

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM DECISIONS CONCERNING THE TRANSFER
OF EGG PRODUCTION BETWEEN GRADING STATIONS

BETWEEN:

ISLAND EGG SALES LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Mr. Ross Husdon, P. Ag., Chair
Ms. Christine J. Elsaesser, Vice Chair
Mr. Richard Bullock, Member

For the Appellant

Mr. Roy Jensen, Director
Ms. Celia Hayward

For the Respondent

Mr. Robert P. Hrabinsky, Counsel

Place of Hearing

Victoria, British Columbia

Dates of Hearing

December 9, 2002

INTRODUCTION

1. This is a marketing policy appeal brought by the Appellant, Island Egg Sales Ltd. (“Island Eggs”), which operates an egg grading station on Vancouver Island. Over the past few years, it has increased its market share and requires more eggs to meet this demand.
2. As a result, the Appellant asked two producers, John and Janet Penner (the “Penners”) and J&A Poultry Farm Ltd. (“J&A Poultry”) to apply to transfer their production from their current grading station on the Lower Mainland, Golden Valley Foods Ltd. (“Golden Valley”). The British Columbia Egg Marketing Board (the “Egg Board”) did not approve the transfers and it is against these decisions, communicated in a May 27, 2002 letter, that Island Eggs appeals.

ISSUE

3. Did the Egg Board err or act unfairly in refusing to approve the application to transfer the production of the Penners and J&A Poultry from Golden Valley to Island Eggs? If so, should additional egg production be transferred to Island Eggs?
4. The Appellant describes its grounds for this appeal as follows:
 - a) Island Eggs is not receiving the amount of production it needs to grow and maintain business.
 - b) Industry statistics show an imbalance between Island Eggs and Golden Valley in the percentage numbers of eggs they each import and declare surplus.

FACTS

5. Island Eggs is a company incorporated pursuant to the laws of BC; Mr. Roy Jensen is the sole director and officer of the company. Mr. Jensen and Mr. Ian Christison are shareholders in Daybreak Farms (Terrace) Ltd. (“Daybreak (Terrace)”), a company involved in egg production and grading in the Terrace area.
6. In March 2000, the Appellant appealed two similar decisions of the Egg Board denying the transfer of free-range eggs to Island Eggs’ grading station from Golden Valley. The BCMB resolved these appeals in favour of Island Eggs: *Island Egg Sales Ltd. v. British Columbia Egg Marketing Board*, August 4, 2000. In that decision, the BCMB held:
 91. Accordingly, the Panel is of the opinion that the Appellant should receive specialty production to service its market. Over a six-year period commencing in 1992, the Appellant worked very hard to develop a market for specialty eggs on Vancouver Island.

This is not a case where the Appellant has sat back and done nothing and now seeks a hand

out. It developed a market. By delaying and denying assistance, the Egg Board in effect handed this market over to other grading stations and the unregulated sector. Our concern here is not competition between grading stations but rather the foreseeable impact of Egg Board decisions on the growth in the illegal unregulated sector and the negative impact on the supply management system.

92. We disagree with the Egg Board that transfers of producers between grading stations are a “zero sum gain”. This analysis overlooks the importance of maintaining regional markets. The Egg Board has a duty to consider the impact of its policies and decisions on regional markets. Unless there is a very good economic or policy reason, Egg Board decisions should not detrimentally undermine a regional market. One region should not be sacrificed to benefit another. Unfortunately, that is exactly the effect of the Egg Board’s decisions in relation to Vancouver Island and the Appellant.
 93. The Panel recognises that it is very difficult to turn back the clock; much has transpired in the meantime. However, we direct the Egg Board to give priority to the Appellant to ensure that it receives the necessary product to service its specialty market. We cannot go further and dictate the amount of production to be directed to the Appellant, as there was evidence of a softening of the Appellant’s market. Whether this is a temporary or permanent state of affairs, we are uncertain. The Egg Board will need to make a determination on this issue. We also recommend that the transfer of product to the Appellant be reviewed annually or at the Appellant’s request, to ensure a reasonable supply is maintained.
7. On December 21, 2000, the BCMB issued its *Vancouver Island Egg Supply Review Supervisory Decision* arising out of issues surrounding egg supply to Island Eggs. In that Decision, the BCMB directed the Egg Board to:
 - a) rescind a TRLQ permit to a Lower Mainland producer;
 - b) ensure that Island Eggs’ specialty egg requirements are addressed, and
 - c) review its transportation policies.
 8. Effective April 23, 2001, Cedar View Farms Ltd. of Abbotsford (with 11,748 layers) applied to the Egg Board to change registered grading stations from Golden Valley to Island Eggs. The Egg Board initially declined this request and in June 2001, Island Eggs appealed that decision to the BCMB.
 9. On February 21, 2002, the Penners of Abbotsford (with 21,824 layers) applied to transfer their production from Golden Valley to Island Eggs. J&A Poultry of Abbotsford (with 37,225 layers) made a similar request on May 6, 2002.
 10. On May 8, 2002, Golden Valley wrote to the Egg Board opposing the transfers stating in part:

...There are several reasons why these applications need to be refused.
On April 23, we were informed by the BCEP that we had lost 80,900 layers to “Eggs for Processing” [EFP].
We currently have three flocks which have failed pre-grade failure.

We currently have one flock that we cannot grade because it tested positive for salmonella.

The above unusable production represents a large portion of our supply from your producers, which has already significantly depleted our ability to service our customers. In order to fill our customer's requirements, we are purchasing all eggs available in BC, as well as purchasing numerous loads weekly from out of province in graded and ungraded state.

In talking to Mike Gillanders on the EFP issue, he indicated that the reason that all of the EFP flocks were from Golden Valley Foods Ltd. was that there were no other flocks in the province that had these levels of under grades. If this is the case, then other grading stations are not in a depleted supply situation as we are. Therefore their supply of usable eggs is much higher than ours.

The board continues to ignore high levels of surplus eggs in the Interior of British Columbia (45.4%), and continues to add to the problem by awarding additional quota to that area, yet takes absolutely no responsibility for moving eggs to markets where they are required. When it comes to re-direction of product, the BCEP needs to be sourcing it from an area where surplus levels are unreasonably high, to those stations looking for additional product.

When the BCEP is looking at surplus levels from (sic) your quarterly IP [Industrial Product] report, they need to be aware that Golden Valley Foods Ltd. latest surplus levels of 22.5% include all FFP, EFP, and salmonella positive flocks, which account for approximately 6% of our total supply. Therefore our true surplus level is 16.5% which is comparable to both Island Eggs and Veekens, but certainly no where near the 45.4% levels being experienced in the Interior.

11. After considering all three applications at its meetings on May 21-22, the Egg Board by letter dated May 27, 2002, advised Island Eggs that the applications for transfer of production were declined. In this letter, the Egg Board pointed to concerns raised by the BC Egg Processors Council (the "Council") regarding the EFP program and its impact on the grading stations.¹ The Egg Board felt it was in the best interests of the industry to draw all the EFP production from the Lower Mainland and in turn free up 2.1% "Grow For" layers in outlying areas (approximately 5000 layers for Island Eggs). This meant that the production from these layers in the regions was available for the table market. The Egg Board also examined the change in market estimates showing increased sales for, and increased layers shipping to, Island Eggs and Golden Valley since January 2001. In light of the information presented, the Egg Board declined all three applications to transfer production to Island Eggs.
12. On June 24, 2002, Island Eggs appealed the Egg Board's decision denying the transfer of the production from the Penners and J&A Poultry to its grading station. It did not pursue the first appeal relating to Cedar View Farms Ltd. as the quota attached to this operation had been transferred in the interim.
13. On July 16, 2002, Island Eggs wrote to the Egg Board advising of a further substantial increase in market share as a result of taking over a Golden Valley customer on the Lower Mainland. Islands Eggs requested that, in light of the new circumstances and given the Registered Grading Station Reports, the Egg Board direct additional production to Island Eggs as per its "market share increase formula".
14. The Egg Board advised that it would be considering Island Eggs' request for

¹ This EFP Program was established by the Egg Board to provide product for the BC processing industry. These eggs receive the market price for processing eggs and unlike the industrial product (surplus) removal program, the producer price is not subsidised directly by the table price.

additional production at its July 29-30, 2002 meeting and provided the background information that would be put before the Board members. This information included 2001 and 2002 figures showing Island Eggs' estimated sales, imports/trades and shippers in number of birds.

15. On the same date, a similar letter was sent to Mr. Jensen and Mr. Christison as principals of Daybreak (Terrace). At the hearing of this appeal, Mr. Jensen and Ms. Hayward denied seeing the Daybreak letter. Despite the fact that Mr. Jensen is a principal of Daybreak (Terrace), he was unaware that Daybreak (Terrace) had also asked for additional eggs to be directed to them. Mr. Jensen also presented a fax note from Mr. Christison denying that he received the letter addressed to Daybreak (Terrace).
16. The Egg Board met on July 29-30, 2002 and amongst other things considered Island Eggs' request. Minutes of the meeting indicate that the Egg Board felt that as the "owners of both grading stations (Island Eggs and Daybreak (Terrace)) are also producers who own quota and who ship to both stations", there should be a joint resolution of both grading stations' supply issues. As a result, it was recommended that Island Eggs be offered another shipper on the condition that Island Eggs and Daybreak (Terrace) enter into an agreement between themselves to supply the needs of Daybreak (Terrace).
17. The Egg Board's decision was set out in its August 7, 2002 letter to Mr. Jensen as principal of Island Eggs and Daybreak (Terrace) and to Mr. Christison of Daybreak (Terrace). The Egg Board stated:

[t]hat subject to receipt of a plan to supply the needs of Daybreak (Terrace), using a combination of current quota holdings and imports, the Board is willing to direct from Golden Valley to Island Eggs Sales an additional shipper of a size that will supply more of the additional needs of Island Eggs Sales Ltd. and replace any production quota that might be required to be moved from Island Eggs Sales Ltd. to Daybreak (Terrace).
18. Along with both letters, the Egg Board included the information it considered in coming to its decisions, including an analysis of the estimated sales, imports/trades and shippers in number of birds for Golden Valley, Island Eggs and Daybreak (Terrace). This analysis was for 2001 and 2002 and did not contain the additional 2000 data that Island Eggs had provided in advance of this meeting.
19. Island Eggs was dissatisfied with the Egg Board's response and continued with its appeal of the earlier Egg Board decisions declining transfers of additional production.
20. On October 25, 2002, the Council sent a letter to all BC egg producers advising that the McDonald's Restaurants contract for shell and processed product had been lost (a volume of approximately 2,000,000 dozen BC eggs).

ARGUMENT OF APPELLANT

21. Island Eggs argues that the Egg Board's decisions declining to direct further production to its grading station are flawed. These decisions in effect give one grading station (Golden Valley) a competitive advantage over another (Island Eggs).
22. Island Eggs also points to other examples of unfair conduct by the Egg Board, many of which do not relate to the issues on appeal other than to demonstrate a pattern of alleged unfair treatment by the Egg Board:
 - The BCMB has previously commented on the appearance of preferential treatment of certain grading stations by the Egg Board: see *Island Eggs Appeal Decision, supra* at para 78. Island Eggs submits that this preferential treatment continues to their disadvantage.
 - Although Island Eggs continues to have problems with a large producer/vendor in terms of egg quality and reliability of supply, the Egg Board refuses to act.
 - Island Eggs has repeatedly asked for freight assistance with respect to product directed from the Interior but to no avail. The Egg Board refers Island Eggs back to the Council for resolution of this issue.
 - The issues of freight rates are closely tied to Island Eggs supply issues. The Egg Board has in the past directed Interior producers to Island Eggs but due to unfair freight policies it only recovers 9% of its freight costs (as opposed to other grading stations that recover 46%). Another grading station, Jubilee Farms, receives freight assistance from the Egg Board despite it not even being a member of the Council. As a result, Island Eggs is placed at a huge competitive disadvantage.
 - In the *Vancouver Island Egg Supply Review Supervisory Decision*, the BCMB recognised that the Egg Board provides the Council with \$500,000 annually to underwrite the costs of transporting eggs based on set criteria. However, the Egg Board has a responsibility to regularly review its policies to ensure that they actually support the objective of free movement of eggs from areas of surplus to graders who require product. The Egg Board also has the responsibility to ensure that the Council is administering these funds, raised by producer levy, in ways that are fair and transparent. The Egg Board has not met this obligation.
 - As a result of not having a producer directed to them, Island Eggs must purchase surplus eggs from Golden Valley; these eggs are of poorer quality with a higher amount of downgrades and as such are more costly to grade. Island Eggs estimates that it costs them .299 cents over the producer price to purchase graded eggs from Golden Valley and .067 cents over the producer price to purchase heavy weight nest run. These costs could be avoided in their entirety if the Egg Board would direct product to Island Eggs. As Island Eggs virtually never has surplus heavy weight eggs, trading and additional costs are Island Eggs' responsibility alone as it is a "purchaser" not "seller" of surplus product.
 - In one instance, the Egg Board did act to direct an Interior producer to Golden

Valley to free up an Island producer for Island Eggs. Golden Valley refused to agree with this direction of product. The Egg Board not only did not enforce its decision, it directed the Interior producer to Island Eggs, without any regard to the increased freight costs. Island Eggs questions the logic in directing an Island producer to the Lower Mainland and an Interior producer to the Island?

- In the *Island Eggs Supplementary Appeal Decision* dated October 10, 2000, the BCMB awarded costs to Island Eggs. To date, the Egg Board has not paid these costs.
- In August 2001, despite being advised that Island Eggs' lawyer was on holidays and would be returning the first week in September, the Egg Board proceeded to garnishee Island Eggs' bank account to collect over-quota fines due from Daybreak (Terrace). Island Eggs got the garnishing order lifted and the monies returned but curiously, although Daybreak (Terrace) offered to put the monies into a trust, neither Daybreak (Terrace) nor Island Eggs have heard anything further on this matter. Island Eggs argues that the Egg Board acted in an unprofessional and unethical manner and wonders whether this action was in response to this appeal.

23. Island Eggs argues that the Egg Board's decisions are inconsistent with its policy of directing producers to those grading stations with increasing market share. As a result, BC producers are paying unnecessary surplus removal levies for product sent to the breakers that could have supplied the table egg market.
24. Island Eggs points to comments on page 4 of the BCMB's *Vancouver Island Egg Supply Review Supervisory Decision, supra*, in support of its position on this appeal:

However, neither the Egg Board nor producers can afford to ignore the impacts to the system if regional production capacity is not maintained. Consolidation of processing in one region and the loss of production capacity in other regions of the Province could undermine the ability of the regulated marketing system to respond to pressures from outside.

Regional processing has proven to be a key component of maintaining a viable regional production sector.

25. Further, Island Eggs takes issue with the Egg Board using Daybreak (Terrace) as the reason for not approving the request to direct additional production to Island Eggs, as it was unaware that Daybreak (Terrace) had requested additional production. As far as Mr. Jensen and Ms. Hayward knew, the needs of Daybreak (Terrace) were fairly well met when quota that was temporarily placed on the Island was returned to Terrace.
26. Island Eggs argues that the Egg Board should have considered its market share increases independent of Daybreak (Terrace). Island Eggs has been a grading

station for 50 years. It has a substantial customer list and 30 employees. It is unfair

for the Egg Board to prefer Golden Valley's customers and employees to those of Island Eggs. The Egg Board argues that Golden Valley's customers, three of the biggest retailers in BC, must get the eggs they need when and where they want them. Island Eggs argues that it also serves some very large customers, who will be lost if Island Eggs does not provide the production they want.

27. Island Eggs points to a letter written by then Minister of Agriculture, Fisheries and Food, Corky Evans on October 17, 1997 which states:

The British Columbia government does not condone the use of powers granted to the Egg Board through the Natural Products Marketing (BC) Act (NPMA), in a manner that creates any undue disadvantage to specific firms in the market-place. Provincially regulated marketing boards are expected to use their powers in a fair and transparent way, where the interests of all market participants affected by regulation are taken into account.

28. Island Eggs argues that Minister Evans' statement is as applicable today as when it was written. The Egg Board has placed Island Eggs at a disadvantage in the market place. This situation must be remedied. Further, Island Eggs argues that the Egg Board must act to ensure that the Council administers its funds fairly so that all grading stations pay equitable freight rates.

ARGUMENT OF RESPONDENT

29. The Egg Board concedes that Island Eggs' imports (expressed as a percentage, not a volume, of throughputs) are generally higher than those of Golden Valley. It also concedes that Island Eggs' industrial product, also expressed as a percentage, not a volume of throughputs, is generally lower than that of Golden Valley. Taken on their face, the Egg Board concedes that these numbers support a greater need for production by Island Eggs than Golden Valley. However, the issue is more complex than a mere contest between grading stations.
30. The thrust of the Egg Board's argument is that despite Island Eggs' market needs, additional production cannot be taken away from Golden Valley at this time without incurring a real and substantial risk that BC producers will lose a significant portion of their market to another province.
31. As was recently recognised by the George Morris Centre in its paper *The Economic Environment: Implications for the Regulated Marketing System* prepared in June 2002, for the Provincial Government as part of their review of regulated marketing, the food industry has undergone a period of consolidation and rationalisation. Grocer concentration has resulted in fewer buyers, often in centralised offices outside BC. The Egg Board points out that the egg industry is no different. In the last decade, the table egg market has become increasingly concentrated; buyer head

offices have centralised outside BC; supply contracts for eggs have become fewer and larger. As a result, BC producers are vulnerable to losing their market to other

provinces and that vulnerability is concentrated in Golden Valley. It grades approximately 78% of the eggs produced in BC and markets approximately 71%. Its customers are principally large grocery retailers including Canada Safeway, Loblaws/The Real Canadian Superstore and Save-On-Foods/Overwaitea.

32. The Egg Board argues that the table egg sector has been hit pretty hard as of late; all graders are short of product. In April 2002, 50,000 layers (approximately 2.1% of the total layer flock) in production and going to satisfy the table egg market were allocated (or dedicated) to the EFP Program. Thus, according to the Egg Board, the production of 50,000 layers was no longer available to satisfy the retail market. Given that it has 78% of the production, Golden Valley feels the majority of the impact of this decision as all of the EFP come from the Lower Mainland. In contrast, this allocation results in an increase in table egg supply for areas outside the Lower Mainland and specifically, an increase for Island Eggs of 5,000 layers.
33. The Egg Board questions how much further Golden Valley's market can be pressured without exposing BC to the significant risk of losing a large retail customer. The Egg Board argues that if these large retail customers continually see more and more of their contracts being supplied with product imported from other provinces, there is a risk that the entire contract will move to that other province.
34. The Egg Board points to Manitoba as a significant threat to BC's market share. Manitoba has acquired 900,000 layers for the EFP market, of which only 400,000 are currently in production. The Egg Board argues that the risk is not just fanciful. In 2001, Floritto Egg Sales, an Interior grading station, lost one of its major customers to the prairies. The loss of only one of Golden Valley's major customers would result in a 20% loss of production to BC. Such a loss would be catastrophic and result in a large surplus of eggs for the table market. In addition, the cost to remove this surplus would increase substantially given that BC has little excess breaker capacity and as such would be required to ship eggs to an out-of-province breaker. In the end, BC would lose provincial allocation.
35. Finally, the Egg Board points to the suggestion in the October 25, 2002 letter from the Council advising that the McDonald's Restaurants' contract has been lost. First of all, the Egg Board points out that the suggestion that the McDonald's contract has been lost is, at this time, no more than rumour or innuendo. However, if the contract is in fact lost, while this would be a terrible loss for BC, it may go some way in alleviating Island Eggs' shortfall concerns as more production would be available to supply its market needs.
36. Ultimately, it is the Egg Board's position that this is an inappropriate time to transfer production from Golden Valley to Island Eggs. The Egg Board does not want to pressure BC's largest retail customers to the point where a contract is lost,

especially when each one comprises 20% of industry egg sales. Accordingly, the Egg Board asks that this appeal be dismissed.

DECISION

37. The egg industry in Canada is supply managed on a national basis through allocations of quota issued to each province by the Canadian Egg Marketing Agency. Commodity boards regulate egg production within each province. In BC, almost all eggs are marketed through grading stations. According to the Egg Board, as BC does not receive adequate national allocation to meet its market needs, grading stations import approximately 200,000 boxes of eggs from the prairie provinces annually and retailers import a further 200,000 boxes of eggs directly into the retail market.²
38. This appeal raises issues as to how to properly allocate eggs between competing grading stations in circumstances where BC is short of production.
39. The BCMB has had the opportunity to consider specific issues relating to egg supply on a number of occasions both on appeal and in the exercise of its supervisory role. The BCMB has also considered the issue of the Appellant's egg supply (both conventional caged white and specialty production). As mentioned earlier, the BCMB has issued the *Island Eggs Appeal Decision, supra*, the *Island Eggs Appeal Supplementary Decision, supra* and the *Vancouver Island Egg Supply Review Supervisory Decision, supra*. These decisions recognised that Island Eggs has a market that needs to be served and that in the past the regulated system failed to meet this market demand resulting in an increase in unregulated production on Vancouver Island. As a result, the BCMB directed the Egg Board to give Island Eggs priority in its requests for further production.
40. Since those earlier decisions, Island Eggs has seen a considerable increase in the production shipped to it. The Egg Board's numbers show that since 1998, Island Eggs has seen a 110.9% increase in production. Island Eggs argues that it skews its growth figures to look at 1998, as it lost a significant amount of production that year. Further, Island Eggs argues that it is wrong to count the production from the Running "W" Farm as, although it was directed to Island Eggs, Running "W" uses its production to satisfy its own customers first. In any event, Island Eggs says that its growth during this period was 67%. In the first three-quarters of 2001, Island Eggs increased a further 3.72%. Whatever the exact figure, it is clear that Island Eggs has seen marked growth. Over the same period of time, according to the Egg Board's numbers, Golden Valley has seen an increase of 1.0167%.
41. Island Eggs also argues that it has significantly lower industrial product declarations (eggs shipped to the breaker) despite increased market share. This demonstrates its efficiency as a grading station; it does not ask for product it does not need. Golden Valley however, has significantly higher industrial product

² A box contains 15 dozen eggs.

declarations, meaning it sends considerably more surplus product to the breaker on a percentage basis. When one considers that Golden Valley is about seven times the size of Island Eggs, it is sending vast amounts of product to the breaker which could otherwise meet the demands of the table market. The Egg Board's decision to not transfer a shipper to Island Eggs significantly increases the surplus removal costs to the entire system.

42. For its part, the Egg Board agrees that Island Eggs on a percentage basis has significantly lower industrial product declarations. However, it argues that the analysis is not as simple as stated by Island Eggs. Golden Valley has large customers. Because of the size of these customers, for example, if they all "special" at the same time Golden Valley must import product to supply the market. Five or six weeks of eggs may be sold in two weeks. Once the special is over, there is typically a "special shadow" where there is a decreased demand for eggs. However, chickens keep laying eggs and as such, surplus product must be shipped to the breaker. The Egg Board argues that the analysis is not as simple as looking at Golden Valley's industrial product declarations and concluding that it is long in product over the course of the year.
43. Looking at Island Eggs' increase in production, the Panel finds that the Egg Board *has* recognized Island Eggs' market and *has* been responsive to its requests for more product. However, it is also clear that as far as Island Eggs is concerned, these transfers are not occurring fast enough to keep up with its growing market.
44. On this appeal, the Appellant sought to demonstrate that its market share had increased and the Egg Board had failed to respond to its production needs. There does not appear to be any issue that Island Eggs currently does not have enough product to meet market demands. In fact, the Egg Board concedes that if Island Eggs and Golden Valley are compared on a percentage of throughputs, Island Eggs imports significantly more product and ships significantly fewer eggs to the breaker and as such, has a greater need for production than Golden Valley.
45. However, the Egg Board argues that this issue is bigger and more complex than Island Eggs' greater need. The Egg Board points to the trend towards increased consolidation and rationalisation amongst grocery retailers. As there are fewer retailers, there are fewer contracts to supply and those contracts represent a significant market share. Looking at Golden Valley, with 78% of the production it supplies 71% of the market. Its largest customers include: Canada Safeway, Loblaws/The Real Canadian Superstore and Save-On-Foods/Overwaitea. The loss of any one of these contracts would result in a 20% reduction in BC's total market. To put this loss in perspective, any one of these contracts amounts to roughly twice Island Eggs' market share.
46. The Egg Board questions how much further Golden Valley's market can be

squeezed before its large retail customers move their contracts to another province. It points to the impact of the EFP Program on Golden Valley, stating that it lost a good portion of the production from 50,000 layers, which is now unavailable to the retail grocery market. As Golden Valley has the bulk of the province's EFP production, it feels the majority of the impact of this decision. A similar situation arose in 2001, when an interior grading station lost one of its major customers to the prairies.

47. In response, Island Eggs argues that it too has large customers and there is no basis for the Egg Board to prefer Golden Valley's customers. Further, Island Eggs accuses the Egg Board of relying on "scare tactics" as a basis to decline its requests for transfers.
48. Although the Panel is of the view that the Egg Board overstates the impact of the EFP Program on Golden Valley, we recognise that transfer of production between grading stations makes for difficult decisions for the Egg Board. As BC is under allocated, decisions of how to balance production needs of grading stations are difficult – those decisions are not simply a contest between competing grading stations; they affect the entire industry. The Panel agrees with the Egg Board that the downside risk of Golden Valley losing one of its large retail customers is so significant that it warrants special measures. The loss of a contract, which takes up 20% of BC's production, would be catastrophic to BC's entire egg industry. The Egg Board has the statutory responsibility to regulate the BC egg industry. It has looked at this issue and determined that at this time, there is too great a risk to transfer production from Golden Valley. The Panel is convinced, based on the evidence, that this risk is far from speculative. It is real and significant. We are satisfied that that the Egg Board's decisions to not approve the specific applications for transfer of production were, in principle, sound.
49. It should be noted that the Egg Board did not refuse the applications to transfer outright. While it declined to approve the transfer of the Penners and J&A Farms production, there was recognition that Island Eggs required an additional shipper. Consistent with its position on this appeal, the Egg Board pointed to the competing interests of grading stations (Island Eggs and Daybreak (Terrace)) pressuring a limited supply. In light of the related nature of the two grading stations, the Egg Board required Island Eggs and Daybreak (Terrace) to collectively work out their supply issues before an additional shipper could be directed to Island Eggs. Island Eggs did not respond to this request and continued with its appeal.
50. Having arrived at the conclusion that the Egg Board's previous decisions were sound, we hasten to add that reconsideration by the Egg Board is now warranted. At the time of the hearing of this appeal, reference was made to "rumour and innuendo" – which by this point in time should be a known fact – that the McDonald's contract has been lost. The Egg Board indicated that if the McDonald's contract were indeed lost, there would be a further reduction in

Golden Valley's market share. As a result, there may be a surplus, which could be directed in part to Island Eggs. This change of circumstance warrants a reconsideration of the August 7, 2002 decision by the Egg Board.

51. Island Eggs also raised on-going concerns regarding unfair application of the Egg Board's transportation policy. Based on the evidence heard at this hearing, the Panel finds that there may have been inequity in the application of the transportation policy between grading stations. In response, the Egg Board indicated that it was attempting to develop an agreement with the western provinces to address the whole transportation issue including the cost of on-farm pickup.
52. Given that the Egg Board recognises concerns with its transportation policy and that it is currently working with the western provinces to try and resolve these issues collectively, the Panel refrains from making any directions at this time. However, the BCMB will continue to monitor this issue in its supervisory capacity to ensure that fair and transparent transportation policies are implemented and observed.
53. Finally, Island Eggs raised two issues of alleged misconduct on the part of the Egg Board unrelated to the issues on appeal. Island Eggs referred to the Egg Board's attempts, in August 2001, to enforce a pre-judgment garnishing order for \$58,565.36 in unpaid over quota levies due from Daybreak (Terrace) despite being advised that Island Egg's lawyer was unavailable. Island Eggs argues that the garnishing order was unreasonable and it caused significant hardship to its operations. It was also unnecessary as subsequent to the order Egg Board has not pursued the matter even though Mr. Christison has offered to put the monies into trust.
54. The second issue arises out of the *Island Eggs Appeal Supplementary Decision, supra*. In that decision, the BCMB determined the amount of over quota levies payable by Island Eggs as a result of illegal production (\$48,529.68). The same over quota levies, referred to above, owed by Daybreak (Terrace) were referred to at para. 17:

It should be noted that this decision does not in any way limit or restrict the Egg Board's ability to pursue over-quota levies against Daybreak Terrace assessed up to April 1, 1999. The validity of the Terrace over-quota assessments was not at issue in this appeal and as such the Panel is not prepared to set those levies, in the amount of \$58,565.36, aside.

55. More importantly, the BCMB awarded costs against the Egg Board stating:

27. While not wishing to be regarded as adopting the judicial practice that "costs follow the event", particularly with regard to commodity boards which must frequently make difficult judgment calls in a complex area, we are satisfied that the unique facts of this case reach the standard for an order of costs to be made against the Egg Board. For the reasons set out in our August 4, 2000 decision at paragraphs 71-93, the Egg Board's decisions in this case, while made in good faith, disclosed a number of significant errors in practice and judgment,

the cumulative effect of which had a serious adverse effect on the Appellant and the industry, which in our judgment makes a direction of costs appropriate.

28. Having concluded that indemnification by way of legal costs is appropriate, we conclude that an order of actual costs would be unduly harsh and that indemnification on a basis less than actual costs is appropriate.
56. According to Island Eggs, the costs and disbursements payable came to \$12,668.00. However, despite the fact that Island Eggs paid its over quota levies as directed by the BCMB, the Egg Board has not paid Island Eggs' costs. At the hearing of this appeal, the Egg Board chose not to respond to this allegation and thus provided no rationale for why the costs remain unpaid.
57. Given that these two instances do not bear on the issues under appeal, it is not necessary for the Panel to deal with them in the context of this decision. However, the BCMB has supervisory jurisdiction over all commodity boards and commissions to ensure that they act in the public interest, and in a fair and transparent manner. Given that the issues raised by Island Eggs raise concerns about the Egg Board's compliance with BCMB directions, this Panel has recommended that the Chair of the BCMB undertake a supervisory investigation to determine the appropriate course of action.

ORDER

58. The appeal is dismissed.
59. In accordance with our discussions at paras. 50-52, the Panel makes the following directions:
 - a) In the event that Golden Valley has lost the McDonald's contract, the Panel directs the Egg Board to reconsider its August 7, 2002 decision to determine whether there is now a surplus, which could be directed in part to Island Eggs.
 - b) The Egg Board is directed to give priority to revising its transportation policy to ensure that the policy meets the needs of all industry stakeholders, even if a western province solution is not reached. The BCMB will continue

to monitor the transportation policy issue in its supervisory capacity to ensure that fair and transparent transportation policies are implemented and observed.

60. There will be no order for costs.

Dated at Victoria, British Columbia, this 25th day of April 2003.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Ross Husdon P. Ag., Chair

Christine J. Elsaesser, Vice Chair

Richard Bullock, Member