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

BETWEEN:

ELKVIEW ENTERPRISES LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Hamish Bruce, Member
For the Appellant	Mr. Michael Le Dressay, Counsel
For the Respondent	Mr. Robert Hrabinsky, Counsel
Date of Hearing	March 10-11, 2003
Place of Hearing	Surrey, British Columbia

INTRODUCTION

1. This appeal arises from a January 19, 2001 decision of the British Columbia Egg Marketing Board (the "Egg Board") concerning an amendment to the existing Temporary Restricted Licence Quota ("TRLQ") Permit held by the Appellant, Elkview Enterprises Ltd. ("Elkview").

2. In 1996, the Egg Board granted the Appellant, a quota holder, a "temporary restricted licence", in the amount of 4300 layers over and above its quota, in order to allow the Appellant, pending future purchase of quota, to service an emerging free-range egg market it had developed.[1] In 1998, this licence was, for reasons that will be discussed in detail below, increased by approximately 10,000 layers, to 14,000 layers, with a proviso that this production would be reduced as and when the Appellant purchased quota. In 1999, the Appellant purchased production from another producer, and was consequently required to "give back" his temporary permit production according to a "claw back" schedule.

3. In 2000, the then British Columbia Marketing Board, now the British Columbia Farm Industry Review Board (the "Provincial board"), acting in its supervisory capacity and pursuant to the requirement for its prior approval of any issuance of quota under the *British Columbia Egg Marketing Scheme, 1967* (the "*Scheme*"), directed modifications to the Egg Board's TRLQ Program. The revised TRLQ Program was issued on October 26, 2000, and provided for a maximum TRLQ of 5000 birds per applicant.

4. On January 19, 2001, in response to an application by Elkview to amend its TRLQ permit to reflect the terms of the revised TRLQ program, the Egg Board conferred upon Elkview the option to bank $0.08 of its current licence fee of $0.23 per bird on a maximum of 5000 layers of TRLQ, retroactive to December 3, 2000. However, the Egg Board did not amend the previous claw back schedule. By letter dated February 1, 2001, Elkview appealed this decision to the Provincial board.

5. On February 27, 2002, the Egg Board applied to the Provincial board for summary dismissal of this appeal arguing that the sole issue identified by the Appellant on appeal concerned a "decision" of the Egg Board taken at the specific direction of the Provincial board and as such was not appealable. In its decision dated July 8, 2002, a Panel of the Provincial board dismissed the Egg Board's application finding amongst other things that as the decision appealed from was an independent exercise of discretion by the Egg Board, it was properly subject to an appeal.[2] However, as the Egg Board took the position in its application that it had not exercised *any* discretion in considering the Appellant's request, the Panel determined the proper course was to return the issue to the Egg Board for consideration stating as follows:

> 16. When the new TRLQ Program came into effect as a result of the BCMB's Supervisory Decision of October 26, 2000, the Appellant decided that it wanted the benefit of that Program. There is no reference in the October 26, 2000 Supervisory Decision to the Appellant. There is also no suggestion that his 1999 arrangement with the Egg Board was exempt from the decisions the Egg

[1] This temporary restricted licence was the precursor to Temporary Restricted Licence Quota or "TRLQ."
[2] The same Panel heard this appeal.

Board is empowered to make according to the terms of the TRLQ program as outlined in that Supervisory decision.

17. The Egg Board in fact considered the Appellant's request and determined that it would incorporate a new Program option, to bank 8 cents of the current licence fee on a maximum of 5000 layers of TRLQ, into the Appellant's existing permit. The Appellant appealed this decision arguing in effect that it was entitled to more.

18. Although it appears that the Egg Board did in fact exercise its discretion as to what elements of the new TRLQ Program, if any, it would grant to the Appellant, for the purposes of this application, the Egg Board denies exercising any discretion. It argues that the decision to allow Elkview to bank 8 cents of its licence fee on 5000 layers of TRLQ was, in effect, a decision of the BCMB and not a decision of the Egg Board.

19. To the extent that the Egg Board considered that it had no independent discretion in determining what elements, if any, of the new TRLQ Program should as a matter of fairness and good public policy be granted to the Appellant, the Panel finds that the Egg Board made an error of fact and of law in understanding the BCMB's Supervisory directions.

20. In view of this finding, the appropriate course of action is to adjourn this appeal to allow the Egg Board the opportunity to make its own decision in this matter. The Egg Board must in this instance, and in the future, exercise its discretion as to how best to allocate quota within the TRLQ Program. The Egg Board is directed to provide reasons for its decision. Should the Egg Board decide that the decision at issue should be confirmed, the appeal will proceed. If the Egg Board modifies its decision and Elkview remains dissatisfied, it has the right to appeal that decision to the BCMB. If the Egg Board modifies its decision to the satisfaction of Elkview, the parties can advise the BCMB that the appeal is no longer necessary.

6. The Egg Board reconsidered its position in accordance with the above direction. On October 16, 2002, it confirmed its earlier decision conferring upon Elkview the right to bank $0.08 of its licence fee on a maximum of 5000 layers. Elkview renewed its appeal of this decision and the appeal was heard March 10-11, 2003.

ISSUES

7. As a matter of policy, should the Appellant's current TRLQ permit be amended to reflect the terms of the revised TRLQ program approved by the Provincial board in October 2000?

BACKGROUND

8. There is a fairly lengthy history that gives rise to this appeal. Given the nature of the issues raised, it is important to canvass that history in some detail.

(a) Free range production, the temporary restricted licence (1996) and the events of 1997

9. In 1989, Mr. and Mrs. Cornelis Luteyn purchased the Elkview operation, consisting of a farm located at 9155 Upper Prairie Road in Chilliwack and 11,000 birds of layer quota. In 1992, the Appellant discovered a market for free range eggs and began converting its quota from

conventional caged layers to meet this demand.[3] Initially, the Appellant marketed its free range eggs itself. However, it was later successful in obtaining a contract to supply Canada Safeway Ltd. stores.

10. By 1996, the Appellant had converted its entire quota holdings to free range brown egg production. However, as market demand was in excess of what the Appellant could supply, Mr. Luteyn approached the Egg Board for a creative solution that would enable him to meet this niche market, on the basis that he had been unsuccessful in obtaining quota.

11. The Egg Board concluded in September 1996 that: "effort must be made to accommodate a producer who is attempting to accommodate his niche market." The solution ultimately proposed, in November 1996, was to grant the Appellant a "temporary restricted licence" in the amount of 4300 layers as "a temporary solution to allow Mr. Luteyn to expand now and acquire quota later." The Appellant was thus the first producer to be issued a temporary restricted licence.

12. An Egg Board letter to the Appellant and his banker, dated December 11, 1996, confirmed that: "The Parties will acknowledge that the purpose of the temporary restricted licence is to allow Elkview to produce beyond its existing licence as a regulated producer up to the amount of layers on the temporary restricted licence *until* Elkview can acquire quota to replace the temporary restricted licence…." [emphasis added] This letter contained no specific deadlines for the acquisition of quota, but it did state that Elkview will attempt to purchase quota "as soon as possible" and that the Egg Board would assist Elkview's attempts to do so in the Fraser Valley.[4] The letter also provided for Elkview to pay amounts into trust in order to develop a fund for future quota purchase. However, there was no evidence that any funds were ever paid into such a trust. Nor does it appear that levies were collected in 1997.

13. By August 1997, the Appellant had not purchased any quota, but he did approach the Egg Board to ask whether his temporary licence would be reduced if his daughter purchased quota. The Egg Board answered that it would indeed reduce his permit birds, but gave the proviso that upon such reduction the Appellant would have the option to reapply for an increase. In November 1997, the Appellant's daughter acquired layer quota on the National Quota Exchange. Egg Board documents indicate that two lots of quota were acquired, 2951 birds and 1154 birds.[5]

14. It is not clear whether or how the Egg Board specifically addressed the impact of the daughter's quota purchase on the Appellant's temporary licence. Based on a

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[3] In order to convert a barn to free range production, the cages must be removed and replaced with nesting boxes. As birds must have access to the outside, more land is needed and the barn must be reconfigured to have a significant overhang to shelter the birds while outside. The area surrounding the barns must be sloped away from the barn to ensure good drainage and avoid mud holes.

[4] The evidence before us did not include a copy of any document purporting to be the 4300 layer "temporary restricted licence", but there was no dispute that the licence was granted in 1997, and that the December 11, 1996 letter (subject to revisions respecting the obligations on the Bank) reflected the conditions on which the licence was granted.

[5] Had Mr. Luteyn acquired this 4105 bird layer quota on behalf of Elkview, the 4300 bird permit would have been almost completely discharged.

February 24, 1998 letter from Mr. Peter Whitlock, then Controller of the Egg Board, to the Appellant referring to levies payable on the "4300 permit birds", it appears that despite its earlier advice the Egg Board was prepared, initially at least, to proceed on the basis that the 4300 bird licence was unaffected by the daughter's purchase.

15. The Egg Board now submits that, based on its discovery in 1998 of common housing of the Appellant's layers with those of Mr. Luteyn's daughter, "there is cause to suspect that this acquisition of quota was in substance an acquisition of quota by the Appellant, carried out in a manner calculated to circumvent the obligation to reduce TRLQ." The Egg Board points out that a temporary licence is particularly vulnerable to abuse, as there are powerful economic incentives to use it as a quota substitute. We will have more to say about this point below.

(b) The Delight operation, the Appellant's initial attempts to acquire it, and the Egg Board's decision to increase the Appellant's temporary restricted licence by 10,000 birds (1996-1998)

16. During most of the period that the Appellant had been dealing with the Egg Board, another producer, Ms. Christine Delight, had been developing a significant free run layer operation under the name Kelly's Acres Ltd. ("Kelly's Acres").[6] Ms. Delight structured her production through a system of contracts with clients, designed to exclude her from regulation under the *Scheme*. In 1991, the British Columbia Court of Appeal held that Ms. Delight was not marketing "through normal marketing channels" as required to be captured by the *Scheme* and as such was lawfully operating outside regulation.[7] Ms. Delight therefore had the advantage of being able to produce eggs without paying levies or purchasing quota.[8]

17. In late 1996, Ms. Delight approached the Egg Board, advising of her desire to "regularise" her operation. She expressed concern about losing market share to other producers who might employ her contract model, and about possibly losing a major customer who was not keen on continuing the contract system she had developed. Her offer, it appears, was to support the Egg Board in an approach to the Provincial Government to amend the *Scheme* by repealing the reference to "through normal marketing channels"; in exchange for receiving various production rights from the Egg Board once she came into the system. Early discussions did not result in a conclusive outcome.

18. The Appellant describes the Delight operation as its "principal competition" through 1997 and 1998. It is therefore not a surprise, given the circumstances and respective interests of Elkview and the Delights, that Mr. Luteyn approached the Delights in the fall of 1997 with a view to purchasing the Kelly's Acres operation. Mr. Luteyn advised the Egg Board Chair and staff of his negotiations at the time, as his interest was obviously in finding a way to transform the "external" Delight production into quota production after the purchase.

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[6] Free run birds, like free range birds, are not caged. However, free run birds do not have access to the outside. Egg Board minutes from January 1998 estimate Ms. Delight's flock at 9,000 birds. By 1999, it was determined that the actual flock numbers were more in the vicinity of 18,000, which were ultimately converted into 15,000 quota layers.

[7] *Delight v. British Columbia (Egg Marketing Board)*, [1991] BCJ No. 2795 (CA).

[8] Ms. Delight as an unregistered producer was still obligated to pay market licence fees.

19. Mr. Luteyn states that he was advised and encouraged by Egg Board officials to pursue negotiations, and we accept that he was encouraged to so negotiate. Clearly, the Egg Board had a valid and ongoing interest in bringing the Delight production into the system if that were possible as part of a properly structured arrangement. However, nothing in the evidence satisfies us that the Egg Board's conduct or statements encouraged or justified Mr. Luteyn's next step, which was to place an additional 10,000 pullets on his farm without prior regulatory approval and solely on the basis that he believed that a deal with the Delights was imminent.[9] Egg Board minutes from February 1998 record that "Mr. Luteyn has 10,000 birds on order presumably for export, but no quota for them." Egg Board minutes from May 1998 make clear that the Egg Board had "not resolved" the question whether it was prepared to issue quota to a purchaser of the Delight business.

20. As just referenced, Mr. Luteyn's evidence was that the purchase of the 10,000 additional birds, and his commencement of barn construction to house these additional layers, was done in anticipation of what he felt would be an imminent deal with the Delights. The Appellant continued on with this plan even while objecting in March 1998 to the Egg Board providing information to another party who had also engaged in negotiations to purchase the Delight operation.

21. As matters unfolded, by April 1998 Ms. Delight had walked away from all negotiations, including those with the Appellant. The result, for the Egg Board, was the very difficult regulatory problem of the Appellant having 10,000 additional layers in production without any lawful authority to be producing, a situation we find that was created by the Appellant. Had the Delight deal closed in 1998, as the Appellant anticipated, the proper and expected regulatory outcome, as a matter of sound marketing policy, would have been to issue quota for the Delight production, and retire the Appellant's 4300 temporary restricted licence which was, by definition, *temporary* and granted on condition of purchasing additional quota. Had that deal closed, the Appellant would have been left entirely with quota production, and no permit production. As a result of the Appellant's actions, which placed the cart well before the horse, the regulatory question now confronting the Egg Board was whether to take measures to address the illegal flock, or take some other regulatory action.

22. The Egg Board's solution was to accommodate the Appellant. Rather than taking a harsh approach, on June 19, 1998 it granted the Appellant a licence for the additional 10,000 birds, thus increasing its permit amount from 4300 to 14,000 layers. This new licence must be read with the concurrent agreement dated June 19, 1998, which, while being structured as an agreement, must be understood as setting out the regulatory terms and conditions of the licence. It states in a recital that Elkview "wishes to increase its production of free range eggs and is desirous of entering into an agreement with the Board *to increase the temporary restricted licence pending the acquisition of quota*." [emphasis added]

23. The document recognises that Elkview was producing in excess of its licenced production and states that "the purpose of the temporary restricted licence is to allow the Company to produce the excess until it acquires regularly licensed production quota for the excess." The

[9] As expressed in the Appellant's statement of facts (p. 5): "Elkview had, unfortunately, engaged in preparations to take in the Kelly's Acres operation."

agreement provided for security, and a levy, and imposed the following obligation on the Appellant:

> The Company shall make all reasonable efforts to acquire regularly licensed production quota to replace the temporary restricted licence….
>
> The Company agrees that each layer of regularly licensed production quota acquired will concurrently reduce the temporary restricted licence

24. Given the circumstances, we find nothing in these terms to be contrary to the public interest or objects of proper regulation. The Appellant had severely jumped the gun, and it was only proper that if it was to be given the major accommodation of having its illegal production "legitimized", the Appellant should have a corresponding obligation to acquire quota as soon as reasonably possible, pay appropriate levies, and stand down its permit birds as quota was obtained. The temporary licence was never intended as an "entitlement"; it was always meant as a bridge. It is evident through the Appellant's actions that it was hoping for a very long bridge.

25. In this context, the Egg Board was understandably disappointed when, only a few months after granting this accommodation to the Appellant, it began to common house layers with those of Mr. Luteyn's daughter, raising the very real concern that Mr. Luteyn had indeed used his daughter's purchase as a mechanism to avoid having his quota reduced. As noted in the Board's October 9, 1998 letter to Elkview, "[t]he Board has gone to great lengths to approve exceptions for your particular circumstances. Rather than informing the Board and working with it to seek its permission, it seems that the Board must continually apply the rules to you." The Appellant was ordered to have the flock of Mr. Lutyen's daughter removed by November 1998, and was asked for a report on efforts to acquire quota.

(c) The second round of negotiations, the Appellant's acquisition of the Delight operation, and the issue of the claw back (1999)

26. By 1999, the Appellant had entered into a fresh round of negotiations with the Delights for the purchase of Kelly's Acres. Mr. Luteyn states, and we accept, that he did this on the suggestion of an Egg Board member, Mr. Jake Penner, who told him that he could rely on the Egg Board's full support in completing the purchase and converting the operation to issued quota. In his statement of facts, Mr. Luteyn states that he was not advised that this might reduce or eliminate his TRLQ, and his counsel in argument suggested that he cannot be faulted for not knowing what was in the minds of Egg Board members on this issue. We find this to be unpersuasive, given that only 10 months earlier, his licence was granted on the express basis that new quota would reduce his temporary quota. The standing intention of the Egg Board was clearly stated in the plain words of the agreement drafted less than a year earlier. It is difficult to understand how Mr. Luteyn would be thinking any differently, or would reasonably perceive this to be a "complete surprise", unless he indeed perceived his TRLQ as something other than it really was.

27. The Appellant proceeded to contact the Delights and successfully negotiate a deal. Consequently, on April 1, 1999, the Appellant's solicitor wrote to the Egg Board advising that a critical condition had to be fulfilled before the transaction could be completed:

> …our client has entered into a written agreement with the Delights for this purchase [of all the issued and outstanding shares of Kelly's Acres Ltd.]. However, the only subject condition remaining to be satisfied in order to allow my client to proceed with and complete this transaction is that we require the written confirmation from the Board of its intentions and agreement with respect to the operations of Kelly's Acres Ltd. following my client's acquisition thereof….
>
> Accordingly, in order for this transaction to complete, we will require the written confirmation and agreement from the Board, properly approved by the Board, approving the acquisition of Kelly's Acres Ltd. by my client and agreeing to issue Kelly's Acres Ltd….not less than 18,000 birds of quota…

28. The April 1, 1999 letter from the Appellant's solicitor was conspicuously silent on the question of what would happen to the 14,000 bird permit issued 10 months earlier. That said, the letter's reference to market demand exceeding his supply certainly contained the implication that he hoped the new birds would not affect his permit birds.

29. In our view, any reasonable person in the regulated marketing context, let alone a person with the Appellant's experience, access to advisors and awareness of the explicit terms of the June 1998 licence, would have to know that the impact of the Delight purchase on the temporary licence would, *at the very least,* be a serious issue. Yet the Appellant, once again, acted in a very unwise fashion. In its statement of facts (p. 7), the Appellant concedes that, well before the critical condition to complete this transaction had been resolved with the Egg Board, he "had embarked on purchasing a separate piece of property" and ordered pullets. Rather astoundingly, he later relies on these very same actions, and the financial consequences flowing from them, to found an argument for "duress" in accepting the Egg Board's regulatory requirements.

30. We find that given the nature of the June 1998 permit and the terms under which it was issued, it was and should have been entirely foreseeable that the Egg Board would insist upon the Appellant's compliance with the term requiring the retirement of its TRLQ upon purchase of additional quota. The Appellant, and not the Egg Board, is responsible for taking the calculated risk to extend itself financially (yet again) before receiving regulatory approval. Even here, however, the Egg Board's response granted the Appellant an accommodation. Rather than retiring the permit birds on a 1:1 basis as would have followed based on the terms and conditions that were part of the June 1998 licence, the Egg Board instead proposed the incremental reduction over time, the claw back schedule.

31. Counsel for the Appellant argues that the Egg Board's decision to claw back the production as part of the Delight purchase rather than cancel it outright somehow supports the argument that the Appellant was being reasonable in assuming that the Kelly's Acre's purchase was not going to affect its permit birds. The Panel rejects this argument. The claw back provision was all about *how* the permit production would be retired given that the Appellant had now acquired the quota production in whose proxy the permit birds had been issued; it was never about *whether* it would be retired. The Egg Board was entitled to create a claw back

provision that, by staging the removal of the permit birds, would both enhance market stability and soften the impact on the Appellant. It is ironic for the Appellant to now use that same claw back provision as justification for its erroneous thinking about the impact of the Kelly's Acre's purchase on its permit production.

32. To return to the chronology, when the Egg Board, in response to the Appellant's request for regulatory approval, raised the issue of the reduction of permit birds, the Appellant objected on the basis that (a) Kelly's Acres was a separate corporate entity[10], (b) the claw back had not been "discussed", and (c) the claw back was unfair because the Appellant was assisting the Egg Board in solving the Delight "problem." Through counsel, the Appellant advised the Egg Board that "any advantage to my client is all but eliminated if the Temporary Licence is reduced and/or eliminated" as the net advantage would only be an increase of 4,000 birds.

33. The Egg Board rejected this reasoning, but proposed an amended claw back schedule more favourable to the Appellant. This was met with a further response from the Appellant's solicitor on May 7, 1999. Interestingly, the response was not to walk away from the deal, or even to appeal to the Provincial board on the grounds that the Egg Board requirement was contrary to public policy. Rather, the Appellant's counsel responded as follows on May 7, 1999:

> Both myself and my client still disagree with the Board's requirement that the Restricted Temporary Licence currently held by Elkview be reduced due to the issuance of quota to Kelly's….
>
> However, notwithstanding the foregoing, in order to effect this transaction my client will agree to the reduction and eventual elimination of the Temporary Licence, provided that same occurs in a commercially reasonable manner so as not to adversely affect my client's business operations. Accordingly, *we propose the following changes to Clauses 7 and 8 of the Agreement*:
>
> (a) The current Temporary Restricted Licence would be reduced by a maximum of 2,000 layers per year for each of the years January 1, 2001 to January 1, 2003 inclusive, and by 4,000 layers per year for the years January 1, 2004 and January 1, 2005. This would provide for a complete elimination of this Temporary Licence by January 1, 2005 in a manner that is commercially reasonable. Of course, my client will, in accordance with the actual terms of the Temporary Licence Agreement, reduce such Temporary Licence sooner if possible by acquiring replacement quota, provided that such quota is available at a commercially reasonable price.
> [emphasis added]

34. On May 12, 1999, the Egg Board replied by proposing a claw back schedule that accelerated the claw back by one year, so that the temporary licence birds would be fully retired by January 1, 2004 rather than 2005. It also advised Elkview that if this deal did not close, "the Board will consider itself to be at liberty to extend the offer to any other party."

35. On June 4, 1999, the Agreement was signed, whereby the Egg Board issued 15,000 birds of layer quota to the Appellant and waived approximately $210,000 in unpaid Marketing Licence fees owed by Kelly's Acres. The Appellant agreed that the TRLQ permit would be "clawed back" over a period of four years starting in 2001. At this point in time, the Appellant held the original 12,442 birds of layer quota plus 15,000 birds of layer quota

[10] The Appellant's representations on this point before the transaction are to be contrasted with their advice to the Egg Board in July, 1999 that they were amalgamating "[f]or accounting and tax purposes."

operated as Kelly's Acres as well as the 14,000 birds of TRLQ permit.[11] On June 21, 1999, the Appellant signed another document relating to its TRLQ confirming the claw back schedule.

36. Having outlined these facts, we state here that we categorically reject the Appellant's argument that it accepted these terms under "duress". The circumstances that gave rise to the 14,000 bird permit were not of the Egg Board's making, and even then the Appellant was accommodated. The Appellant was encouraged, but not forced, to buy the Delight operation, and indeed the encouragement to do so is consistent with the Egg Board's statement that it would make Mr. Luteyn aware of available quota. The Appellant was at all times represented by legal counsel. The Egg Board is a regulatory board, not a private party. It is required to make regulatory judgments in the public interest as part of granting regulatory approvals, including imposing terms that a person subject to regulation may not otherwise "agree to". The Appellant did not seek to appeal to the Provincial board on the grounds that the terms required by the Egg Board were unfair or contrary to the public interest.

37. In the circumstances, the only "duress" that existed was created by the Appellant's own economic imperatives and self-interest, and from its repeated conduct of making financial commitments before receiving regulatory approvals. We do not find anything improper in the Egg Board advising the Appellant that it would look elsewhere if the Appellant walked away from the deal. The Egg Board had a legitimate interest in addressing the Delight issue, and if the Appellant was not the right candidate to do so, it had a right to look elsewhere, and to advise the Appellant of this. The Appellant is a sophisticated party who could make its own business decisions.

(d) The Appellant's application for a delay in the claw back (February 2000)

38. On February 25, 2000, the Appellant, through counsel, applied to the Egg Board for (a) a one year delay in the claw back schedule on the basis of strong market demand and potential loss of large clients, and (b) a further temporary licence of 15,000 birds. On March 9, 2000, Mr. Luteyn appeared with counsel, to make an oral submission to the Egg Board in support of his application, and followed this up with a March 10, 2000 letter from his counsel to the Egg Board. On April 11, 2000, the Egg Board dismissed the application, and in its April 28, 2000 reasons for decision stated:

> The Board is of the opinion that it had contracted with you to provide you with a 14,000 bird TRLQ permit which has a defined schedule whereby the TRLQ would be reduced over a defined period of time. As with all contracts, each party contracts in good faith at the outset and by so doing commits to fulfill its contracted commitment. The Board considered the following options that Elkview could employ to fulfill its free range production needs:
>
> - Successfully participate on the National Quota Exchange,
> - Purchase of other British Columbia registered producers quota operations,
> - Contract with other producers to have them convert to Free Range production from other forms of production, and/or
> - On an equal opportunity basis with all other applicants, allow for the passage of time until Elkview's application for TRLQ quota comes available through the TRLQ waiting list.

[11] The figure of 12,442 comes from the Appellant's 1997 licence. Some growth may have been issued between 1997 and 1999.

> The Board commends Elkview for the efforts it has employed to increase the market demand for Free Range eggs. By your client's presentation to the Board, it is understood that the market is now greater than the supply and the Board trusts that your client will utilize some of the aforementioned options to address his needs.
>
> It is necessary to emphasis (sic) that the Board is not only responsible to satisfy the needs of the marketplace but also to provide equal opportunity for British Columbia producers to receive and/or acquire quota. Therefore, the Board, must deny Elkview's request. As per the contract with Elkview, the 3,000 TRLQ will be withdrawn effective January 1, 2001.

39. The Appellant did not appeal this decision of the Egg Board to the Provincial board. However, the Appellant did criticise the Egg Board, citing this letter and the Egg Board's October 16, 2002 letter, for so strongly emphasising "sanctity of contract." The Appellant made the point that it would be a misconception to regard the agreements as if they were simply contracts between two totally private actors. We agree that the contracts have a regulatory purpose. Given our broad scope for appeal, we have undertaken our review on the basis that a contract containing regulatory requirements cannot be treated as a blind fetter on a regulator, or act as a substitute for critical thought where there are compelling policy grounds for change. We do not find that this happened here, and indeed we find that the threshold for making a change to terms for retiring the Appellant's permit should, as a matter of sound marketing policy, be a high one. As such, it is relevant for the Egg Board as a regulator to consider such factors as a party's participation in the development of and ultimate agreement to particular terms as a condition of receiving a benefit as well as the various expectations flowing from such agreements.

(e) Policy developments in 2000 and the Appellant's further application for a revision to its claw back schedule

40. Despite the Egg Board's refusal of April 2000, the Appellant considered that significant marketing policy developments within the egg industry arising later in the year 2000 provided it with a legitimate case to argue in favour of retaining its temporary licence production for a much longer period of time.

41. The policy developments in question originated in a June 2000 decision by the Canadian Egg Marketing Agency ("CEMA") to allocate 107,000 additional layers to British Columbia, as part of "new growth" in the nationally supply managed egg system. The Provincial board rejected the Egg Board's original proposal to simply divide up the entire allocation on a *pro rata* basis among registered producers. The Provincial board directed the Egg Board to make a portion of the allocation available to specialty producers, and develop a TRLQ program that addressed the needs of the specialty and regional markets.

42. The Egg Board initially proposed an allocation of 16% of the 107,000 layers to its revised TRLQ program. The proposed new TRLQ permit was to be for a maximum of 5,000 layers for a 7-year term, with 25% of the permit being returned to the Board in each of years 4, 5, 6 and 7. TRLQ holders were entitled to have $0.08 of their levy banked to offset the cost of purchasing quota. However, as the Provincial board felt that its primary concern of flexible,

transparent, accessible and sustainable decision-making had not been fully addressed, it directed an increase in the allocation of layers available to supply the TRLQ program and directed that TRLQ be issued for all types of specialty production. Priority was given to new entrants, meeting regional marketing opportunities and accommodating organic production in the regulated marketing system. The Provincial board also directed that TRLQ holders replace 25% of their permit with regular quota at the end of years 4, 5, and 6 and the Egg Board was directed to issue the remaining 25% of TRLQ as regular quota at the end of year 7.[12] The new TRLQ program became effective in December 2000.

43. On January 10, 2001, the Appellant filed a further submission with the Egg Board, in which it sought to have the permit amended in a fashion consistent with the terms of the revised TRLQ program. The submission stated: "[t]he present terms of the Temporary Permit issued to Elkview are such that Elkview has none of the benefits of the TRLQ program but has delivered all of the objectives of the Program as stated in the British Columbia Marketing Board Supervisory Review."

44. On January 19, 2001, the Egg Board issued its decision, the key paragraphs of which state:

> After considerable discussion it was agreed that retroactive to December 3, 2000, 8 cents of current licence fee on a maximum of 5000 layers of TRLQ would be banked in the same way as is now available to new TRLQ holders….
>
> The Directors reviewed the issue of the claw-back terms of the current contract and confirmed the obligation must be fulfilled. The TRLQ programme is new and the integrity of the claw back concept must be adhered to or it will be meaningless. As a grader, you have many ways to acquire production, including the current lease of one or your barns to Mr. Virji.
>
> A revised TRLQ contract will be forwarded to you next week. If you wish to replace your current contract with the new one please indicate your acceptance by signing the new contract and returning it to the BCEP offices by February 16, 2001.

45. The Appellant appealed to the Provincial board, principally on the basis that the Egg Board did not provide any accommodation on the claw back provision. As noted above, this Panel rejected a preliminary objection by the Egg Board that it exercised no independent discretion, and remitted the matter to the Egg Board in order to make a decision. The Egg Board confirmed its original decision on October 16, 2002 and the Appellant renewed its appeal. The appeal was heard on March 10-11, 2003.

ARGUMENT OF THE PARTIES

Entitlement to Benefit of Revised TRLQ Program

46. The Appellant argues that three principles should have guided the Egg Board in considering the Appellant's January 10, 2001 application to amend its temporary licence. First, any claw back schedule must be realistic as to the amount of time it would take to purchase 14,000 layers on the open market, and flexible where the producer's *bona fide* efforts to acquire quota had failed. Second, the Appellant's licence should be amended to reflect policy

[12] See *Egg Quota Allocation, Supervisory Decision* (October 26, 2000, Provincial board)

changes in the TRLQ program. Third, special circumstances, related to emerging market needs and other market realities including the growth of unregulated specialty production, can and should justify extending these benefits to TRLQ greater than 5000 birds.

47. The Appellant argues that fairness dictates that the terms of its existing permit be dovetailed with the terms of the new TRLQ program. The Appellant seeks to modify the claw back schedule, at a minimum by delaying the final claw back by one year, and also maintains that its entire permit should be eligible for the $0.08 banked levy retroactive to December 2000 and not just the 5000 layers offered by the Egg Board. The Appellant argues that it too should be eligible to have 25% of its permit converted to quota at the end of year 7.

48. The Appellant argues that it should not be limited to what it describes as the onerous claw back provisions agreed to in 1999. Such provisions only make sense if a producer has a reasonable amount of time to acquire quota. They need to be flexible and take into account the permit holder's efforts to acquire quota. In support of this proposition, the Appellant cites the Provincial board's decision in *Eggstream Farms Ltd. v. British Columbia Egg Marketing Board*, November 30, 2001:

> 50. In considering the issue of the claw back or surrender provision, the further issue of the bona fide attempts on the part of a producer to purchase quota arises. In this appeal, the Panel heard evidence of the Appellant's attempts to purchase quota. Although a prospective seller was found, the Egg Board did not act to vary its regional quota transfer policy and as such the Appellant was unable to purchase the quota. The Panel is of the view that before the claw back or surrender provision can operate to decrease a producer's TRLQ Permit, there must have been real opportunities for the producer to purchase quota. There must be some evidence that the producer failed to make bona fide efforts to purchase quota.

49. The Appellant further argues that if a producer under the new TRLQ program is given 7 years to purchase 3750 layers of quota, it should have approximately 30 years to purchase its 14,000 TRLQ layers, rather than the 4½ years it was given. The Appellant maintains that despite *bona fide* efforts it has not been able to purchase quota. The Egg Board has offered no assistance or leads as to available quota, yet Egg Board members have been able to purchase quota during this time frame. With respect to its lack of documentation supporting *bona fide* efforts to purchase quota, the Appellant maintains that it should not be faulted for not producing documents, as finding available quota is simply a matter of luck, relying on word of mouth or being in the right place at the right time. There is no formal process. Again the Appellant points to the *Eggstream* decision, and argues that there must be evidence that quota became available and it declined to purchase it.

50. The Appellant also argues that it should not be held to the terms of the 1999 claw back provisions as those provisions are "unconscionable" and were only extracted after the Egg Board threatened to invite another producer to purchase Kelly's Acres. The Appellant maintains that the Provincial board should take into account the breach of confidence by the Egg Board during the Appellant's first round of negotiations with the Delights, and that it was pushed into the second negotiations with Kelly's Acres without being told about what was at issue, eventually signing the deal under duress. The Appellant points out that it is a pioneer and that its efforts should have been encouraged not stifled. Further, its request should have been considered in light of the short supply in the regulated market, the apparent absence of a plan to stem the growth of the unregulated sector thereby placing the Appellant on an uneven

playing field, and in light of Mr. Luteyn's "vow" that if he had the production he could solve the problem of unregulated production.

51. The Egg Board takes issue with the allegation of misconduct. The Egg Board argues that rather than victimise the Appellant, it has made accommodation after accommodation going back to 1996 when it first issued a temporary production permit to the Appellant. From its inception, TRLQ was intended to be a temporary permit and not a quota substitute; it is a mechanism for a producer to meet a market demand pending acquisition of quota. The Egg Board states that despite recognising his obligation to purchase quota, Mr. Luteyn has not purchased any quota to offset his permit and has in fact sought to purchase quota without a corresponding offset. Almost immediately after the issuance of his permit, Mr. Luteyn asked the Egg Board whether his children could purchase quota without a reduction in the Appellant's permit. In October 1997, Mr. Luteyn's daughter successfully acquired quota on the National Quota Exchange. The Egg Board argues that there is cause to suspect that this acquisition of quota was in substance an acquisition by the Appellant, carried out in a manner to circumvent the obligation to reduce TRLQ. After acquisition, the Egg Board discovered that there was common housing of the layers owned by the Appellant and those of Mr. Luteyn's daughter, a practice prohibited under the Egg Board's General Orders.

52. In February 1998, Mr. Luteyn, in anticipation of completing negotiations for the purchase of Kelly's Acres, placed 10,000 pullets on his farm and began building barns to house these pullets. The Egg Board argues that by taking these steps before concluding an agreement on Kelly's Acres, Mr. Luteyn willingly put the cart before the horse. When the deal collapsed, Mr. Luteyn blamed the Egg Board for his predicament. The Egg Board argues that Mr. Luteyn is not unsophisticated; he is a very large producer. He knew that before any transaction to acquire the Kelly's Acres operation could be concluded, there would have to be quota issued to cover the production and Christine and Dick Delight, Kelly's Acres and the Egg Board would all have to agree on terms. Until there was agreement between all those parties, there was no deal. Any "pressure" felt by the Appellant arose because of its own decisions to place pullets and build barns without first acquiring the Kelly's Acres operation. The Egg Board argues that it is disingenuous for Mr. Luteyn to blame the Egg Board for the consequences of his decisions.

53. With respect to the Appellant's argument that Mr. Luteyn has tried to purchase quota, the Egg Board questions whether his efforts were *bona fide*. Since 1996, Mr. Luteyn's daughters have each acquired quota, through the National Quota Exchange and a private transaction. During the same time frame, there have been 8-10 different quota transfers on the Exchange. As well, at nearly every meeting the Egg Board approves private quota transfers between individual producers. Beyond his actions (or lack of action), the Egg Board also points to Mr. Luteyn's repeated testimony that it does not make sense to buy quota to reduce TRLQ as there is no resulting increase in production capacity for the expenditure. Thus, the Egg Board argues that Mr. Luteyn has no real interest in purchasing quota and reducing his TRLQ permit.

54. As for the Appellant's argument that it should have the benefit of a longer claw back provision (either 7 or 30 years), the Egg Board argues that this is contrary to the temporary

nature of the program. It was meant to be a short term bridging solution, allowing producers to meet a market demand while trying to acquire quota. Once quota is acquired, the permit is retired so that TRLQ can be issued to the next producer on the waiting list.

55. The Egg Board argues that contrary to being victimised, the Appellant has enjoyed more than its fair share of accommodations. It has received a disproportionate allocation of the benefits under the TRLQ program. To grant the Appellant further accommodation is simply not rational or justifiable and will effectively sound the death knell to the program by rendering TRLQ a quota substitute, denying access to those producers who legitimately require a temporary bridging solution. The longer that the Appellant has TRLQ, the less TRLQ is available to those producers who either need a leg up in the industry or a short term solution to compete in the same marketplace before acquiring quota.

56. As for the Appellant's argument that it should be eligible for the $0.08 banked levy on *all* its permit retroactive to the date the program was revised and not just 5000 layers, the Egg Board argues that the levy over and above the $0.08 going back to 1999 has already been spent on advertising for specialty eggs. The funds are simply not available to be reimbursed.

Impact of Unregulated Production

57. As an alternative argument, the Appellant maintains that by virtue of the special circumstances presented by the threat of unregulated production to the egg industry, for which it says the Egg Board is responsible, it should receive a further TRLQ permit. Throughout the time that the Appellant has supplied the free range market, it has competed with unregulated producers who neither pay levies nor have quota. Initially, the Appellant competed with Kelly's Acres; at the time of the hearing, the Appellant was competing with Olera Farms, an organic operation and grading station run by Mr. Alfred Reid. The Appellant argues that in addition to the disadvantage of higher costs due to levies and purchasing quota, there is the further disadvantage of being unable to simply increase production to meet market demands without first purchasing quota. The Appellant maintains that with more permit production, it could go head to head with the unregulated producers and soon eliminate the bulk of the unregulated production. It says that, in the face of the "uncontrolled growth" in the illegal market, an immediate solution is required, rather than more meetings as proposed as part of the specialty review.

58. The Egg Board maintains that expanding the Appellant's permit is not the only solution to unregulated production; the Appellant could obtain production for its grading station from other producers. The Appellant disagrees, as it cannot compete with Olera's grading station as Olera has a $0.61/dozen advantage because it does not pay levies. The Appellant argues that its only source of competitive eggs is either its own eggs or those of Mr. Luteyn's daughters.

59. As the Appellant's permit has been clawed back, it has only managed to supply its markets through the purchase of "quota credits", generated when laying flocks are retired earlier than normal. The Egg Board issues a quota credit to the producer allowing the lost egg production to be produced in the future. The producer can either grow the production himself or sell the

right to produce to another registered producer. The Appellant argues that this is a makeshift solution and could easily result in it being unable to fulfil its market requirements.

60. The Egg Board argues that the Appellant's argument "give me permit and let me compete" is short-sighted. The Appellant is not the only specialty producer in the province. There is a long waiting list of producers ready, willing, and able to compete in this marketplace, whether for free-range or organic product. While it is in the interests of the industry that registered producers engage in specialty markets and "battle the unregulated production on the street", it does not follow that all TRLQ should be allocated exclusively to one producer. All specialty producers should have access to the program.

61. Finally, the Egg Board observes that notwithstanding the Appellant's failure to acquire quota to offset claw backs of TRLQ, the production available for its grading station has not decreased. In fact, the throughput of the Appellant's grading station has actually increased substantially by virtue of the acquisition of quota by one of Mr. Luteyn's daughters in 1997, a quota lease arrangement with a Mr. Virji in 2000 and the subsequent purchase of the Virji quota by another daughter in 2001.

DECISION

62. We begin by emphasising that we have considered all the Appellant's arguments afresh, according to the standard of review set out in *British Columbia (Chicken Marketing Board) v. British Columbia Marketing Board* (2002), 44 Admin LR (3d) 262 (BCCA).

63. When it was first implemented in 1996, the 4300 bird "temporary restricted licence" was not part of an industry wide program but rather was a creative regulatory response to the Appellant being unable to supply a niche specialty market. It was not (and has never been) full "quota." It was intended to be a temporary solution allowing the Appellant to meet its markets. The 1996 licence required Elkview to reapply for a new licence "at least annually", and it was clear from the plain language of the Egg Board's December 11, 1996 letter that the licence was "temporary and restricted" and that "Elkview will attempt to purchase quota to replace the temporary restricted licence as soon as possible…." No other producers received this permit.

64. The Egg Board modified the Appellant's licence in 1998 on application by the Appellant. Upon finding itself in the serious position of having 10,000 producing layers because of its premature actions anticipating a concluded deal with Kelly's Acres, the Appellant requested that the Egg Board increase its licence to 14,000 birds. The Egg Board acceded to this request on the condition that the Appellant post an irrevocable letter of credit and make all reasonable efforts to acquire quota. The terms of the licence were reflected in an agreement signed by the Appellant and the Egg Board. The June 19, 1998 agreement stated, in a recital, that "[t]he Company wishes to increase its production of free range eggs and is desirous of entering into an agreement with the Board to increase the temporary restricted licence pending the acquisition of quota", and "[t]he Board is desirous of entering into an agreement with the Company which will obligate the Company to purchase sufficient production quota to replace the restricted temporary licence." Part V of this document states that "[t]he

Company shall make all reasonable efforts to acquire regularly licenced production quota to replace the temporary restricted licence…."

65. A plain reading of this document supports the Egg Board's position that this permit was "not a gift to the appellant so that the appellant could increase his own production beyond the 4,300 layers of permit already issued to him by another 10,000 and then proceed to acquire the Kelly's Acres operation and further quota." Rather, the 14,000 layer permit was a stop-gap measure to assist the Appellant who had jumped the gun by placing pullets in anticipation of a concluded deal with Kelly's Acres.

66. To repeat the point we made above, there is no question that had the Kelly's Acres deal, involving what became 15,000 quota birds, concluded in 1998, the Egg Board would certainly not have granted the Appellant 10,000 additional permit birds. Indeed, the Appellant would have been required to retire the 4300 permit birds previously granted. In this context, the passage of 10 months before a deal was concluded with Kelly's Acres does not justify granting the Appellant what counsel for the Egg Board described as "almost a double recovery."

67. Given this background, when the Appellant sought approval of the agreement with Kelly's Acres in April 1999 without even mentioning the permit retirement issue, it was entirely proper and foreseeable for the Egg Board to require that issue to be addressed. As noted in the chronology above, the parties engaged in discussions, through counsel, and ultimately agreed to retire the 14,000 temporary restricted licence bird permit over five years:

> The Company agrees to apply annually to the Board for a temporary restricted licence to produce eggs in excess of regularly licensed production, including the current temporary restricted licence, up to a maximum of:
>
> (a) 11,000 layers effective January 1, 2001;
> (b) 8,000 layers effective January 1, 2002
> (c) 4,000 layers effective January 1, 2003
> (d) 0 layers effective January 1, 2004 and thereafter.

68. Since this last agreement, TRLQ has evolved into a broader program with many producers seeking to participate. This appeal raises the policy question as to what benefit, if any, the Appellant should receive from the year 2000 modifications to the program. The Panel has carefully considered the Appellant's request for access to the revised terms of the TRLQ program and its allegations of misconduct on the part of the Egg Board.

69. The first point to be made is that the Panel rejects any suggestion that the terms the Appellant now seeks to change should be regarded as invalid as having arisen out of economic "duress." Any economic duress the Appellant may have felt was of its own making in embarking on production before having a signed deal with Kelly's Acres and obtaining proper regulatory approval. As for "duress" in dealings with the Egg Board, it is important to remember that establishing the proper terms and conditions of licensing are the responsibility of a regulator. A regulator is fully entitled to state that an economic privilege such as a temporary restricted licence will not be granted if certain conditions are not met. This is not duress, but responsible regulation. The Appellant benefited from the

advice of its legal counsel and from the Egg Board's willingness to discuss the matter through legal counsel; in the end, however, the Egg Board was responsible for ensuring that any agreement was consistent with its regulatory responsibilities. Whether the terms and conditions are fair and proper as a matter of sound marketing policy is of course another question, which will be discussed below.

70. The Panel finds that the Egg Board has not victimised the Appellant but rather has given it numerous concessions and accommodations. Other producers have long sought what the Appellant was given. Indeed an initial criticism of the Egg Board's specialty program was that it assisted only one producer. Further, the Panel does not impute any improper motive to the Egg Board in promoting another purchaser for Kelly's Acres. Ms. Delight had lengthy, protracted discussions with the Appellant that did not initially result in a deal. The Egg Board cannot be faulted for trying to find another purchaser as it had a legitimate regulatory interest in "regularizing" the Kelly's Acres production. The Egg Board had a duty to advance the broader interests of the industry as a whole and the Appellant has not established that the Egg Board has engaged in any conduct aimed at harming or undermining the Appellant.

71. As for the addition of claw back provisions as part of the June 1999 purchase of Kelly's Acres, the Panel accepts the Egg Board's argument that any duress or pressure felt by the Appellant in the 1999 negotiations was a direct result of its own conduct, pushing the envelope as it did in 1998, and acquiring property and pullets before having a signed deal and regulatory approval. The Panel agrees that it is disingenuous for the Appellant, having created its own dilemma, to blame the Egg Board.

72. In response to the Appellant's claim that the Egg Board did not properly assist him in finding quota, the Egg Board questioned whether the Appellant made *bona fide* efforts to acquire quota. The Panel agrees with the Egg Board. Mr. Luteyn has made it very clear that he was in no hurry to acquire quota as, in his view, it does not make business sense to acquire quota when the end result is a loss of permit. Not only does Mr. Luteyn's conduct lead to this inference, but he was very candid in his evidence (Evidence of Mr. Luteyn, transcript pp. 42-3):

> Q So when this 5,000, these 5,000 layers came available, what was done?
> A We looked at to buy and financially we couldn't do it. There was 5,000 birds coming on-stream. I would have to buy 10,000 birds in order for to sell the 5,000 birds, that was going against the TRLQ, and keep an extra 5,000 birds, that I had to have. We were 5,000 birds short for the market. So if I would have bought just the 5,000 birds, I would have been short 10,000 birds, because that's permit, that 5,000 birds would have gone straight, half a million dollars would have gone straight towards the permit.
> Q So you didn't think you could afford to buy --
> A I couldn't afford to buy it, but I could afford to buy 10,000, I would have bought it, because then at least I would still have 10,000 more birds, but buy 5,000, I couldn't, because those 5,000 birds were going straight back towards the permit. It's just like giving somebody half a million dollars, keep doing what you're doing right now.
> Q So in your own, according to your calculations, you couldn't afford to buy the 5,000 birds?
> A That's right.

Q So how did you accommodate the purchase of Jubilee Farms?
A My kids approached and they bought the 5,000 birds.
Q Your daughters?
A My son-in-law and my daughter.

…

Q So you allowed them to purchase --
A That's right.

73. The Appellant's position is that it has made *bona fide* attempts to acquire quota but has been unsuccessful and as such it should be granted a longer claw back period. The Panel rejects this argument in its totality and agrees with the Egg Board that the overwhelming conclusion is that Mr. Luteyn has no interest in purchasing quota to retire the TRLQ permit. Based on the evidence at this hearing, Mr. Luteyn's daughters have acquired quota for approximately 9000 layers. Had the Appellant purchased this, it would have gone a long way to offsetting the permit.

74. Having acquired a temporary permit, Mr. Luteyn now views it, effectively, as an entitlement as evidenced by the notion that he must "give" away money for nothing in return. This is entirely contrary to the transient nature of the privilege he was granted (a temporary right to produce until such time as he acquired quota) and the undertakings he gave as a condition of receiving those entitlements. This also distinguishes the particular facts here from the *Eggstream* decision relied on by the Appellant where there was evidence of a *bona fide* attempt by the producer to acquire quota which efforts were frustrated when the Egg Board did not act to amend its regional quota transfer restriction.

75. The Appellant's misperception as to the nature of the temporary licence also reflects the fallacy in his argument that he should receive more favourable claw back terms, consistent with those included under the new program. It is very important to remember that the claw back provision in the *new* TRLQ permits, by definition, speak to a claw back designed to give a producer who has been granted TRLQ time to find replacement quota. In the Appellant's case, he had *already* found the replacement quota in the form of the Delight purchase. Thus, in this case, it was quite proper for the Egg Board to focus on a proper schedule for retiring the permit birds rather than treating the permit as if it operated independently of the Delight purchase. In our view, as a matter of sound marketing policy, the Appellant certainly had no cause to complain when, in these circumstances, the Egg Board retired the permit more slowly than it might otherwise have done, and particularly as the Egg Board was willing to adopt a schedule that very meaningfully responded to the Appellant's own business interests.[13]

76. The Panel has considered whether as a matter of fairness, and independent of Mr. Luteyn's view of the matter, the Appellant should receive any additional benefit from the revised TRLQ program. We answer "no." It is apparent that that Appellant is cherry picking. It is

[13] Under the current TRLQ program, a permit holder purchases quota in years 4, 5 and 6, which is then offset from the permit. The Appellant, however, had a 14,000 bird permit and despite purchasing 15,000 birds of quota in 1999, the actual offsetting was delayed over a four year period.

not enough that it has had the benefit of TRLQ long before anyone else and in considerably greater amounts; the Appellant now wants to pick out those terms in the new program which it sees as better. The Panel finds that the Appellant is not entitled to such special status. Arguably, if the Appellant wanted the benefit of the new program, the Egg Board could have taken an "all or nothing" approach allowing the Appellant to either stay with its larger permit or opt into the new program. In opting into the revised program, the Appellant could have received the benefit of the banked levies, 7-year claw back and 25% allocation of TRLQ in the 7th year with the corresponding trade off being a smaller TRLQ permit (5000 birds). However, the Egg Board exercised its discretion in favour of the Appellant. While the Panel is not prepared to interfere with the Egg Board's exercise of discretion, including the ability to bank $0.08 of the levy on 5000 layers, we are similarly not prepared to direct the Egg Board to grant the full array of new terms to the Appellant's existing permit in light of the history here.

77. The position of the Appellant in this case bears similarities to that of the appellant in the appeal of *Farmcrest Foods Ltd. v. British Columbia Chicken Marketing Board*, June 25, 2003. There the Provincial board specifically rejected the notion that a (grandfathered) permit producer was entitled to expand its operation through further permit. The Provincial board held:

> 62. For the reasons given above we reject the view that the Appellant's grower permit should be increased. The Panel is of the opinion that as a matter of sound marketing policy Farmcrest's present position is unreasonable and seeks effectively to turn the privilege associated with past grandfathering into a right to produce only under permit. This is contrary to both the language and sound principle of the Chicken Board's policy rules. For the reasons given above the Chicken Board was correct in refusing Farmcrest's request for additional permit birds…
> [emphasis added]

78. This Panel agrees with the rationale behind the *Farmcrest* decision. Applying a similar analysis to this case, the Panel finds that the Egg Board has been responsive, fair and balanced in addressing the Appellant's concerns. Given that the Appellant has never lived up to its obligation under the permit to acquire quota, and given its manipulation of quota acquisitions to expressly avoid loss of permit, the Panel finds that the Egg Board has been more than generous. This is especially notable given that the Appellant does not really fit within the spirit of the TRLQ program. That program as it now stands is designed to assist small specialty producers in getting into the market. It is not designed to assist large quota holders (like the Appellant) in expanding their operations.

79. Finally, much was heard in this appeal about unregulated production and the Egg Board's failure to address this issue. The Panel has considered whether, by virtue of special circumstances and the threat that unregulated production presents to the egg industry, the Appellant should receive a further TRLQ permit. The Panel agrees with the Egg Board that access to TRLQ must be shared among those producers who wish to participate in the program. The Appellant has long enjoyed the benefit of TRLQ; as a matter of sound marketing policy, it is time for others to enjoy similar benefits. As for the unregulated production issue, this circumstance has been the subject of ongoing attention and is being addressed.

80. Since the conclusion of this appeal, and at the request of the Provincial board, the Egg Board has been carrying out a review of specialty production. One aspect of this review may include recommendations for improvements to the TRLQ program. Having found no error in the Egg Board's decision relating to the application of the revised TRLQ program to the Appellant's existing permit, the Panel is of the view that if the Appellant wishes to influence policy, it should raise any specific issues directly with the Egg Board in the broader context of the specialty review.

ORDER

81. The appeal is dismissed.

82. There will be no order as to costs.

83. The dismissal of this appeal is without prejudice to the Egg Board's ongoing review of issues relating to speciality production, and the right to grant the Appellant the benefit of any change in marketing policy, to which it might be eligible, flowing from that review.

Dated at Victoria, British Columbia this 13th day of May, 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair