

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT*
AND
AN APPEAL FROM A DECISION CONCERNING
CANCELLATION OF A SPECIFIED PRODUCTION ALLOTMENT

BETWEEN:

JOHN JANSEN

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES BY:

For the British Columbia
Farm Industry Review Board

Garth Green, Panel Chair
Christine J. Elsaesser, Member
Honey Forbes, Member

For the Appellant

John Jansen

For the Respondent

Arlene Lannon, General Manager
Peter Whitlock, Operations Manager

Location of Hearing

Abbotsford, British Columbia

Date of Hearing

November 20, 2006

INTRODUCTION

1. In 2004 and 2005, the British Columbia Farm Industry Review Board (“BCFIRB”) conducted a supervisory review of commodity board practices relating to specialty production in British Columbia. That review examined existing practices and provided directions to better accommodate specialty production in the regulated commodity industries. BCFIRB’s directions to the British Columbia Egg Marketing Board (the “Egg Board”) required specialty permits existing as of December 31, 2004 be converted to specialty quota effective January 1, 2005.
2. Mr. Jansen is a producer of free range organic eggs and is a specialty egg producer. As of December 31, 2004, he held 3,882 birds of layer quota and a Temporary Restricted Layer Quota (“TRLQ”) permit of 5,000 birds. He also held a Special Permit Layer Quota (“SPLQ”) permit for 1046 birds with an expiry date of April 11, 2005.
3. Effective January 1, 2005, the Egg Board converted Mr. Jansen’s TRLQ to specialty quota. However, the 1,046 bird SPLQ permit was not converted as the Egg Board characterized the permit as temporary in nature relating to production lost during the Avian Influenza (AI) outbreak in 2004. Mr. Jansen maintains that the SPLQ permit should have been converted in accordance with BCFIRB directions and as such he has appealed this decision of the Egg Board.
4. The appeal was heard November 20, 2006 in Abbotsford.

ISSUE

5. Did the Egg Board err in not converting Mr. Jansen’s SPLQ permit to specialty quota?

DECISION

6. This appeal involves a consideration of the special permits issued by the Egg Board and how those permits fit within the directions made by BCFIRB as a result of its Specialty Review.¹ Some background is necessary to put this appeal into context.
7. In about December 2003, Mr. Jansen entered into a verbal agreement with a Vancouver Island producer, Gord Galey, to place chicks on the Jansen farm in Chilliwack. These birds were to be transferred to Mr. Galey in April 2004 at the onset of lay. However, as a consequence of the outbreak of AI in February 2004, the Canadian Food Inspection Agency restricted movement of pullets and layers outside the Fraser Valley until July 2004. Thus, the birds intended for the Galey operation could not be shipped when they came into lay. Given that Mr. Jansen did not have quota or permit to cover the production from the Galey layers, his choice

¹ The Egg Board termed its permits “special permits”. In its directions, BCFIRB directed that “specialty permits” be converted to specialty quota.

was to either cull the birds or stay in production and seek redress from the Egg Board. In his mind, supplying the marketplace “was the better way to go”. In November 2004, the Egg Board granted Mr. Jansen’s request for an SPLQ permit to cover the production from the 1,046 birds; this permit was to expire April 11, 2005.

8. According to BCFIRB directions, specialty permits existing at December 31, 2004 were to be converted to specialty quota effective January 1, 2005. Although the Egg Board converted Mr. Jansen’s TRLQ permit to specialty quota, it did not convert the SPLQ permit. Mr. Jansen argues that the SPLQ permit should have been converted to specialty quota for the following reasons:
 - a) as a special permit it falls squarely within BCFIRB direction to convert specialty permits to specialty quota;
 - b) the form of this special permit is no different than others that were converted;
 - c) representations made by BCFIRB Chair Richard Bullock and consultant George Leroux confirm that the permit should be converted;
 - d) conversion of the permit would fall within the spirit of the letter from the BCFIRB Chair to all commodity board chairs requiring them to exercise restraint in non-compliance issues and to seek consistency between commodity boards;
 - e) there is a demand for more organic product and this demand should be met by local rather than imported production;
 - f) background circumstances for why the permit was issued or how the Egg Board internally dealt with the allocation are not relevant considerations in determining whether the permit should be converted.

9. With respect to point a) above, Mr. Jansen points to page 26 of BCFIRB directions regarding permit conversion:

With respect to Permit Conversion, the following policy directions are given:

1. Specialty permits are to be converted to quota licenses of a class applicable to the designated product produced.
 2. Permit conversion to quota is to recognize, as a minimum, the authorized volumes produced in the twelve months ended December 31, 2004, or the nearest quota cycle to this twelve-month period.
10. Given that his SPLQ permit was in effect on December 31, 2004, Mr. Jansen argues that it is clearly covered by the above direction and accordingly, should have

been converted to specialty quota.

11. With respect to point b), Mr. Jansen argues that there is no difference in the appearance of permits issued by the Egg Board. Only the specifics of the grower's name, bird numbers and dates vary. There is no mention on the SPLQ permit as to how the Egg Board is covering the production. Nor is there any indication on the permit as to the reason for its issuance. Mr. Jansen argues that there is no difference between specialty permits and therefore the Egg Board was wrong to treat his permit differently than other specialty permits.
12. With respect to point c), Mr. Jansen argues that his interpretation is consistent with advice received at an information meeting in Abbotsford on October 3, 2005, held by BCFIRB. At this meeting, BCFIRB Chair Mr. Bullock, and consultant Mr. Leroux confirmed that all specialty permits outstanding as of December 31, 2004 were to be converted to specialty quota as of January 1, 2005. Mr. Jansen states that he inquired about his specific situation and was given assurances that the BCFIRB direction applied to his SPLQ permit.
13. With respect to point d), Mr. Jansen argues that his interpretation is consistent with the September 26, 2005 letter from the BCFIRB Chair to all commodity board chairs wherein he stated:

Boards should also take this opportunity to review their enforcement policies in accordance with FIRB's directions. This will include attention to how transitional issues related to the payment of past levies might be addressed. It is understood that there is a range of non-compliance situations and enforcement possibilities. Given these circumstances, the boards may wish to consult with respect to enforcement and compliance issues so as to ensure there is consistency and fairness in the application of the FIRB policy directions across the supply managed sector.
14. He argues that this letter confirms that the Egg Board in implementing the Specialty Review directions was to exercise some restraint and be consistent. Mr. Jansen argues that the Egg Board has not followed the spirit of this direction.
15. With respect to point e), Mr. Jansen argues that there has been a significant demand for organic eggs in BC since 2003. Correspondence between graders and the Egg Board confirms the ongoing demand for organic egg production. Further, the Egg Board has imported organic eggs to meet demands. Mr. Jansen questions why the Egg Board would place a higher priority on importing organic eggs rather than servicing the market locally. He contends that given provincial grader demand and the high level of imported organic eggs, the Egg Board was remiss in not providing for greater organic egg production in the province by converting his SPLQ permit. He was operationally capable and had the birds in place.
16. With respect to point f), Mr. Jansen argues that as market demand is the primary reason for the issuance of special permits, other Egg Board considerations in issuing special permits are irrelevant. Specifically, he argues that issues arising out

of AI were not relevant to the issuance of his special permit and should not be determinative of whether his permit is converted. The existence of his special permit when combined with the directions regarding permit conversion to the Egg Board from BCFIRB make it clear that his special permit should be converted to specialty quota.

17. The Egg Board for its part maintains that it was correct in not converting Mr. Jansen's SPLQ permit to specialty quota. It argues that it is not enough to look at the name given to the permit rather one has to look at the reason why the permit was issued and determine whether it fits within the category of specialty permits to be converted referred to by BCFIRB. The Egg Board argues that it has used special permits for a number of purposes. It issues special permits to producers to allow for temporary production allocations where there existed an underlying quota holding. The most common usage is by producers utilizing "banked production shortages" or "quota credits" to even out over/under production situations. The Egg Board also issues special permits to help producers recover from disasters which interrupt production. If a producer cannot produce his quota for a period of time, he may apply and receive a permit to allow him to make up that production at a later date. These types of special permits are temporary and are not issued from the Egg Board's quota reserves.²
18. The Egg Board also uses special permits to regularize production outside its Standing Order (unregulated production). These permits are fundamentally different as there is no underlying production right so they require a permanent allocation of quota from the Egg Board's quota reserves (MRAP). The Egg Board must account for this special permit production in order to ensure that the province does not exceed 97% of its provincial allocation.
19. When the Egg Board looked at BCFIRB directions to convert specialty permits to quota, it determined that of the special permits it issues only the special permits issued to regularize (or legitimize) production (i.e. permits issued under the MRAP) should be converted. The Egg Board converted the 7 producers falling within this category³. The Egg Board's position is that the Jansen SPLQ permit, issued for unique circumstances arising out of AI, does not qualify for conversion. It was issued with an expiry date in order to ensure organic egg production continued while the producers affected by AI got back into production. Its issuance recognized not just the market demand but also that the demand would have been met by new or existing producers but for AI. The Egg Board felt it would be unfair for producers to be doubly affected by AI, not only losing birds in the short term but losing market share in the long term.

² When the Egg Board receives its annual allocation of quota, a small portion of that allocation is held in the Market Responsive Allocation Program ("MRAP"). This pool of quota can then be allocated by the Egg Board to producers who are filling a special market requirement.

³ According to the Egg Board there were 44 Special Permits in existence in BC as of December 31, 2004. Of these, 36 related to producers utilizing banked production, 7 were organic producers awaiting FIRB directions under the Specialty Review and 1 was the Special Permit issued to Mr. Jansen.

20. The Egg Board also points out that there is no dispute that reason for the issuance of the Jansen SPLQ permit was AI. When Mr. Jansen appeared before the Egg Board to request a special permit or the use of quota credits, he advised the Egg Board that he could not ship the birds because of the transportation restrictions imposed as a result of AI. This is confirmed in the Egg Board's motion.
21. In summary, the Egg Board submits that this appeal should not succeed on the technical argument advanced by Mr. Jansen that simply because he held a "special permit" at the relevant date he should have that permit converted to specialty quota.
22. The Panel has considered the arguments of the parties at some length. We find that in order for Mr. Jansen to be successful in his appeal, he must show that his special permit fits within the category of specialty permits referred to by BCFIRB in its direction to commodity boards to convert specialty permits to specialty quota. We do not agree with the Appellant that the analysis is as simple as looking at the name given by the commodity board to the permit. As the Egg Board uses "special permits" for a number of purposes, it is imperative that the particular purpose behind the issuance of the permit be determined. Given the foregoing, the Panel does not accept the Appellant's argument that the similarity in appearance of all special permits requires them to be treated the same without consideration of why that permit was issued.
23. The Panel accepts that the Egg Board uses special permits for different purposes. They can be issued to allow producers to meet production requirements when they can not produce for various operational interruptions (i.e. quota credits). They are also issued as a result of special circumstances, such as natural disasters, barn collapse or disease to give a producer flexibility in where, when or how he grows out his production. Mr. Jansen's SPLQ permit falls within this category. In both cases, there is an underlying right to produce which has been interrupted and the Egg Board exercises its discretion as to how best to meet market demands. The Egg Board can also issue special permits to specialty producers who were operating without quota in order to ensure production of specialty eggs for a demonstrated market demand. Mr. Jansen's TRLQ permit fell within this category. The significant difference between this latter type of permit is that there is no underlying quota or production right and as such the production must be accounted for within the provincial allocation.
24. The question then arises which if any of these three types of special permits fall within BCFIRB directions for conversion. The purpose behind BCFIRB's Specialty Review was to bring specialty production within regulation. In doing this, BCFIRB required that New Entrant Programs be developed by commodity boards to accommodate new producers. However, BCFIRB also recognized that many commodity boards had previously developed permit programs to accommodate this production. Unfortunately, there was not a great deal of consistency between the permit programs. In addition, the permit programs did not

address BCFIRB's concerns about transferability and allocation of growth within a specialty sector. Accordingly, BCFIRB mandated that permit programs be changed; producers that held permits in these programs were entitled to have their permits converted to specialty quota.

25. The Panel agrees with the Egg Board that BCFIRB's directions regarding permit conversion were directed at those producers holding existing special permits allowing them to produce specialty product for the British Columbia market. Specialty producers were issued TRLQ permits granting the right to produce specialty production at a set level. These TRLQ permits (including the TRLQ permit held by Mr. Jansen) were properly converted by the Egg Board to specialty quota. As for the other two types of special permit, issued either to allow quota credits to be used to cover production or to allow for production at a different time or location as a result of an interruption in production, the Panel agrees with the Egg Board that these do not fit within BCFIRB's permit conversion direction.
26. Looking at Mr. Jansen's special SPLQ permit, the Panel finds that it was necessitated by the interruption in production of another producer as a result of AI. In essence, Mr. Jansen was given the right to temporarily produce the eggs that would have been produced by Mr. Galey had AI not occurred. The underlying right to produce (be it quota or permit) belonged to Mr. Galey. He could not produce for the market and as such, Mr. Jansen was given the temporary right to do so. The SPLQ permit was not issued to meet specialty market demands rather it was issued to cover the Galey production and service his market. If the Panel were to accept the Appellant's argument, the end result would be that the same production would be allocated twice. If Mr. Galey was a permit producer he would have been entitled to permit conversion effective December 31, 2004. However, the Appellant who was temporarily growing Mr. Galey's production and holding an SPLQ permit would also be entitled to permit conversion. The Panel does not accept this argument. If there is a need for more specialty production, allocation should be based on reasoned principles and not happenstance.
27. We have a few comments about BCFIRB directions. The general principles guiding commodity boards are found at page 48. Two principles are relevant to this appeal:

National System

It must be recognized that the five supply managed commodities operate under federal provincial agreements which place limits on the total amount of production available to British Columbia. *To the extent that under national programs the regulated marketing industries are to serve the overall demand for commodities, boards must also serve the growing British Columbia demand for differentiated products. Specialty production policies must recognize that production is accountable as part of the province's allocation for each commodity.* In this context, the division of production within the province and the related issue of affordability are critical factors, as is the need for the boards to pursue and obtain additional allocations to meet all market demands.

Public Interest

Priority should be given in all specialty programs to producers who have not previously been issued quota by a board. Quota producers may, however, be eligible to participate in circumstances where market demand for specified products is not being adequately met.
[emphasis added]

28. Finally, Mr. Jansen attempted to draw support for his arguments from comments made at BCFIRB's October 5, 2005 public meeting in Abbotsford. The Panel finds that no matter how specific Mr. Jansen may have been with his questions, it would be very difficult for any person to give an answer that took into account all the relevant factors of his particular situation. It may well be that the answer received at the meeting was based on the general comments regarding specialty permit conversion contained in BCFIRB directions, without reference to any of the specifics presented at this hearing. In any event, the comments made by the Chair or the consultant are not binding on this Panel who had the benefit of hearing all the evidence and arguments of the parties. Similarly, the Panel does not find any support for the Appellant's arguments in the Chair's September 26, 2005 letter to commodity board chairs asking them to use restraint in dealing with enforcement issues and to strive for consistency in applying BCFIRB directions.
29. Accordingly, the Panel finds that the Egg Board acted in accordance with BCFIRB's specialty directions and did not err by not converting Mr. Jansen's SPLQ permit to specialty quota.

ORDER

30. The appeal is dismissed.
31. There will be no order as to costs.

Dated at **Victoria, British Columbia** this **29th** day of **March, 2007**.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by:)

Garth Green, Panel Chair
Christine J. Elsaesser, Member
Honey Forbes, Member