

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF A
SPECIAL CIRCUMSTANCES APPLICATION BY
JOHN AND WILLY DRIESEN

DECISION

November 17, 2009

INTRODUCTION

1. In connection with the British Columbia Farm Industry Review Board (BCFIRB) consideration of the New Entrant Program (NPP) Rules recently submitted for approval by the British Columbia Egg Marketing Board, John and Willy Driesen, doing business as Rehoboth Farm, have requested that BCFIRB direct the Egg Board to allot 5000 layers to them as a new entrant because of their special circumstances. They submit that they should not be required to seek quota as a new entrant under the lottery proposed in the NPP Rules.

BACKGROUND

2. In September 2005 following its review of specialty production and new entrant programs, BCFIRB provided supervisory directions under the *Natural Products Marketing (BC) Act* concerning new entrant programs. The Egg Board amended its Standing Order to add provisions to provide for a waitlist based new entrant program. Under the program, a successful new entrant was to receive an initial allotment of up to 1000 layers on being granted new entrant status and additional allotments of up to 1000 layers after the second and fifth years in the program, for a total of up to 3000 layers. In its July 18, 2006 letter, BCFIRB provided approval of the Egg Board's new entrant program, subject to the further supervisory directions set out in that letter respecting the program. BCFIRB also noted in that letter that certain aspects of the Standing Order related to specialty and new entrant programs would be the subject of ongoing dialogue and review, and adjustments and amendments might still need to be made.
3. BCFIRB subsequently received inquiries from the Egg Board and other commodity boards with respect to eligibility for new entrant programs and in its letter of February 16, 2007 set out additional draft directions for comment. In its May 3, 2007 letter, BCFIRB finalized its additional supervisory directions respecting new entrant programs.
4. Mrs. Driesen applied in January 2007 for new entrant quota pursuant to the new entrant program provisions set out in the Egg Board's Standing Order at that time. Her application was processed and her name was added to the new entrant waitlist maintained at the time by the Egg Board.
5. Mrs. Driesen had applied the previous December under the Small Lot Authorization Program (SLAP). The program permitted persons wishing to keep more than 99 layers to apply annually to keep up to 399 birds without being required to obtain a licence, register as a registered producer, or pay market licence fees provided they did not market their eggs through a federally registered grading station. Mrs. Driesen's application was accepted under that program.
6. The Standing Order of the Egg Board at the time provided that SLAP producers who wished to grow specialty product and were already third party certified

specialty producers would be given priority for a minimum of one new entrant position per year, with first priority to be given to such producers located outside the Lower Mainland. Rehoboth Farm is located in the Lower Mainland and certificates provided show that the farm was certified organic commencing May 31, 2006.

7. Mrs. Driesen wrote to the Egg Board on April 9, 2007 asking that the board consider her new entrant application because she had an opportunity to start producing specialty product for a grader and would like to start with 1000 birds that summer with the board's approval. She did not receive a reply at the time.
8. Further to her earlier letter, Mrs. Driesen wrote to the Egg Board again on May 23, 2007 asking that "when we are invited to start as New Entrant Specialty producers (I'm still hoping for sometime this summer); we would like to start production with 3000 birds, and not 1000, as I had originally asked for." She indicated that she and her husband would like to build a new barn for their larger flock and did not want to build for 1000 birds and then build again as more quota was extended. She indicated she hoped to have some direction from the board before May 30, 2007 as they needed to inform their barn builder of their plans as soon as possible. Mrs. Driesen did not receive a reply specific to her letter.
9. Following receipt of BCFIRB's additional supervisory directions of May 3, 2007 respecting new entrant programs, the Egg Board gave further consideration to its new entrant program and determined not to proceed with the program as then set out in the Standing Order.
10. In a June 13, 2007 letter addressed to all new entrant applicants the Egg Board advised that because of uncertainty and confusion with how the waiting list process would work and who would be eligible, it had decided to replace the "new entrant selection by waiting list" with a "new entrant selection by lottery" and the Standing Order would be revised accordingly. The board noted that persons who had applied and paid the waiting list fee would receive a refund.
11. The Driesens did not appeal the decision of the Egg Board to change the new entrant program to a lottery based selection process.

SUBMISSIONS

12. The Driesens submit they should now be given priority standing for approval as a new entrant and not be subject to taking their chances on the proposed lottery because:
 - In 2007, they were one of only 2 SLAP producers and are now the only SLAP producer. They met all the requirements of the new entrant program in 2007. As a SLAP and certified organic producer, they would have been awarded new entrant status in priority to other non-SLAP producers.

- In 2007, they had made a significant financial, as well as physical and emotional, investment and commitment to expand the barns to house 2000 layers with provision to expand to 5000 layers. They did so because they knew there was a need for specialty production, had obtained third party certification and had plans to grow beyond the limit of 399 layers allowed under SLAP. Also, staff of the Egg Board had told them they were the “perfect candidate”.
13. The Driesens ask for an allocation of 5000 layers, even though the new entrant program both as contemplated in 2007 and as now proposed would limit allocations to 3000 layers. They submit that as a special permit holder, the Egg Board has discretion under the Standing Order to award them up to 5000 layers of quota from the Market Responsive Allocation Pool. They argue that they should be awarded this amount of quota because it will fill a market need that the grader they have been marketing production through needs to fill.
 14. The Egg Board submits that the Driesens application does not reveal any special circumstances. The board argues that if the Driesens’ perceived advantage under the waitlist based system constitutes a “special circumstance” then it must necessarily be a “special circumstance” shared by all others who had their names on the waitlist. The board submits that to grant special accommodation for this reason would nullify the lottery based system now proposed and effectively mark a return to the waitlist based system.
 15. The Egg Board submits that while its director of operations in 2007 recalls advising the Driesens that their participation in SLAP could result in them “jumping the queue”, the board did not give the Driesens any “assurance” to the effect that they would qualify for and obtain new entrant quota. To the contrary, the board advised all new entrant applicants by letter on June 13, 2007 of its decision to replace new entrant selection by waiting list with selection by lottery. The Egg Board states it did not make representations to the Driesens inconsistent with that advice. The Egg Board argues that the Driesens’ decision to expand their barns was clearly made before the necessary regulatory approvals had been granted. The Egg Board refers to the previous BCFIRB decision, *Elkview Enterprises Ltd. v. British Columbia Egg Marketing Board* (May 13, 2004), as presenting analogous circumstances.
 16. With regard to their grader’s unsatisfied demand for specialty production, the Egg Board refers the panel to the BCFIRB decision, *Materi v. British Columbia Egg Marketing Board* (August 3, 2007) at paragraphs 54 through 57.

ANALYSIS

17. The panel has reviewed all submissions and accompanying materials respecting the Driesens’ application.

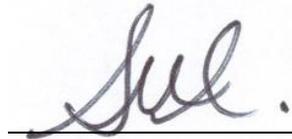
18. The Driesens ask for quota on the basis that had nothing changed with respect to the new entrant program as set out in the Standing Order in January 2007 when they applied, they would have been first in line and would have received quota under the Standing Order provisions at the time.
19. However, the reality is that in early 2007 the terms of the new entrant program, as contemplated by BCFIRB when it approved the program in July 2006, were the subject of ongoing dialogue and review by both BCFIRB and the Egg Board, which had sought further direction from BCFIRB. After receiving BCFIRB's additional supervisory directions in May 2007 and before awarding any quota under the new entrant program provisions, the Egg Board determined to change the basis of the program to a lottery based selection process. At the time the Driesens had not been invited to become a new entrant but were, like all others on the waitlist, only an applicant whose name had been entered on the waitlist pending the Egg Board's decision to proceed to allot quota under the program. While the Egg Board's decision to change the program had potentially negative consequences for the Driesens and presumably others on the waitlist, the fact that the Egg Board determined to not proceed but to change the program provisions does not constitute a special circumstance for the Driesens or any new entrant applicants on the waitlist. The panel also notes that the Driesens did not appeal the Egg Board's decision communicated in its July 13, 2007 letter to all new entrant applicants.
20. We agree with the Egg Board's submission that advice from a staff member that the Driesens were either a "perfect candidate" or in a position to "jump the queue" does not constitute an "assurance" or representation that the Driesens would obtain new entrant quota. It is also clear from Mrs. Driesen's letters of April 9 and May 23, 2007 that she understood that her application to become a new entrant had yet to be considered by the Egg Board. Mrs. Driesen was also apparently aware when she wrote her letter of May 23, 2007 that it would be risky to proceed with the proposed barn expansion and hence her request for some direction from the Egg Board at that point. Notwithstanding that the Egg Board had not approved Mrs. Driesen as a new entrant and allotted quota to her and despite the board's letter shortly thereafter on June 13, 2007 advising of changes to the new entrant program, the Driesens proceeded with their expansion plans. It is clear to the panel that they did so as a result of their own decisions and at their own risk. We conclude that the fact the Driesens proceeded to make this investment does not constitute a special circumstance.
21. With respect to the demand for specialty product and the grader's need for specialty product which the Driesen's submit they can produce, the panel notes and echoes the words of the panel in the *Materi* decision cited by the Egg Board. British Columbia is a province short of production, both mainstream and specialty, and graders may have difficulty supplying their markets from time to time. If a grader has a market that needs filling, it is up to the grader to seek out a willing producer and to contract with the producer to fill that need. The market demand for

specialty product generally or to meet a demand the Driesen's grader wishes to fill does not constitute a special circumstance particular to the Driesens.

DECISION

22. The Driesens' request that BCFIRB direct the Egg Board to allot up to 5000 layers to them as a new entrant is denied.

Dated at Victoria, British Columbia, this 17th day of November 2009.



Sandi Ulmi
Vice Chair



Ron Bertrand
Member



Suzanne K. Wiltshire
Member