

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
IN THE MATTER OF AN APPEAL
FROM A DECISION RESTRICTING QUOTA OR PERMIT HOLDERS TO NO
MORE THAN THREE EGG PRODUCTION UNITS

BETWEEN:

FIVE-FRY FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

FRONTIER FARMS LTD.

INTERVENOR

REASONS FOR DECISION

APPEARANCES

For the British Columbia
Farm Industry Review Board

Christine J. Elsaesser, Vice Chair
Wayne E.A. Wickens, Member

For the Appellant

Art Friesen

For the Respondent

David Taylor, Chair

For the Intervenor

Ray Nickel

Date and Place of Hearing

May 13, 2005
Abbotsford, British Columbia

INTRODUCTION

1. In July 2002, the Appellant, Five-Fry Farms Ltd., (“Five-Fry”) applied to the British Columbia Egg Marketing Board (the “Egg Board”) for an exemption from the “three farm rule” found in s. 7(n) of the Standing Order which provides:

No Registered Producer shall hold Quota or Permit which relates to more than 3 Egg Production Units.

2. In August 2002, the Egg Board declined the Appellant’s request for an exemption and refused to allow a transfer of layer quota from Cedar View Farms Ltd. to Kornelsen Egg Farms Ltd. as the transfer contravened s. 7(n). Subsequent to this decision, Mr. Friesen on behalf of the Appellant asked the Egg Board to consider amending s. 7(n) to allow more flexibility in converting production units to organic or free range as the three farm rule had outlived its usefulness.
3. The Egg Board has considered this matter and advised Mr. Friesen that there was enough flexibility in the system to accommodate his needs. They have declined to take action to change the rule. On October 22, 2004, Mr. Friesen filed an appeal with the British Columbia Farm Industry Review Board (the “Provincial board”). Although the appeal is filed out of time, the parties agreed that the appeal should be heard.
4. Ray Nickel of Frontier Farms Ltd. was granted Intervener status on May 10, 2005 and made a brief statement in support of Mr. Friesen’s position at the hearing of the appeal.

ISSUES

5. Is it sound marketing practice to limit registered producers to having an interest in a maximum of three egg production units?
6. Should the Egg Board have undertaken a review of the policy of the three farm rule and consulted with producers in light of current economic and production options?

FACTS

7. Mr. Friesen owns Five-Fry in partnership with his spouse. It has approximately 11,000 birds or 10,610 basic layer quota on this farm. Mr. Friesen is a Certified General Accountant, and operates an accounting business in addition to his farming interests.
8. Mr. Friesen also is in partnership with Mr. Nickel, (Frontier Farms Ltd.) and Frank Pauls, (Kornelsen Egg Farms Ltd.).
9. Mr. Friesen’s spouse also has an interest in Cedar View Poultry Ltd.

10. Since 1988, the Egg Board has had a restriction in its Standing Order precluding registered producers from holding quota or permit which relates to more than three egg production units: s. 7(n). An “egg production unit” is defined as “the land and buildings comprising a poultry farm at which a registered producer keeps or maintains layers owned by him and used for the purpose of producing eggs to be marketed in accordance with marketing quota or marketing permit”: s. 1(1).
11. The Standing Order set a limit on the maximum quota to be held by registered producers to 5% of total quota issued: s. 8, which also extends to “related persons”: s. 8(b). At the time these restrictions were put in place, there was also limitation on the maximum size of an egg production unit of 20,000 layers. This restriction was increased to 40,000 layers in 1993 and ultimately removed in 1999. The 5% limit remains in place.
12. As a result of growth in the provincial allocation, the maximum quota which can be held by a registered producer equates to a number over 100,000 layers. Now a registered producer by virtue of the 5% rule can hold quota for 100,000 birds. However, a registered producer cannot have four egg production units with 20,000 birds on each unit.

ARGUMENT OF THE APPELLANT

13. Mr. Friesen argues that for a variety of reasons the limit on three egg production units is out of date and inconsistent with current economic realities or production options. These reasons include:
 - i) new rules requiring larger bird cages will reduce barn capacity and require capital expansion and building to provide the additional space;
 - ii) smaller farms and smaller acreages provide greater opportunity to attract new entrants into the egg industry and are easier to sell;
 - iii) family, estate and succession planning is restricted by the current policy, limiting options for future involvement of children or in the case of the untimely death of Mr. Friesen or his spouse;
 - iv) in the past, the Egg Board has made arbitrary exemptions allowing more than three production units in the event of death exceeding its policy limit. Mr Friesen does not want to rely on an arbitrary decision of the Egg Board in his favour;
 - v) further it is questionable if the Egg Board has the authority to make exemptions from the policy;
 - vi) partnering with other producers is a good business practice which is limited by the current policy;
 - vii) moving into speciality production, (free range, free run, organic) is facilitated by multiple smaller holdings as certification for certain speciality production options requires separation of holdings; and

viii) smaller production units reduce the risk of disease through lower bird concentrations and offer more opportunity to manage bio-security and animal health problems¹.

14. Mr. Friesen does not take issue with the Egg Board restriction on registered producers holding no more than 5% of the total quota. However, for the reasons set out above, he argues that the three farm rule is unnecessary. He maintains that he wants to carry out some long term planning for his family and his estate, diversifying his production operations to deal with different potential scenarios. However, he seeks to do his planning in full compliance of the Standing Order and not in reliance upon special exemptions or allowances.
15. As an accountant, Mr. Friesen says that he too could undertake some “creative” manipulations to get around these rules. He knows that some egg producers play games to circumvent the rules and he does not want to do so. He prefers to have the rules changed to stop the creativity and to reflect the current economies of the egg industry. He argues that it is not fair that those producers who choose to be “creative” have a competitive advantage over those operating within the rules.
16. Finally, the Appellant is concerned about the Egg Board’s delay in considering this issue. He has been trying to deal with this issue since 2002 and in that time, the Egg Board has failed to provide him with an opportunity to appear before the board and express his views and position on the issue.

INTERVENOR

17. Mr. Nickel is a partner with Mr. Friesen in Frontier Farms Ltd.. He also takes issue with the three farm rule; it is out of date and there is no good reason to have such a limitation in place given the current status of the egg industry. He questions the need for a three farm rule given the existence of the 5% maximum quota holding rule and sees this as an unnecessary complication. The three farm rule should have been rescinded when the Egg Board included the 5% maximum quota restriction in the Standing Order.
18. The realities of the market place, restrictions by local financial institutions and the current economies of scale make partnering a good mechanism for growing farm businesses. Partnering allows farmers to purchase operations that on their own they would unlikely be able to afford. The three farm rule makes partnering more cumbersome and restrictive.
19. Mr. Nickel argues that the Egg Board has been delinquent in trying to resolve this issue and suggests that it could have been resolved long ago by engaging the

¹ Mr. Friesen had two flocks depopulated, but a third flock on a different production unit was spared and continued in production.

industry advisory committee structure and/or the producer association to put forward their concerns and advice.

RESPONDENT

20. The Egg Board argues that the three farm rule is reflective of its concern regarding the concentration of the industry, both geographically and individually (through related persons or corporately). The Egg Board maintains that it is sound policy to have the three farm restrictions in place.
21. However, the Egg Board does agree that the Appellant raises issues worthy of review. However, it suggests that the review should have a wider context. Unfortunately, such a review requires consultation with the industry and more time and resources than currently available to the Egg Board. Other issues such as follow-up to the Avian Influenza (“AI”) outbreak and the Speciality Review currently underway have priority.
22. As for the specific concerns raised by the Appellant and supported by the Intervenor, Peter Whitlock Operations Manager for the Egg Board argues that there is the ability for the Egg Board to override its own rules. Producers may come to the Egg Board and seek an exemption in the case of an inheritance, or special circumstance such as AI. In such circumstances, the Egg Board has allowed exceptions to the three farm rule.
23. In the absence something better and without a review and further consultation, the Egg Board argues that the three farm rule should not be cancelled. It is working and it is appropriate to let it stand, until such time as the Speciality Review is completed and its impact on industry concentration is known.

DECISION

24. Under the *Natural Products Marketing (BC) Act* and the *British Columbia Egg Marketing Scheme, 1967* (the “Scheme”), the Egg Board has the authority to make “such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage or marketing of the regulated product and to amend or revoke the same”: *Scheme*, s. 37(o). The Egg Board also has the authority “to exempt from any determination or order any person or class of persons engaged in the transportation, production, packing, storing or marketing of the regulated product or any class, variety or grade thereof”: *Scheme*, s. 37(e).
25. Clearly, the Egg Board has the authority to impose restrictions on the number of production units held by a registered producer and likewise has the ability to exempt registered producers from the application of that order.

26. In this appeal, the Appellant seeks a cancellation of s. 7(n) of the Standing Order which restricts registered producer to a maximum of three farms. Given current economic realities, he maintains that this order is too restrictive and the Egg Board's maximum quota rule is adequate to promote the objectives of ensuring the egg industry remains family farm oriented and is not concentrated either geographically or individually.
27. In addition, all parties were aware of the potential for abuse and for producers to get around the three farm rule. The Appellant argues that the very fact that producers are trying to get around this rule is indicative of the three farm rule not serving Egg Board objectives. The rule should be changed or cancelled to reflect current economic realities. Further, the Appellant maintains the solution is not an ad hoc decision by the Egg Board dealing with his situation. The Appellant does not want to rely on the Egg Board's assurance that if the need arises (i.e. in the event of a sudden death) an exemption would be forthcoming.
28. It is evident the Appellant is a conscientious producer with a well-founded desire to plan for his family and future opportunities. Despite attempts to raise the three farm issue with the Egg Board, no consultative process has been initiated and the issue has not found any real forum with the Egg Board. The Egg Board for its part is cognisant of the concerns and agrees that a review of the issue and other matters is warranted, but argues that other priorities have occupied the Egg Board's time and attention. In the meantime, the Egg Board continues to require all producers to live by the regulations. This response is understandably not satisfactory to the Appellant.
29. The Panel recognises that the Egg Board has been dealing with a number of issues, some planned and some unplanned. The Panel also appreciates that industry concentration is also a live and significant issue. However, the three farm rule raises issues of necessity of regulation and the need to promote and ensure innovation within regulated commodities and within regions. These are issues which the Egg Board should be well aware of as they form part of the Minister of Agriculture's Regulated Marketing Economic Policy, July 26, 2004.
30. In the Panel's view, further delay in reviewing the three farm rule could result in lost opportunities for registered producers who seek to diversify, relocate or restructure, especially in light of the concerns raised by the recent AI outbreak. Further, and as the Egg Board has recognised, potential outcomes which could flow from the Specialty Review may also require some rethinking of the three farm rule in light of speciality egg production opportunities.
31. Accordingly, the Panel directs the Egg Board to conduct a review of farm ownership including the existing three farm rule through consultation with the industry advisory committee and the producer association. This review should incorporate a

consideration of what regulation is necessary with respect to farm ownership including corporate ownership as well as holdings by related individuals.

32. The Egg Board is directed to complete this review and implement any subsequent changes in its Standing Order within 120 days of this decision.
33. The Egg Board, along with the other supply managed commodity boards, has been participating in a Specialty Review over the past two years. The mandate of this review is to allow for the inclusion of specialty production within the regulated marketing system under a cohesive set of principles. This process is nearing the end and the Provincial board's directions will soon be published. These directions may have an impact on restrictions related to farm ownership and the three farm rule. The Egg Board is encouraged to design a consultative process sufficiently broad to encompass the issues which may arise out of the Specialty Review.

ORDER

34. The appeal is granted to the extent that the Egg Board is directed to conduct a review of the issue of farm ownership to be completed and implemented within 120 days of this decision.
35. In the interim, s. 7(n) of the Standing Order remains in effect until further order of the Egg Board.
36. There will be no order as to costs.

Dated at Victoria, British Columbia, this 21st day of July 2005.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Wayne E.A. Wickens, Member