

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING AN APPLICATION FOR
TEMPORARY RESTRICTED LICENCE QUOTA
FOR FREE RUN PRODUCTION

BETWEEN:

MARILYN VAN NUYS dba VAN NUYS FARMS

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. Rolf Van Nuys Mrs. Marilyn Van Nuys
For the Respondent	Mr. Peter Whitlock, General Manager
Date of Hearing	October 3, 2000
Place of Hearing	Abbotsford, British Columbia

INTRODUCTION

1. On May 15, 1999, Marilyn Van Nuys appealed the decision of the British Columbia Egg Marketing Board (the "Egg Board") denying her request for a permit to produce white, free-run eggs from an additional 4000 laying hens. Although Marilyn Van Nuys is the registered producer, she operates "Van Nuys Farms" with her husband, Rolf Van Nuys. Accordingly, in these reasons, we refer to both Mr. and Mrs. Van Nuys jointly as the "Appellants".
2. Golden Valley Foods Ltd. ("Golden Valley") was initially granted Intervenor status in this appeal. However on August 28, 2000, they withdrew from the appeal.
3. By letter dated May 29, 2000, the Egg Board sought to have the appeal dismissed by the British Columbia Marketing Board (the "BCMB") arguing that the appeal was filed outside the 30 day time limit imposed by the *Natural Products Marketing (BC) Act*.
4. On July 24, 2000, the BCMB dismissed the Egg Board's application and ordered that in the interest of fairness, this appeal be heard.
5. The hearing proceeded on October 3, 2000. Both the Appellants and the Egg Board appeared without Counsel. Mr. Rolf Van Nuys presented the case on behalf of the Appellants. Mr. Peter Whitlock presented the case on behalf of the Egg Board.

ISSUE

6. Should the Egg Board issue a free run permit under the Temporary Restricted Licence Quota ("TRLQ") Program to the Appellants?

FACTS

7. The Appellants began farming in 1995, placing their first flock on March 6, 1996. As of January 1, 2000, the Appellants hold basic layer quota of 5050 birds (5000 purchased in 1995, 50 of allocated growth) and 1010 birds of New Entry quota (1000 given under the New Entry Program on January 2, 1997 and 10 of allocated growth). In total, they have 6060 birds of quota. Under the New Entry Program, the Appellants are obligated to farm until January 1, 2003 before their new entrant quota can be transferred or sold.
8. On December 16, 1998, the Egg Board issued its policy on the TRLQ Program. This Program created temporary licenses allowing approved producers to grow organic or free range eggs without purchasing quota.

9. In December 17, 1998, the Appellants, in response to a request received from their grading station, Golden Valley, approached the Egg Board requesting that free run production, in addition to organic and free range production, be considered for the TRLQ program.
10. The Egg Board considered the request and on January 22, 1999 advised the Appellants that the TRLQ program would remain restricted to organic and free range production.
11. On April 13, 1999, in response to a further request for more free run production from Golden Valley, the Appellants again approached the Egg Board requesting a permit to produce free run eggs under the TRLQ program.
12. On April 20, 1999, the Egg Board reconfirmed that the TRLQ program would only be considered for certified free range or organic production as in its opinion “[t]here appears to be enough producers willing to convert their production to Free-run that the additional incentives are not required at this time.”
13. On July 20, 1999, Golden Valley notified the Appellants that as they now had a supply of free run production in excess of 10,000 birds of production, they no longer required additional free run production from the Appellants. As a result of this change of events, the Egg Board and the Appellants agreed to adjourn the appeal indefinitely.
14. On February 15, 2000, Golden Valley notified the Appellants that it was then in need of brown free run production from an additional 4,000 birds. In response to this request, the Appellants wrote to the Egg Board on March 7, 2000 again requesting reconsideration of their application for a permit to grow 4000 birds of free run production.
15. On April 18, 2000, the Egg Board denied the Appellants’ request stating:

As may be noted, the TRLQ, as it later came to (sic) known as, did not include Free Run eggs. The understanding was that there are a number of producers, with quota, who are willing to convert their quota to Free Run production. Therefore, it was not considered to be in the best interests of the BC egg industry, at this time, to encourage new production in the form of Free Run beyond the registered producers who have already expressed their interest to convert to Free Run.
16. On May 3, 2000, the Appellants advised the BCMB of their desire to have this appeal scheduled as soon as possible.

ARGUMENT OF THE APPELLANTS

17. The Appellants take issue with the Egg Board’s TRLQ Program. The current wording of the Program allows for temporary lease arrangements to be made to promote and facilitate the production of free range and organic eggs. The Appellants maintain that this Program should be broader in scope and include free run eggs.

18. Traditionally in the egg business, specialty eggs have been considered to be something other than caged white production. Specialty eggs include brown, free run, free range and organic egg production.
19. The Appellants have made repeated requests of the Egg Board to broaden the scope of the TRLQ Program but the Egg Board has refused to make any amendments. The Egg Board feels that there are enough producers with quota willing to convert their production to free run. Thus, the Egg Board takes the position that it is not necessary to offer the same incentive for free run production as is available to free range and organic.
20. The Appellants disagree with this position and rely on the evidence of Mr. Walt Puetz, Production Manager of Golden Valley. Mr. Puetz maintains that, due to consumer preferences, the market for brown free run eggs has grown substantially over the past ten years. Golden Valley has had difficulty getting producers to convert to producing free range and free run product. When the Appellants approached Golden Valley in 1995, Mr. Puetz advised them to produce free run eggs as Golden Valley was short of this type of production.
21. At the time the Egg Board created its TRLQ Program, Golden Valley was still having difficulty obtaining enough specialty eggs, including free run eggs, to satisfy its markets. In early December 1998, Golden Valley wrote to the Appellants and advised that it had a market for approximately 4000 white free run eggs and that they were prepared to contract for this amount of production. The Appellants took this request to the Egg Board but were turned down. In April 1999, Golden Valley repeated the request, but indicated the need was now for brown as opposed to white free run eggs. The Egg Board however, was still not prepared to extend the TRLQ Program to free run production.
22. In the summer of 1999, as a result of taking over the Lower Mainland contracts of an interior grading station, Floritto's Egg Sales Ltd., Golden Valley secured a supply of speciality production. After five years of "begging" and "pleading" for more speciality production, Golden Valley had enough specialty product to satisfy market demand. As a result, Mr. Puetz wrote to the Appellants on July 20, 1999 to inform them of this development. At this point in time, this appeal was adjourned indefinitely as the Appellants felt that without market demand and the support of Golden Valley, this appeal could not be successful.
23. However, the Appellants argue that as of February 15, 2000, the situation has changed. Golden Valley again has a need for brown free run product from approximately 4000 birds. The Appellants assert that the Egg Board should consider the request to allow the Appellants to grow this free run product for Golden Valley under the TRLQ Program.
24. As of the hearing date, the Appellants argue that Golden Valley's need for free run production is even greater now (up to 6000 birds). Golden Valley does not have the same need for free range production as its market demand and supply are just about equal. Thus, the Appellants argue that it is free run production, which is in need of an incentive, not free range.

25. The Appellants argue that aside from the fact that the TRLQ program disadvantages them personally, it does not make sense. Everyone is short of quota. BC's allocation of quota does not meet its production demands. However, there has to be flexibility in the system. If 1/2% of quota was clawed back from the annual production allocation for caged white eggs, 10-11,000 birds of production would be freed up. This allocation would satisfy BC's entire specialty production needs.
26. In addition, the Appellants assert that if any market is to be shorted it should be the caged white market. Manitoba regularly ships this product into the province and as such caged white eggs are easier to source than the free run brown egg demanded by the consumer.
27. The Egg Board cannot say to a grower, buy quota if you want to expand in the specialty market. Quota is as scarce as "hen's teeth". In addition, when the cost of quota is factored in, conversion to specialty production simply does not "cash flow out".
28. The bottom line is that Golden Valley needs between 5000 and 6000 birds of brown free run production. It does not have a supplier for this product. Golden Valley is prepared to enter into a long term contract with the Appellants to give them the necessary security to approach the bank and obtain the financing to build a new barn to grow the TRLQ permit production.
29. The Egg Board has tremendous powers to regulate the egg industry, which should be used responsibly. In addition, rather than remain unresponsive, the Egg Board should be considering Golden Valley's needs. It is the party that is prepared to assume all the risk. If market demand drops, the Appellants maintain that Golden Valley will honour its contractual commitments and absorb any price differential.
30. The Appellants argue that these circumstances present compelling reasons to include free run production in the TRLQ Program. Failing that, the Appellants argue that they should be exempted from the TRLQ Program and be granted 6000 birds of permit. The Appellants argue that the Egg Board's failure to grant the permit they require has resulted in lost revenues of approximately \$48,000.

ARGUMENT OF THE RESPONDENT

31. The Egg Board does not dispute the evidence that there is a shortage of specialty production. In fact there is an overall shortage of all types of production. However, the Egg Board cannot address shortages in a "willy-nilly" fashion. There must be some order in the system. In addition, because of this shortage, pricing is the number one issue facing the Egg Board. Lack of published prices for specialty production tends to result in producers getting lower prices for their eggs as they are competing with the unregulated market.
32. The Egg Board argues that the decision to restrict the TRLQ Program to free range and organic production had nothing to do with the Appellants. Rather the Egg Board had a very small amount of quota and a decision had to be made how best to allocate that production.

33. In December 1998, the Egg Board felt that as some producers were ready to convert or had voluntarily converted or started up free run facilities, there was less need to create an incentive for that type of production. The Egg Board does not believe that Golden Valley's demand for free run is an indication of a province wide need. Rather, it is the Egg Board's position that there remains a provincial need for organic and free range production and as such, the Egg Board made a decision to offer the incentive for free range and organic production. That was the Egg Board's position in 1998 and that remains its position today.
34. The Egg Board maintains that if it allowed free run as part of the TRLQ Program, this limited amount of quota would be entirely used for free run production, as producers seem more willing to convert to free run than to free range or organic.
35. The Appellants argue for a claw back of caged white production to support specialty production. The Egg Board receives many of these types of requests. Organic producers suggest a claw back of 70,000 birds, the northern producers suggest a claw back of 110,000 birds, Vancouver Island producers suggest between 50-200,000 birds. Quota is scarce and there is only so much to go around. A claw back is really a decision of the Egg Board to take one grading station's market share and customers and give it to another. The Egg Board argues that it is unacceptable to cut an already short market to supply another.
36. The Egg Board argues that the majority (90%) of the market, which must be served, is still the caged white production. The Egg Board takes the position that it has a duty to ensure that this market is served. Shorting the white caged layer market runs the risk of losing that market to another province.
37. The Egg Board recognises that it has tremendous power and responsibility to supply the customers within the supply managed system. The Egg Board has tried to be innovative and responsive over the years. One such innovation is the TRLQ Program. This Program is not meant to take the place of regular quota. It is intended to be self-sustaining with 2% of production being directed to the TRLQ Program on a constant revolving basis over 7 years. It has and will continue to supply New Entrants and specialty producers with quota to help address production requirements. The Egg Board argues that the TRLQ Program, as designed, has been successful in increasing specialty egg production.
38. The Egg Board, to the best of its abilities, must control increased production in a balanced way, in the best interests of BC and the egg industry. Presently, the shortages are most acute in free range and organic production areas and as such an incentive is the appropriate way to address this problem.
39. Egg Board decisions are directed by market demands; the current situation could change. The Egg Board wants to have flexibility to respond to market demand and respond to change. The TRLQ Program must also be flexible.

DECISION

40. The BCMB has long supported initiatives that promote new entrants into the regulated marketing system. More recently, as part of our *Review of the Regulated Marketing System*, the BCMB encouraged boards and commissions to develop programs that would encourage market responsiveness in areas of “niche” or specialty production.
41. In December 1998, the Egg Board developed the TRLQ Program. This Program is designed to encourage the production of certain types of specialty production, free range and organic. Several producers have applied to the Program to produce organic or free range eggs under permit without obtaining quota.
42. At the time the TRLQ Program was developed, the Egg Board made a decision to exclude free run production from the Program. Mr. Whitlock states that this was because, of the three types of specialty production, growers appeared to be more willing to convert to free run production. Organic and free range production were in more need of an incentive. The Egg Board feared that if the TRLQ Program included free run eggs, only free run eggs would be produced. Thus, the Program would not have had the desired effect of increasing specialty production beyond free run eggs.
43. The Egg Board’s rationale for excluding free run production may have been justified in 1998. The Program was in its developmental stages and the Egg Board wanted to achieve the most from the limited quota available for the TRLQ Program. However, the Panel is not convinced that a program designed to encourage specialty egg production in the Province should be restricted or limited in the type of specialty production which qualifies.
44. The evidence of Mr. Puetz was very clear. Golden Valley has sufficient free range production to meet its market demands. On the other hand, it has a market in BC for free run production which is not being met. Given that Golden Valley markets approximately 80% of the eggs produced in BC, it would appear that some justification exists for an incentive for free run production. In an increasingly competitive marketplace, with large grocery retailers tending towards centralised buying, it is also important to ensure that BC grading stations are able to provide the product that their established markets require.
45. The Panel is of the opinion that in order to be flexible and responsive to market demands, the TRLQ Program should not be restricted to free range or organic production. Free run production should be part of the Program. It is within the power of the Egg Board to place restrictions or limits on the free run component in order to prevent it usurping the entire Program. It would however, appear to be in the best interests of the Province to have a TRLQ Program that accommodates all types of specialty production.

46. The Panel turns now to the Appellants' request to be granted either a permit to grow free run production under the TRLQ Program or an exemption from the TRLQ Program. After reviewing the evidence as a whole, the Panel is not satisfied that the Appellants should be granted either a permit to produce free run production or an exemption from the TRLQ Program.
47. Based on our decision on the first issue, the Egg Board will have to decide how to incorporate free run production into the TRLQ Program. Without knowing the terms under which free run permit will be granted, the Panel is not prepared to grant free run permit to the Appellants.
48. There is a shortage of quota in the Province. A number of producers have applied for TRLQ permits and have not received anything. The Panel is not fully aware of the circumstances of these applications and as such we are not prepared to prefer the application of the Appellants to that of any other producer. The Egg Board is in the best position to review all the applications and determine a fair distribution of TRLQ permits.

ORDER

49. The appeal is dismissed.
50. There will be no order as to costs.

Dated at Victoria, British Columbia this 10th day of November, 2000.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

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