give;

- no later than February 4, 2002, the Egg Board will tender its list of witnesses in response, along with a brief description of the evidence its witnesses intend to give; and
- at a date in early February, 2002 convenient to all parties, BCMB staff will convene a second pre-hearing conference to set the hearing dates and address (by consent if possible) any other procedural matters that arise.

ORDERS

82. The Appellant's bias application is dismissed.

83. The Egg Board's evidentiary objection is dismissed.

84. The parties are directed to proceed according to the directions set out at paragraph 81 of these reasons.

Dated at Victoria, British Columbia this 21st day of January, 2002.

British Columbia Marketing Board
Per

(Original signed by):

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