IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION CONCERNING
ENFORCEMENT OF BRITISH COLUMBIA EGG MARKETING BOARD
STANDING ORDER

BETWEEN:

ALFRED REID AND OLERA FARMS

APPELLANTS

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

CERTIFIED ORGANIC ASSOCIATIONS OF BRITISH COLUMBIA
BRITISH COLUMBIA ASSOCIATION FOR REGENERATIVE AGRICULTURE
ORGANIC AMBROSIA TREE FRUIT GROWERS

INTERVENORS

REASONS FOR DECISION

APPEARANCES:

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Hamish Bruce, Member
For the Appellants	Ms. Wendy A. Baker, Counsel
For the Respondent	Mr. Robert P. Hrabinsky, Counsel
Date of Hearing	June 10-13, 2002
Place of Hearing	Surrey, British Columbia

I. INTRODUCTION

1. Alfred Reid and Olera Farms (the "Appellants") appeal from the August 1, 2001 decision of the Respondent British Columbia Egg Marketing Board (the "Egg Board"), communicated to them by letter from Egg Board legal counsel dated August 9, 2001.

A. The Egg Board's decision

2. The Egg Board arrived at its August 1, 2001 decision following a hearing conducted under s. 17 of its Standing Order.[1] The Egg Board's decision is set out in Egg Board Minutes bearing that date; its key findings and conclusions expressed in those Minutes, may be summarised as follows:

- The Egg Board's authority under the *British Columbia Egg Marketing Scheme, 1967*, BC Reg. 173/67 (the "*Egg Scheme*") is not limited with respect to a producer by reason of that producer being a "certified organic producer".

- Mr. Reid has contravened the Egg Board Standing Order by:

  - failing to pay the marketing licence fee or to instruct the agency through which he markets to deduct the fee and remit it to the Egg Board (Standing Order, s. 12);
  - marketing a regulated product without holding a marketing licence (Standing Order, s. 18(a) and (b)).

- Olera Farms ("Olera") has contravened the Egg Board Standing Order by:

  - failing to deduct the marketing licence fee due from Mr. Reid and to remit it to the Egg Board (Standing Order s. 12(c));
  - refusing to produce books, records and other information for inspection regarding the production and marketing of regulated product (Standing Order, ss. 4(a) and (b)).

- The marketing licence fees payable by Reid/Olera are $74,825.10 for the period starting at week 26 of 1999 and concluding in week 10 of 2001. Adding weeks 11-30 of 2001, the total marketing licence fees payable amount to $93,400.30.

- Mr. Reid and Olera are to be notified of this decision and their right to appeal to the British Columbia Marketing Board (the "BCMB"). Thirty

[1] Section 17(c) of the Standing Order provides: "[w]here a contravention is referred to the Board and the Board is satisfied that the contravention appears to have taken place, the Board shall notify the contravenor in writing of the contravention and shall fix a time and place at which the contravenor shall have an opportunity to be heard by the Board or a committee of the Board in respect of the apparent contravention".

days following such notification, Egg Board counsel will commence a Supreme Court action under ss. 15 and 17 of the *Natural Products Marketing (BC) Act* (the "*Act*") compelling Mr. Reid and Olera to comply with the Egg Board's Standing Order and to recover unpaid levies.

3. Mr. Reid and Olera refused to attend the Egg Board's s. 17 hearing. Their position, expressed in their legal counsel's July 30, 2001 letter to the Egg Board, was that "the B.C. Egg Board has no jurisdiction over them or any certified organic producer".

B. The Appeal to the BCMB: Grounds of Appeal

4. On September 10, 2001, Mr. Reid and Olera appealed the Egg Board's decision to the BCMB. The primary ground of appeal is that the "regulated product" to which the *Egg Scheme* applies does not, on a proper interpretation of the *Egg Scheme*, include organic table eggs certified under the *Agri-Food Choice and Quality Act*, SBC 2000 c. 20 and the *Organic Agricultural Products Certification Regulation*, BC Reg. 200/93. In a Pre-Hearing Conference Report, the parties framed this issue as follows:

> Does the Egg Board have the jurisdiction to regulate certified organic egg production and marketing? Grounds:
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> (a) certified organic producers have not consented to being part of the regulated system; and
> (b) certified organic product is a distinctly different natural product from conventional eggs.

5. The Appellants' second ground of appeal arises only if they fail on the first ground. In the Pre-Hearing Conference Report, the issue was set out as follows:

> If the Egg Board does have jurisdiction, then is it unfair and arbitrary for the Egg Board to impose levies from a date that precedes the Egg Board's December 12, 2000 letter to the Certified Organic Associations of BC. Grounds:
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> (a) the date from which the levies have been imposed precedes the point in time when the Egg Board asserted jurisdiction; and
> (b) the Appellant has been singled out and targeted.

6. As became apparent in argument, the substance of this second issue is that if the Appellants' production does fall within the *Egg Scheme*, the Egg Board should not be allowed to collect or enforce levies that may have arisen by operation of the Egg Board's Standing Order prior to (a) the Egg Board's December 12, 2000 letter to the Certified Organic Associations of British Columbia ("COABC") asserting regulatory authority over organic producers; or (b) the Egg Board's January 9, 2001 letter to registered grading stations regarding collection of marketing licence fees.

C. The Panel's Preliminary Issues Decision

7. On November 9, 2001, this Panel conducted a hearing to address two "preliminary" motions raised by the parties. The first motion, on behalf of the Appellants, was the allegation that a reasonable apprehension of bias on the part of the BCMB arose from its prior involvement and past statements made in relation to organic egg production. The second motion, on behalf of the Egg Board, was an application to restrict the Appellants from calling lay evidence in support of their argument regarding the proper interpretation of the *Egg Scheme*.

8. On January 21, 2002, the Panel issued a 23-page decision dismissing both motions. Those reasons are comprehensive and self-explanatory, and will not be repeated here.

D. The present appeal hearing

9. The "merits" of this appeal were heard over four days, from June 10-13, 2002. The parties filed a number of exhibits, including Exhibit "2", which is a three-volume joint document book consisting of 274 tabs.

10. The Appellant called three witnesses: Alfred Reid, Steven Easterbrook and Irving Reid. The Appellants also sought to call a fourth witness, Mr. Hans Buchler, an organic grape grower. The Respondent objected to the evidence of this witness, and after hearing submissions, the Panel ruled that the witness's proposed evidence was not relevant to the specific issues before the Panel on this appeal. The Panel held that it was open to counsel to address in argument any analogy between her argument on this appeal and the distinction between table grapes and grapes grown for the production of wine under the now-revoked *Grape Scheme*.

11. The Egg Board called one witness – its General Manager, Peter Whitlock. The Panel heard from three intervenors in support of the Appellants: COABC (written submission), the Organic Ambrosia Tree Fruit Growers (written submission) and the British Columbia Association for Regenerative Agriculture (which provided evidence through Karl Hann). Each witness was subject to cross-examination, and answered questions from the Panel.

II. FACTS AND CHRONOLOGY

A. The Reid/Olera operation

12. The Appellant, Alfred Reid, is an egg producer. He owns chickens that lay eggs for consumption as table eggs. He has a ten-acre farm, with 15 cross-fenced fields, on which he undertakes his egg farming and other agricultural activities. Mr. Reid started producing table eggs in 1996.

13. Before becoming a table egg producer, Mr. Reid was a hatching egg producer. The distinction between table eggs and hatching eggs is that table eggs are laid for the purposes of human consumption, while hatching eggs are fertilised and hatched as chicks and raised for consumption as chicken.

14. Mr. Reid was a hatching egg producer between 1984 and 1995. During that time he held hatching egg quota created under the supply-managed regulated marketing system. Mr. Reid left the hatching egg business in 1995, following a dispute with the British Columbia Broiler Hatching Egg Commission (the "Commission").

15. During cross-examination, Mr. Reid volunteered that he abandoned the hatching egg business because the BCMB asked him to choose between being an organic producer and a producer within the supply management system "worth millions of dollars as a hatching egg producer to this day". Mr. Reid's motivation for leaving the hatching egg business is only of background relevance to this appeal, but we note that his evidence on this point was inflammatory and did not accurately describe the decisions in *Reid v. British Columbia Broiler Hatching Egg Commission* (November 3, 1993, BCMB), reversed [1995] BCJ No. 388 (SC).[2]

16. As noted above, Mr. Reid started producing table eggs in 1996. The Egg Board has estimated that, effective June 17, 1999 (the date of the inspection and layer count used by the Egg Board to calculate levies), Mr. Reid had 7000 table egg layers for which he did not seek or hold permit, quota or licence. Mr. Reid testified that he never told egg inspectors the number of birds he had in place; he refused to do so as they had no right to the information. However, Mr. Reid took no issue on this appeal with the 7000 laying hens attributed to him by the Egg Board effective

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[2] According to those decisions, Mr. Reid's dispute with the Commission followed inspections on his hatching egg operation in 1993, resulting in a hatchery (Lilydale) refusing to place a flock on his farm. He appealed to the BCMB, in part, because certain identified deficiencies were not written in the relevant Standards. The BCMB dismissed the appeal holding that the evidence showed deficiencies on many items written in the Standards. The Court overturned the BCMB on this issue as the BCMB failed to consider whether the Commission followed its approved inspection procedures. With regard to Mr. Reid's evidence before us, nothing in the BCMB's decision suggested "organics" were in a class separate from "supply management".
The Panel did express concern for the safety of hatching egg flocks resulting from "the Appellant's refusal to get rid of the (Muscovy) ducks which he has on his farm", which ducks he used to control insect pests in his organic vegetable garden. The Panel emphasized the need to isolate, for health and safety reasons, broiler hatching egg flocks from other creatures, including ducks. It was in this context that it said "if a person wishes to be a broiler hatching egg producer the health of his flocks and progeny must take precedence over his or her lifestyle preference". This was not an ultimatum to choose between broiler hatching production and an organic vegetable garden, but rather a statement regarding responsibility and safety in respect of broiler hatching eggs.
We also note that Mr. Reid's comparison between the present case and the Court's conclusion that ducks are not "fowl" within the meaning of the inspection Standards is misconceived. The second issue in *Reid* was not whether an organic duck is a "duck" regulated under a scheme. Rather, all the Court decided was that if ducks (or, for that matter, rodents) are to be identified as a safety hazard in the Standards, this should be written in directly, rather than relying on the word "fowl", a term specifically defined as "spent broiler breeders" in the Commission's General Orders. Failing this, the Court noted that before taking action on an unwritten standard, "insistent" procedural fairness is required.

June 17, 1999. Mr. Reid's laying flock is far in excess of the 99-bird exemption set out in s. 2(c) of the Egg Board's Standing Order.

17. Mr. Reid produces table eggs following methods of production and animal husbandry described in a document entitled "British Columbia Certified Organic Production Operation Policies and Farm Management Standards Version 3". Under the former *Food Choice and Disclosure Act*, SBC 1989, c. 66, and more recently the *Agri-Choice and Food Quality Act* (discussed below), these methods must be followed if one wishes to lawfully represent to the public that a food product is "British Columbia certified organic".

18. Mr. Reid described the key features of his table egg production. In accordance with certification standards, his chicken feed has no animal by-products and has no genetically altered components. Husbandry practices exclude use of pesticides, herbicides, antibiotics and hormones in respect of the layers or their feed. Slat floors are prohibited and layers have plenty of outdoor access. As part of gaining "certified" status, Mr. Reid farms 1000 layers/acre in contrast to the more intensive operations of conventional producers. These practices increase the cost of production, giving rise to a price premium that consumers are willing to pay.

19. It became apparent on the evidence of Mr. Reid and his witness Mr. Easterbrook that the certification standards with which they are familiar are not 100% natural. COABC standards allow for feed to include certain amounts of artificial vitamin supplements and artificial proteins. Judgements are made within the organisation regarding whether particular substances and practices are "approved", "restricted" (which, subject to various rulings, may still be labelled organic) or "prohibited". Certification standards have evolved over time and are subject to further change as determined by COABC.

20. Mr. Reid testified that he did not have detailed knowledge regarding table egg production other than certified organic table egg production. Neither Mr. Reid nor Mr. Easterbrook produced scientific or expert evidence to support their view that the COABC method of production renders "certified organic" eggs so objectively distinct from any other table egg as to make them different natural products when considered objectively from the perspective of agricultural science. When asked about the distinction between his production as compared with free-range production and free run production, Mr. Reid stated: "I don't know a hell of a lot about free run or free-range eggs". This (in addition to other factors discussed below) seriously diminishes the weight of Mr. Reid's factual contention that a "certified organic" table egg is so fundamentally different from any other table egg as to be a different natural product altogether.

21. Mr. Reid's assertion that a "certified organic" table egg is so different from any other egg as to be a different natural product is, in truth, subjective and rather extreme. A June 1998 draft policy paper produced by the Ministry of Agriculture and Food provides a more helpful, objective assessment. It states that "[t]he

perception and tolerance of risks associated with the use of some technologies such as pesticides, growth hormones, antibiotics and genetically engineered production inputs, vary dramatically among members of society". Some consumers hold to the personal view that a "certified organic" table egg is a higher or better quality table egg, for which they are prepared to pay more money. But a table egg it remains. Mr. Reid in fact conceded that his organic table eggs compete with other table eggs on grocery store shelves.

22. There are numerous varieties and grades of chickens and eggs by those chickens, even apart from "certified" organic eggs. Among these different types, there are differing inputs, husbandry practices and philosophies. Whether the *Egg Scheme* includes all these varieties, and in particular includes eggs that are "certified organic", is of course the legal question to be dealt with on this appeal. Completely apart from the legal definitions under the regulated marketing legislation, Mr. Reid has failed to persuade us on the basis of science that his table eggs are so different in their essential nature from other eggs as to be objectively different natural products. The ethical and environmental issues discussed in the evidence do not change the essential nature of a natural product sold to the public as food, nor do the business objectives and marketing strategies of those engaged in certified organic production.[3]

23. When he first commenced production of table eggs in 1996, Mr. Reid had his eggs graded and marketed through Rabbit River Farms, a grading station owned by another egg producer, Mr. Easterbrook.[4]

24. In 1998, Mr. Reid started his own grading station, operating under the name Olera Farms (Olera appears to be a business name rather than a separate corporate entity). Olera now markets Mr. Reid's eggs as well as the eggs of other producers. There was no evidence before us on how many eggs Olera markets, but Mr. Reid gave evidence that its growth has been "rapid". Mr. Reid gave evidence that Rabbit River also continues to market some of his eggs.

25. According to Mr. Reid, Olera holds a licence (a copy of which was not included in evidence) issued by the federal Canadian Food Inspection Agency. Mr. Reid gave evidence that after a year of operating the Olera grading station, the federal agency

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[3] The latter factor may well be highly relevant to the policy question of how organic production should be regulated and administered, but the Appellants have chosen to limit their appeal. A "Note" to the Pre-Hearing Conference Report makes this clear: "Note: The issue of whether certified organic producers "should", as a matter of policy, be under the jurisdiction of the Egg Board is not an issue in this appeal".

[4] Mr. Easterbook gave evidence that following contacts with the Egg Board regarding the cost of quota, and in the absence of an economic new entrant program, he took the risk of being outside the law. He set up an unregulated flock of layers in 1994, and then proceeded to develop a market for his production. Following a complaint originating from Alberta in 1998, the Egg Board seized Mr. Easterbrook's flock. The ensuing discussions with the Egg Board resulted in "a gentleman's agreement" whereby Mr. Easterbrook was allowed to continue to operate provided he did not increase the size of his flock (500 birds). Following the creation of Temporary Restricted Licence Quota ("TRLQ"), the Egg Board granted Mr. Easterbrook TRLQ in the amount of 500 birds, without formal application by him.

advised him to apply for a "Ministry of Agriculture" grading licence, which application Mr. Reid says he made. Mr. Reid also did not provide us with a copy of the licence or licences, which would have been required by the *Agriculture Produce Grading Act*, RSBC 1996, c. 11 ("*APGA*"). We note that the *Shell Egg Grading Regulation*, BC Reg. 105/78, issued under the *APGA*, prohibits any person from grading eggs produced on his own farm unless he holds a valid and subsisting producer grader licence issued by the Minister.

26. Mr. Reid gave evidence that after applying for the Ministry licence, he received a grading station licence issued under the Egg Board's Standing Order "out of the blue". The licence was provided to Olera in January 2001 for one calendar year. When, on February 9, 2001, Egg Board counsel wrote to Olera to follow up with a Grading Station audit, Mr. Reid refused to allow such an audit. This refusal was one of the grounds for the Egg Board's s. 17 breach proceedings.

B. Legislation governing organic certification

27. Starting in 1986, Mr. Reid began converting his land to organic production of vegetables and raspberries. At that time there was no generally accepted standard in BC for what "organic" meant. This led to consumer confusion and to conflict among various self-styled organic organisations.

28. For his part, Mr. Reid initially became involved in the formation of the British Columbia Association for Regenerative Agriculture" ("BCARA"). BCARA set as one of its tasks the creation of group standards for what should be defined as "organic" production. Leading up to 1991, there were as many as 11 independent organisations throughout the Province acting in a fashion akin to BCARA. This state of affairs led to a call for province-wide certification standards, enabled by legislation, for production of food held out to be "organic".

29. In 1991, the *Food Choice and Disclosure Act* came into force. Section 2 reflects its operation:

> 2. The Lieutenant Governor in Council may, in accordance with the Act, establish programs to enable persons who belong to a prescribed class of persons engaged in farming, gathering, processing, packaging, selling or handling practices related to food products, at their option,
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> (a) to have their farming, gathering, processing, packaging, selling or handling practices, as the case may be, certified as meeting prescribed standards and to receive a certificate as evidence that the prescribed standards have been met, and
> (b) where they hold a certificate, to describe, label or advertise the food product as having been farmed, gathered, processed, packaged, sold or handled in accordance with the prescribed standards.

30. The *Food Choice and Disclosure Act's* title, purpose, background and operation make clear that it was a consumer statute, operating on a voluntary basis, potentially across the entire food industry. As noted by the Minister of Agriculture

who introduced the *Food Choice and Disclosure Act* at Second Reading (*Hansard*, July 18, 1989, p. 8702):

> The purpose of this legislation is to give the consumers a "choice" in their foods. I think it's important to recognise that the system will be voluntary in the aspect of enrolment and the programs for certification, and they are to develop, Mr. Speaker, by way of consultation with groups who might wish to utilize such a system.
> It allows our food processors and marketers to develop and label food products with government sanctioned descriptions. Consumers desiring information on food contents or seeking products produced without the use of synthetic additives may rely on the good descriptions and labelling that will be enabled by the Act.

31. Coincident with the proclamation of the *Food Choice and Disclosure Act* in March 1991, the Lieutenant Governor in Council passed a regulation enabling certification standards for certain commodities. There was *no* corresponding change in the natural products subject to regulation under the regulatory schemes and the *Food Choice and Disclosure Act* did not purport to exempt a new class of natural products from these schemes. The Minister of Agriculture, Food and Fisheries made this very point in July 2000, when the Legislature repealed the *Food Choice and Disclosure Act* and replaced it with the *Agri-Food Choice and Quality Act* which contained new definitions, an expansion on the activities to which it can apply and augmentations to the regulatory provisions. Its purpose, however, is identical to its predecessor.

32. At first reading of the *Agri-Food Choice and Quality Act* on June 15, 2000, the Minister stated that: "[t]his bill will enable the agrifood industry to establish voluntary certification programs and tell consumers about the quality and production standards for B.C. agriculture and food products." (*Hansard*, p. 16662). This purpose is repeated in the *Organic Agricultural Products Certification Regulation*:

> 1. The purpose of this regulation is to establish a program to enable persons to be certified if they meet standards for the farming, gathering, processing, packaging, selling or handling of organic food products so that the public can be made aware which food products meet those standards.

33. Under this Regulation, a person wishing to obtain certification must be a member in good standing of a "producer certifying agency" or "trade certifying agency". These agencies in turn derive their status from membership in the COABC, a society incorporated in the early 1990s with Mr. Reid as its first President. Cabinet recognised COABC as the "Administrator" under the Regulation. Section 5 of the Regulation states that agencies may only certify a person who meets the standards set out in Book 2 of the *British Columbia Certified Organic Production Operation Policies and Management Procedures*. Agency certification decisions are subject to appeal to the COABC as Administrator.

34. The Egg Board's position with regard to certification was that if producers wished to develop organic standards, they were welcome to do so. The Egg Board was not involved in developing those standards in the mid-1990s, and was not asked to

participate. There was no evidence that anyone at the time ever suggested to the Egg Board, or to any other commodity board, that certification had any relevance to the legal powers under the various regulatory schemes. Indeed, this would have been surprising. Cottage production, new entrants and niche markets have been central policy issues for marketing boards for many years. Boards and Commissions continue to grapple with how best to manage this aspect of their respective industries.

35. Just as with its predecessor, nothing in the *Agri-Food Choice and Quality Act* suggests that its certification provisions create entirely new categories of natural products, or exempt its natural products from regulatory schemes under the *Act*. Indeed, it would be most remarkable if a consumer information statute, intended merely to assign a particular content to the label "certified organic", could have such legal effect. This was made explicitly clear during the committee stage of debate on the Bill (*Hansard*, July 4, 2000, p. 17077):

> B. Barisoff: Could the minister give assurances that the federal and provincial regulations, specifically the Natural Products [Marketing] (BC) Act, take precedence over the legislation and producers cannot use the process of certification to avoid producing outside the regulated marketing requirements, where they apply?
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> Hon. C. Evans: Yes. The concern that the honourable member's question might be the case was, I think, the focal point of industry concerns expressed in 1999. I'm happy to say that consultation with producer groups and also legal consultation in the meantime have given us full assurance, and I think that all the industry thinks so too.

C. Public policy efforts to exclude organic production from regulated marketing schemes

36. Following the *Food Choice and Disclosure Act's* proclamation in 1991, organic industry production did not attract significant enforcement attention by commodity boards. However, as the organic industry grew in visibility, production and economic power, it began to compete with conventional production. As a result, the Egg Board as well as other commodity boards became more assertive, insisting that all producers comply with the regulatory requirements for licensing, permits or quota as required by the relevant standing orders for the benefit of the entire industry.[5] A lobby effort by COABC ensued. The events that followed provide the public policy context out of which the present appeal arises, as well as relevant background to the second issue on this appeal.

37. COABC lobbying efforts became particularly intense following the Egg Board's January 1998 seizure of Mr. Easterbrook's flock. After Mr. Easterbrook and Mr. Reid appealed to customers via flyers in egg cartons, a faxed letter campaign in

[5] A June 1998 Ministry of Agriculture and Food discussion paper reports that as of 1996, there were 270 members of organic certification agencies farming 56,000 acres. Membership had increased to 340 by the spring of 1998. COABC's April 30, 2000 submission to the Minister states that COABC egg production "has increased from approximately 5000 birds in spring of 1998 to 21,500 at the present time…"

support of Rabbit River began. Local press in various communities picked up the story and the campaign spread. As a result, the Minister of Agriculture and Food received several thousand letters supporting Rabbit River. COABC took the lead in the lobby campaign. COABC's letters make it clear that it took little comfort in advancing a position that an exemption from regulated marketing was implicitly granted by the *Food Choice and Disclosure Act*.[6] In COABC's July 3, 1998 submission to the BCMB as part of a regulated marketing review, COABC stated that the legal issue is "moot" and that the real solution is for "the NPMA schemes [to] be amended to explicitly exclude certified organic products in order for the organic industry to continue to develop".

38. The BCMB Regulated Marketing Review Report was completed in February 1999. The Report provided a set of policy principles to guide commodity boards in the creation of programs to accommodate producers of non-generic (i.e., niche or specialty) products, such as certified organic production. The BCMB noted that as a result of requirements to buy expensive quota, existing new entrant programs had not successfully accommodated such production. The BCMB's principles were founded on the premise that commodity boards "have a responsibility to maintain a system that operates at a reasonable level of expense" for such producers. The BCMB articulated a permit system "to ensure a competitive, market-responsive system which provides for development in all segments of the market – generic, niche, organic or neutraceutical".[7]

39. Following the BCMB Report, various meetings took place with COABC, including a March 5, 1999 meeting initiated by the Minister of Agriculture and Food. After that meeting, discussions jointly facilitated by BCMB member Richard Bullock and Ministry employee David Matviw took place between COABC and various commodity boards.

40. On June 3, 1999, the COABC President wrote to the Minister advising that the discussions were "going nowhere" and seeking a meeting "to discuss an outright exemption of B.C. Certified Organic production from marketing board regulation". In part, COABC took umbrage at the Egg Board's efforts to encourage a specialty egg industry independent of COABC and its proposed levy on certified organic product. On June 18, 1999, Mr. Whitlock wrote to Mr. Matviw of the Ministry advising of the Egg Board's perspective on issues of quota, production, certification, pricing and levies. Meanwhile, the Minister had received correspondence from a concerned producer alleging that COABC was a "closed shop" with a self-serving agenda, seeking the equivalent of "free quota."

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[6] Section 2(2)(a) of the *Natural Products Marketing (BC) Act* authorizes the Lieutenant Governor in Council to amend any scheme at any time. It is noted as well that the individual commodity schemes also grant the commodity boards the power to grant policy exemptions from regulation (see for example, *Egg Scheme*, s. 37(e)). However, as early as July 1998, COABC took the position that "meeting with individual commodity boards is not the appropriate forum for discussion of this position".

[7] A similar set of draft policy statements was issued by the Ministry of Agriculture and Food on June 7, 1999.

41. On July 19, 1999, the Egg Board set out its first iteration of its TRLQ program: "[t]o facilitate additional production of certified free-range and certified organic product the Board has set aside one percent of the total registered quota to encourage producers to produce these specialty products".

42. On July 28, 1999, the Minister of Agriculture and Food wrote to the Appellants emphasising the need to reconcile the issues between organic growers and the regulated marketing system:

> …a reconciliation of issues between the two groups, based on consultation, would be preferable to a solution which I might impose as Minister…. [I]t was hoped that issues could be dealt with in the context of a series of meetings jointly convened by the …BCMB and the ministry.
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> From the correspondence I have received from you and others, it appears that the meetings that took place did not lead to a solution. As Richard Bullock, the BCMB representative, cannot continue with these negotiations, I am prepared through my ministry to provide an independent mediator to continue where Mr. Bullock left off.

43. In August 1999, the Ministry of Agriculture and Food engaged Mr. Robin Junger as a mediator. The mediation was unsuccessful. On November 29, 1999, the mediator advised the Ministry that the failure arose and:

> …because the parties do not have a clear and common understanding of the probable outcomes which each will face in the absence of an agreement. These differences relate to major overarching issues such as the possibility of enforcement/seizure by the boards, establishment or recognition of non-COABC certification regimes and general exemption or exclusion from the marketing board regimes.

44. By way of solution, the mediator recommended that, following receipt of detailed proposals and responses for integrating COABC organic production into the regulated marketing system, the Minister decide "whether to exempt COABC production from egg and chicken marketing board system[s]".

45. The Egg Board provided its proposal on March 31, 2000. COABC's proposal was provided on April 30, 2000, and made the specific request that "B.C. Certified Egg Producers be excluded from the B.C. Egg Marketing Scheme". In the late summer and early fall of 2000, Ministry staff prepared options for the Minister to consider.

46. No formal ministerial decision was ever communicated to the parties. However, the Minister of Agriculture, Food and Fisheries has on more than one occasion stated that the organic industry is required to comply with the *Act* [February 2000 letter from Minister to COABC and *Hansard*, July 4, 2000]. The Minister has never given his support to the exemption sought by COABC on April 30, 2000 and as such the Lieutenant Governor in Council has not amended the *Egg Scheme*.

D. Temporary Restricted Licence Quota

47. As noted above, the BCMB issued its policy recommendations regarding specialty production in February 1999. On July 18, 1999, the Egg Board announced its

TRLQ program. The purpose of this program was to promote and regulate the production of free-range and certified organic production. This program came under further review after the Egg Board purported, on June 8, 2000, to allocate a 3% production increase (107,000 birds) granted to British Columbia by the federal Canadian Egg Marketing Agency ("CEMA") entirely to registered producers on a pro-rata basis.

48. On June 26, 2000, the BCMB, in its supervisory capacity, cancelled the pro rata distribution of the CEMA allocation to existing producers, as the Egg Board had not obtained prior BCMB approval as required by the *Egg Scheme*. The BCMB Chair emphasised that the 3% CEMA allocation "may be the only new growth that British Columbia receives this year or in the foreseeable future". He referenced marketing policy issues arising from the need to address unregulated production and the markets being serviced by specialty production. A BCMB supervisory panel approved a separate Egg Board decision allocating 17,000 birds to organic and specialty producers, without prejudice to further allocations for that purpose following a full review. Although invited to make their views known, COABC declined to participate in the ensuing BCMB Specialty Egg Production and Marketing Review.

49. On July 5, 2000, the Egg Board Chair wrote to COABC advising of the 17,000 bird TRLQ allocation, and advising that producers who apply for TRLQ before September 30, 2000 "will receive an amnesty if the application reveals previous infractions of the [Egg Board's] Standing Order." The deadline was later extended to the end of November 2000.

50. The BCMB released its Supervisory Decision, the *Egg Quota Allocation Review* on August 15, 2000. In that decision, the BCMB directed the Egg Board to reconsider the CEMA quota allocation to address the needs of the specialty and regional markets and amongst other things to make the TRLQ program more effective and less restrictive. In response, the Egg Board released its "Revised Decisions Regarding Quota Allocation" on October 12, 2000. However as this decision did not fully address the BCMB's concerns, the Supervisory Panel directed the Egg Board to amend the TRLQ program to include all types of specialty production (i.e. all but white or brown caged bird production) and give priority to applicants who were new entrants, meeting regional marketing opportunities, or accommodating organic production in the regulated marketing system.

51. On November 14, 2000, the Egg Board notified COABC of the changes to the TRLQ program and provided application forms for distribution among its members. The Egg Board also asked for a meeting with COABC producers to review the application and obtain input as to how TRLQ should be allocated. Once again, COABC declined to participate.

52. On December 4, 2000, the Egg Board issued a release describing TRLQ:

> The seven-year program, which is open to certified free-range, organic and free-run producers, allows applicants to have up to 5,000 of their birds placed under the TRLQ at the cost of 23 cent per

> bird, per week, levy. In essence, what this means is that the TRLQ is a "lease to own" investment program allowing organic and specialty producers to build up quota towards becoming a registered producer over a seven-year period. Throughout the seven-year period, 8 cents of the 23-cent levy … is accumulated in a bank account for each producer. At the end of each of the years 4, 5 and 6, half of the accumulated levies are used towards the cost of purchasing birds for regular quota allocation. Then, at the end of year 7, the Egg Board will issue the remaining 25 percent of TRLQ as regular quota….
>
> The program is restricted to 7 years, to make the TRLQ sustainable and to ensure there is steady turnaround of TRLQ, so that more new entrants can be added to the program.

53. On December 12, 2000, the Egg Board wrote to COABC advising that it intended to issue the 17,000 TRLQ birds without delay, that the Egg Board would be visiting each producer with more than 99 birds in early 2001 to determine whether a producer held quota or had applied for TRLQ: "If not, the flock will be placed under seizure and the producer given 10 days to apply for TRLQ or explain to the [Egg Board] why further action should not be taken to bring the farm within the current regulations".

E. COABC's request for its own scheme under the Natural Products Marketing (BC) Act

54. On December 17, 2000, COABC asked the BCMB to initiate a process to establish a "British Columbia Certified Organic Commission under the terms of the Natural Products Marketing Act".

55. On January 4, 2001, the BCMB Chair wrote to the COABC setting out the BCMB's statutory role, and stating: "I suggest that the first step in the process would be for the Certified Organic Associations of British Columbia to obtain the support of the Minister of Agriculture, Food and Fisheries to proceed with the develop of a draft marketing scheme".

56. By letter dated January 15, 2001, COABC requested that Ministry conduct a plebiscite to determine support among BC organic producers for the establishment of a "British Columbia Certified Organic Marketing Commission". In his response dated March 6, 2001, the Minister of Agriculture, Food and Fisheries stated:

> *I want you to be aware that the policy position for this process is that organic production must fit within the regulated marketing system for those commodities where it applies. At this time, I am not prepared to entertain control of production where that power is made available to commodity boards and commissions, to move to an organic commission*. [emphasis added]

F. Egg Board enforcement action

57. In February 2001, the Egg Board attempted to have a representative of the accounting firm of KPMG LLP audit the Appellants' grading station. As the Appellants declined to participate in the audit, on March 12, 2001, the Egg Board wrote to Mr. Reid and advised that he was in breach and demanded rectification in accordance with s. 17(a) of the Egg Board's Standing Order.

58. Despite being notified on four separate occasions of the time and place of the hearing into the alleged breaches, Mr. Reid declined to attend the hearing taking the position that the Egg Board has no jurisdiction over himself, Olera or any certified organic producer. The events that led to the Egg Board's August 1, 2001 decision have already been described above.

III. THE NATURE OF THE QUESTIONS AND THE STANDARD OF REVIEW

59. The Appellants' first ground of appeal raises a question of law regarding the proper interpretation of the *Egg Scheme*. The second ground is essentially a policy challenge to the Egg Board's decision, in the individual circumstances here, to enforce and collect levies arising from the Appellants' production and marketing prior to December 2000. Before proceeding further, we wish to make three points about the nature of the issues and how we have approached them.

60. First, the Egg Board relied on the April 24, 2002 decision of Metzger J. in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002 BCSC 620 to argue that the BCMB ought to grant deference to aspects of the Egg Board's August 1, 2001 decision. On August 16, 2002, the Court of Appeal reversed the decision of Metzger J.: *BC Chicken Marketing Board v. BC Marketing Board* (2002), 216 DLR (4th) 287 (BCCA). Our review of the Egg Board's decision has been in accordance with the law as stated by the Court of Appeal: "[t]he Marketing Board (BCMB) is not a generalist court, but a specialised tribunal expected to use its expertise. That expertise would be lost if it were required to grant deference to a commodity board…".

61. Second, while the first issue has thus far been framed as concerning "jurisdiction" of the *Egg Scheme*, we avoid the label "jurisdiction" because, on reflection, we have concerns whether this label accurately characterises the question of whether the Appellants' eggs are "regulated product".

62. The Supreme Court of Canada has made clear that the form in which a question is worded (i.e., as addressing the "powers" of an administrative body) or divided into sub-issues (i.e., as dealing with a "preliminary issue") cannot dictate whether it is truly "jurisdictional": *Canadian Union of Public Employees v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. To say that a question is "jurisdictional" is merely a shorthand way of expressing a conclusion. It is not the beginning, but the end, of the required analysis:

> …it should be understood that a question which 'goes to jurisdiction' is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, 'jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (SCC) at pp. 209-210.

63. The required analysis involves consideration of privative language, expertise, the purpose of the *Act* and the nature of the question: *Ponich Poultry Farm Ltd. v. British Columbia Marketing Board*, 2002 BCSC 1369 at paras. 24-31.

64. We do not think the label "jurisdictional" accurately captures the legal question whether the term "regulated product" in the *Egg Scheme* includes the Appellants' certified organic eggs. The Appellants' interpretation arguments call for an informed factual assessment of the true nature of their natural products and an application of the facts to the language and objects of the *Egg Scheme* taking into account the regulated marketing context, the *Egg Scheme* and the effect of various alternative interpretations on those purposes. The question whether a white, brown, free-range, free run or "certified organic" egg is "regulated product" in the *Egg Scheme* is not, as we view the matter, a generalised question of law. It is an issue that lies at the core of regulated marketing law and our specialised mandate.

65. Third, we confirm that the Appellants have chosen not to advance any additional or alternative arguments about whether "certified organic" egg production *should*, as a matter of marketing policy, be exempted from regulation by the Egg Board under s. 37(e) of the *Egg Scheme* even if it is, in law, "regulated product". The March 15, 2002 Pre-Hearing Conference Report specifically states that this "is not an issue in this appeal." While the Appellants' policy objections are very much evident and reflected in their factual and legal arguments – reinforcing the points made in the preceding paragraphs about the nature of the legal issue – the fact that the Appellants have declined to advance a case for a policy exemption has been respected by the Panel. This appeal will, accordingly, be decided solely on the two grounds advanced by the Appellants.

IV. ISSUE 1: INTERPRETATION OF THE *EGG SCHEME*

66. The first issue on this appeal is whether "regulated product" under the *Egg Scheme* includes organic table eggs certified under the *Agri-Food Choice and Quality Act* and the *Organic Agricultural Products Certification Regulation*. The Appellants argue that the *Egg Scheme* does not include COABC producers, marketers or others associated with the production and marketing of table eggs certified as organic in accordance with the *Organic Agricultural Products Certification Regulation*.

A. The Natural Products Marketing (BC) Act and the Egg Scheme

67. We commence our analysis by reviewing the *Act* and the *Egg Scheme*. As will be seen by what follows, this legislation is framed in a broad and enabling fashion, consistent with the purpose of ensuring effective and comprehensive regulation in this important economic sector.

68. Section 1 of the *Act* defines "natural product" as meaning "a product of agriculture or of the sea, lake or river and an article of food or drink wholly or partly manufactured or derived from such product". This definition is supported by

equally broad statutory purposes, and by provisions enabling the creation of schemes for individual natural products – such "schemes" being regulations made by the Lieutenant Governor in Council:

> 2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.
>
> 2(2) The Lieutenant Governor in Council may
>
> (a) establish, amend and revoke schemes for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products,
>
> (b) constitute marketing boards and commissions to administer the schemes, and
>
> (c) vest in those boards and commissions powers considered necessary or advisable to enable them effectively to promote, control and regulate the production, transportation, packing, storage and marketing of natural products in British Columbia and to prohibit all or part of that production, transportation, packing, storage and marketing.

69. Without limiting the generality of s. 2, s. 11 of the *Act* goes on to list a series of specific governance powers that schemes may confer on commodity boards. The listed powers address all aspects of production and marketing, including time, place, manner and price: ss. 11(1)(a), (b), (c), (k). Licensing and levy powers are included: ss. 11(1)(f)-(j). Commodity boards can be empowered to make industry-wide orders (s. 11(1)(q)) and grant exemption from those orders: s. 11(1)(e).

70. The list of powers in s. 11(1) of the *Act*, together with those in s. 2, have an overarching purpose of enabling broad and effective economic regulation within a minimum of legal technicality. The power to make industry-wide orders, and to grant exemptions from them, recognises that a commodity board's legal ability to regulate product does not determine the policy question of exceptions or exclusions from regulation or enforcement.

71. The Appellants concede that their eggs are a "natural product" within the meaning of the *Act*. They do not take issue with the broad powers capable of being granted to commodity boards by the *Act*. They argue, however, that as a matter of law, certified organic eggs are not included in the natural products regulated by the *Egg Scheme*.

72. We therefore turn to the *Egg Scheme* itself. As will be seen from what follows, the *Egg Scheme* is drafted in a fashion consistent with the broad and enabling structure of the *Act*.

73. Section 16 of the *Egg Scheme* sets out its purpose:

> 16. The purpose and intent of this scheme is to provide for the effective promotion, control and regulation of the production, transportation, packing, storage and marketing of the

> *regulated product* within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part. [emphasis added]

74. Section 37 of the *Egg Scheme* delineates a lengthy list of powers conferred on the Egg Board, which powers are prefaced with the following:

> 37. The Board shall have authority within the Province to promote, regulate and control the production, transportation, packing, storing, and marketing, or any of them, of the *regulated product*, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part, and without limiting the generality of the foregoing shall have the following authority….[emphasis added]

75. Section 15 of the *Egg Scheme* defines "regulated product":

> "regulated product" means layers and all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed.
>
> "layer" as applied to chickens means laying hens and any class of female chicken hatched for the purpose of egg production.

76. Regulated product thus includes (1) laying hens; (2) any class of female chicken hatched for the purpose of egg production; and (3) all classes of eggs of the domestic hen, including eggs wholly or partly manufactured or processed. The express reference to "*any* class" and "*all* classes" demonstrates the intended breadth of the *Egg Scheme*. On their face, the definitions operate by inclusion, not exclusion, a matter we discuss in more detail below as part of the analysis that follows.

B. Interpreting Regulated Marketing Legislation

77. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, the Supreme Court of Canada held that the mere fact that parties make competing arguments does not mean there is "ambiguity" in a statutory provision. "[I]t is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity": para. 30. If there is no genuine ambiguity after applying the required approach to statutory interpretation, the inquiry is at an end. One need only resort to other interpretive aids or principles, such as a "*Charter* values presumption", if genuine ambiguity remains after applying the Driedger approach: *Bell Express Vu*, *supra*, paras. 28-30.

78. The Court in *Bell Express Vu* confirmed that the proper approach to interpreting enactments is that described by Professor E. Driedger in the second edition of *The Construction of Statutes* (1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

79. This approach accords with s. 8 of the *Interpretation Act*, RSBC 1996, c. 238: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". It also reinforces the settled approach to the construction of regulated marketing legislation. As articulated by McIntyre J. in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2 at p. 7:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. [emphasis added]

C. Certified organic table egg production is subject to the Egg Scheme

80. For the reasons that follow, we conclude that there is no genuine ambiguity in the *Egg Scheme*. It clearly applies to certified organic table egg production.

81. Factually, the Appellants have wholly failed to persuade us on the evidence of their extreme assertion that "organic certification", a standard subject to change over time and subject to judgements made by COABC, fundamentally changes the nature of table eggs, making them a natural product distinct from the classes of table eggs regulated by the *Egg Scheme*.[8] On this point, we rely on the findings of fact we made at paras. 17-22 above.

82. Legally, the Appellants are wrong in suggesting that "certification" under the *Agri-Food Choice and Quality Act* does anything other than address food choice and consumer information. Nothing in the language or purpose of organic certification legislation serves to elevate those products to a legal status that excludes them from regulated marketing schemes. On this point, we refer to the discussion contained in paras. 27-35 above regarding the *Food Choice and Disclosure Act* and the *Agri-Food Choice and Quality Act*.

83. There are many classes of table eggs in BC besides the Appellants' table eggs, including caged white, caged brown, free run, free-range, Born 3, ProCert organic. Each class of egg has its own production and husbandry methods, but the end point remains the production of table eggs, eggs produced and marketed for consumption. Various types of laying hens produce the different classes of eggs hatched for the purpose of table egg production. That these different classes of

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[8] On this point, we observe that one consequence of the 1999 Mediation between COABC and the Egg Board was a Mediator's recommendation that the Ministry "review the decision-making process pertaining to organic accreditation and certification … to ensure that the decision existing decision-making and appeal structures meet the requirements of administrative fairness and natural justice." The Mediator emphasised that this was not meant as a criticism, but rather a recognition that the COABC structures are more limited than those in the *Natural Products Marketing (BC) Act*.

table eggs are part of the "regulated product" included in the *Egg Scheme* is supported by its use of language.

84. First there is the definition of "regulated product" in s. 15 of the *Egg Scheme*, quoted above, which language is broad and enabling. The definition expressly recognises that there are different classes of eggs. It expressly states that "any" and "all" these classes are included in the *Egg Scheme*. The *Egg Scheme's* language of "any" and "all" is inconsistent with the Appellants' position that it regulates *some* classes of table eggs. The Appellants' position that its table eggs are somehow in a legal category by themselves flies in the face of this expansive language.

85. Second, by way of broader legislative context, there are numerous references in s. 37 of the *Egg Scheme* to reinforce its intention to apply broadly to all classes and varieties of eggs. Under s. 37 of the *Egg Scheme*, the Egg Board may:

- regulate and prohibit "the *quality, grade or class* of the regulated product that shall be transported, produced, packed, stored or marketed": s. 37(a)
- exempt "any person or class of persons engaged in the … marketing of the regulated product, *or any class, variety or grade thereof*": s. 37(e)
- "fix the price or prices paid to the registered producer for *all classes or categories of eggs*, with power to fix different prices for different areas of the Province": s. 37(j.1)
- establish or conduct a pool such that each person "receives a share of the net proceeds in relation to the *amount, variety, size, grade and class* of the regulated product…": s. 37(k) [emphasis added]

86. Third, having set out its application to any class, variety or grade of eggs, s. 17 of the *Egg Scheme* states that it is applicable to "*all persons* who produce, transport, pack, store or market the regulated product but no way applies to a consumer who acquires the regulated product from a producer." [emphasis added] The obvious breadth of these provisions is supported by the grant of various regulatory devices to take account of differences. These include permits and exemptions (ss. 37(c.1), (e)), which are commonly used in supply-managed industries to address the cost of quota and to encourage and address specialty and niche marketing and the power to classify different producers into different groups and charge fees and levies accordingly: s. 37(v).

87. The Appellants' legal position that its activities exist outside the *Egg Scheme* plainly contradicts the *Egg Scheme*'s definition of "regulated product" and the broader legislative context.

88. Having examined the *Egg Scheme*'s definitions and the broader legislative context, the next step is to consider the *Egg Scheme*'s objects and purposes, to determine whether those purposes shed any different light on the true legislative intention regarding certified organic table egg production: see *Re Rizzo & Rizzo Shoes Ltd.* (1998), 154 DLR (4^{th}) 193 (SCC).

89. In our view, the *Egg Scheme*'s purposes and objects only reinforce the conclusion that the Appellants' position should be rejected. The purpose and object of the *Egg Scheme* is to effectively regulate table egg production in order to maximise production and price stability through a system of quotas, licences and permits. This purpose is reflected in s. 16 of the *Egg Scheme*:

> *Purpose of Scheme*
>
> 16. The purpose and intent of this *scheme* is to provide for the *effective* promotion, control and regulation of the production, transportation, packing, storage and marketing of the regulated product within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part. [emphasis added]

90. Regulation of table eggs will not be effective if such regulation is not comprehensive. The purpose of regulation necessarily includes niche and specialty producers and marketers who, like all table egg producers and marketers, wish to economically prosper and flourish. In the table egg sector as in other sectors, specialty production and marketing have grown considerably in recent years. Despite its cost inputs, husbandry practices and consumer prices, Mr. Reid conceded that certified organic production has, as it has grown, begun to compete with conventional producers and with other regulated specialty producers.[9] The economic consequences of such competition as between table egg producers is precisely what regulated marketing is about, and is precisely what the *Egg Scheme* was intended to take into account and address from a public policy perspective.[10]

91. To interpret the *Egg Scheme* in the manner suggested by the Appellants undermines the purpose of enabling the Egg Board to effectively manage egg production both within the Province and as part of the national supply management scheme. The objects of the *Egg Scheme* would be frustrated if the Egg Board could not effectively manage the industry because sub-groups of table egg producers were outside its regulatory orbit and exempt from quota and permit requirements. This explains the wisdom of a broad legislative approach which recognises that it is one thing for a commodity board to decide to exempt certain producers from regulation as a matter of sound economics under s. 37(e), and quite another to assert that an entire sub-set of producers are not even subject to the study and analysis that would lead to such a public policy decision.

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[9] Mr. Reid gave evidence that "I've always made testimony that there's a certain percent of our product that wouldn't compete with conventional. There's a certain percent that would buy an organic egg and only an organic egg, wouldn't buy another, but if you put our eggs next to a conventional egg, there will be some consumers that would buy an organic egg instead of a conventional egg, but if the organic egg wasn't there, they would buy the conventional egg. In that sense, when a consumer goes to a store, they have so many dollars to spend. They might buy a pepper instead of a tomato. Yes, we would replace a certain amount of conventional eggs. I'm prepared to admit that."

[10] David Matview, discussion draft, "Key Issues to be Addressed in Marketing Options for the Organic Industry" (March 12, 1999). "… as the organic sector is growing, with the potential to increase ten-fold for the domestic market alone, access at the national level to increased production quota is essential. This access needs to be pursued collectively by both current supply management producers and organic producers alike, *in order that growth in one component is not achieved at the expense of the other.*" [emphasis added]

92. If the legislation is interpreted so as to exclude COABC organic eggs, any class of egg with distinctive animal husbandry or production inputs could be similarly excluded. The end result would be a tortured interpretation contradicting the plain intent of the *Egg Scheme,* undermining the supply-managed system of egg production within the Province and in effect second-guessing the wisdom of legislators.

93. The Appellants' disagreement with the Egg Board's policy choices regarding the TRLQ program does not affect the reality or genuineness of the *Egg Scheme*'s purposes. In truth, it is the Appellants' construction that contradicts the language and purposes of the *Egg Scheme*. This is evident in the Appellants' claim of legal exclusion from the *Egg Scheme* even while free run, free-range and ProCert certified organic eggs are regulated. It is evident in the Appellants' assertion of an excluded status arising from "certification" which has no legal foundation or factual justification.

94. The *Egg Scheme* was clearly designed and intended to be flexible enough to accommodate the realities of all table egg production and marketing. The Appellants' obvious dissatisfaction with the policy solutions reached by the Egg Board is irrelevant to the legal reality that the Egg Board regulates their eggs.

95. The Panel therefore rejects the narrow view of the *Egg Scheme* advanced by the Appellants. Read as a whole, and with fidelity to its true intention, the *Egg Scheme* contemplates that the Egg Board has the power to effectively manage table egg supply within the Province through the setting of prices for all classes or categories of those eggs and having regard to the market for eggs. The plain language of the definition of "regulated product" when read in conjunction with the purposes of the *Egg Scheme* does not give rise to any genuine ambiguity in relation to certified organic table egg production. "All classes of eggs of the domestic hen" is properly interpreted so as to include certified organic table eggs.

96. Our conclusion on this issue is consistent with the recently expressed finding of the British Columbia Supreme Court, which considered a very similar submission arising out of the chicken industry, which is governed by the *Chicken Scheme.*[11] In *British Columbia Chicken Marketing Board v. Brad Reid*, 2002 BCSC 1451, the Chicken Board applied for an injunction under ss. 15 and 17 of the *Act* to prevent Mr. Brad Reid from producing chicken without a permit. Mr. Reid argued, *inter alia*, that certified organic chicken is not covered by the *Chicken Scheme*, which defines "regulated product" as follows:

> "regulated product" means any class of chicken under 6 months of age and not raised or used for egg production and any article of food or drink wholly or partly manufactured or derived from the regulated product.

[11] *British Columbia Chicken Marketing Scheme, 1961*, BC Reg. 188/61.

97. The parties' positions in the *Brad Reid* case bore striking similarity to those advanced before us on this appeal (paras. 18, 19):

> The position of the [Chicken Board] is that organic chicken is chicken and has always fallen within the BCCMB scheme. It concedes that historically it did not trouble itself with organic chicken growers. However, it contends that when a new Board was appointed in 2000 and undertook an overhaul of the system, produced a new set of Regulations and decided to bring organic chicken producers under the BCCMB umbrella, it was fully entitled to do so. In effect, the petitioner's position is that, although it let the organic chicken producers operate outside the scheme while they were smaller, at any time it could have enforced the legislation against them and it is entitled to do so now. Its position is that it is unfair for one producer to be compliant with the scheme and the other not….
>
> Mr. Reid's position is that organic chicken is not the subject of the Chicken Board's authority. He contends that organic production, recently developed, is very different from conventional chicken production in its costs, which are about three times higher, its consumers, and its pricing, which is set by the market. Mr. Harvey, on his behalf, argued that although the Chicken Board, beginning in about 1996, has talked about bringing organic chicken under its aegis it has not in fact done so; accordingly, the cease and desist order is invalid. He pointed to various ways in which, he alleged, the Chicken Board has in the past accepted that organic chicken does not fall under the chicken marketing scheme. The respondent's position is that the Chicken Board is making a sudden change of direction which is unfair and unsupported by the legislation or regulations, none of which explicitly mentions "organic chicken".

98. In her decision, Madam Justice L. Smith rejected Mr. Reid's argument in clear and definitive terms (paras 40, 57 and 61):

> That organic chicken is grown using different methods, with greater air circulation and space per bird and without the routine use of antibiotics or other synthetic inputs, may be commendable but it does not change the fact that the product is chicken. On their face, the provisions of the *British Columbia Chicken Marketing Scheme, 1961*, extend to all chicken including certified organic chicken. The "regulated product" is defined as "any class of chicken under 6 months of age not raised or used for egg production…". The respondent could point to nothing in the Scheme indicating an intention to exclude organically grown chicken from the meaning of the word "chicken". I find that it is included…
>
> This is not an application for an interlocutory injunction pursuant to the equitable jurisdiction of the court, but if it were, I would consider that there is no triable issue whether organic chicken is covered by the *Scheme*…
>
> There is nothing in the *Scheme* or the legislation to exclude organically grown chicken from the reach of the Chicken Board. Certified organic chicken is chicken.

99. The Panel has arrived at our conclusions regarding the *Egg Scheme* independently of the Court's judgment in *Brad Reid*. Having done so, however, we are satisfied that just as COABC certified organic chicken falls within the regulatory authority of the Chicken Board, COABC certified organic eggs fall within the regulatory authority of the Egg Board. Properly interpreted in its application to COABC table eggs, the wording of the *Egg Scheme's* definition of regulated product "layers and all classes of eggs of the domestic hen" is not ambiguous. This plain meaning reflects an intention that is apparent in numerous other sections of the *Egg Scheme*, out of which no absurdity results. The fact that the Appellants are philosophically

opposed to being regulated does not, in and of itself, create an absurd result. If the Appellants feel the policy choices made under the regulated system do not adequately accommodate their production, that is a matter for them to take up by way of policy submissions within the regulated system, something COABC refused to do when given the opportunity in the BCMB Egg Quota Allocation Review.

100. Before closing, we will address a number of additional points made in the Appellants' argument on this issue.

101. *Section 13 of the Act*: The Appellants rely on s. 13 of the *Act* to argue that (a) "the various schemes" have the object of creating programs to stimulate marketing and advertising of the natural products they regulate; (b) the *Egg Scheme* has not been employed to service "organic production", and (c) therefore organic production must have never been intended to fall within the *Egg Scheme*.

102. For purposes of this submission, we need not embark on a discussion of the impact on the Appellants from the egg industry's general efforts to promote table egg consumption. The Appellants have misread s. 13 of the *Act*. Section 13 is not a purpose clause for the *Act*. Section 2(1) is the *Act*'s purpose clause: s. 13 applies only to commissions established under s. 12. The Egg Board is marketing board, not a marketing commission. Indeed, even if it were a marketing commission, s. 13 does no more than identify additional functions that may (not must) be conferred on those commissions.

103. *"Growers working for growers"*: The Appellants argue that a marketing scheme is founded on producers having shared goals; that product uniformity and pooled production are fundamental to any such system; that the *Egg Scheme* is based on a large scale production model; that adversity between differentiated groups is incompatible with a marketing board system; that COABC growers strongly oppose the regulated system as being contrary to their interests; that the Egg Board marketing model "is inconsistent with the ideology of the organic movement". The Appellants say that all these factors justify the conclusion that it would be "absurd" to interpret the *Egg Scheme* as applying to COABC eggs.

104. The Appellants' assertions betray a simplistic understanding of marketing schemes, and a confusion of policy argument with legal argument. Unanimity has rarely accompanied the decisions to create and retain marketing boards.[12] Diversity, adversity, detractors and competing interests among those subject to regulation are well known in the regulated marketing system. As already shown, marketing schemes have been drafted to expressly recognise and accommodate diversity in producers and in production, and to make special provision for speciality and niche

[12] The *Egg Scheme* is a good example. The recitals to the original *Egg Scheme* (1967) make clear that the scheme was approved by a "substantial majority" of egg-producers owning not less than five hundred laying birds. It is necessarily implicit that there were dissenters. It is also clear that persons with less than 500 laying birds did not vote despite the fact that the Lieutenant Governor in Council extended the *Egg Scheme* to "all classes of eggs of the domestic hen".

market production which operates on a smaller scale but which nonetheless bears on overall industry economics. The job of regulators is to determine whether and how to take account of diversity. COABC opposition to regulation presents a challenge to regulators, but it does not change the legal reality that its production is clearly included in the *Egg Scheme*.

105. It has been held by the Courts that "absurdity" arguments cannot trump a clear meaning where, after proper analysis, there is no genuine ambiguity in legislation: *McMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)* (2000), 76 BCLR (3d) 71 (CA); *Ponich Poultry Farm Ltd. v. British Columbia (Marketing Board)*, 2002 BCSC 1369. It will suffice for us to note that this is not a case pitting ordinary meaning against absurdity. The legislation is clear and the result is not absurd. As already noted, there are sound and compelling reasons for the broad reach of the *Egg Scheme*.

106. *COABC's Treatment by the Ministry*: The Appellants submit that COABC's treatment by the Ministry and the regulators in the discussions and mediations since 1998 shows that "it was effectively conceded throughout these negotiations by the conduct of the parties that COABC organic production was not 'regulated product' within the meaning of the Egg Scheme". For its part, the Egg Board submits that COABC's statements and conduct over that same period reflect implicit and explicit concessions that COABC producers do produce regulated product and thus require express amendments to the schemes in order to be excluded.

107. COABC's conduct and statements show, at the very least, that it has been very concerned about certified organic producers' legal exposure under the various schemes.[13] We have held that, properly construed, the *Egg Scheme* unambiguously includes certified organic table egg production. In light of this conclusion, we see little legal or practical relevance for the present issue in parsing individual statements of the Minister, COABC and the commodity boards. Whatever subjective expectations may have been created by COABC's treatment by the Ministry in a public policy process does not bear on statutory interpretation.

108. *Organic eggs did not exist in BC when the Egg Scheme was created*: The Appellants submit that "[a]s organic egg production did not exist in this province until 1994, the Scheme could not contemplate regulation of this product." This argument is without merit. It assumes that, from a factual or scientific perspective, COABC organic eggs are a fundamentally different natural product from any other table egg, a proposition we reject. Moreover, it flies in the face of s. 7 of the *Interpretation Act*:

> 7 (1) Every enactment must be construed as always speaking.

[13] To provide one example, a July 6, 1999 email from then COABC president Paddy Doherty to Mr. Reid states "I actually do agree with you that we require some sort of exclusion and I hope this is reflected in my report to the Standing Committee on Agriculture."

(2) If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.

109. As the Respondent points out, numerous cases support the principle that where legislation of general application uses a word descriptive of a class of things, the word will normally be construed so as to include all such things as may from time to time fall into that group. Broad legislative language has been held to embrace classes of products not previously farmed, such as rapeseed as "grain" *(Canadian Pacific Railway Co. v. McCabe Grain Co. Ltd.* (1968), 69 DLR (2d) 313 (BCCA), per Robertson J.A.) and new technologies, such as glass fibre as "cable": *British Columbia Telephone Co. v. R.* (1992), 139 NR 211 (Fed CA). See also *Kimberly-Clark Nova Scotia v. Nova Scotia Woodlot Owners & Operators Assn.* (1998), 18 Admin. LR (3d) 67 (NSSC) where "pulpwood" was found to include "pulp wood chips" a product "unimaginable" at the time of regulation.

110. If there was ever an example of broad legislative language to be taken as "always speaking", it is the language of the *Egg Scheme*. It refers to "any" and "all" classes of eggs, makes numerous references to regulating any "class, variety or grade" of eggs. Its purpose would be frustrated without a broad and comprehensive regulatory scope. In both practical and legal terms, the *Egg Scheme* contradicts the Appellants' argument that the *Egg Scheme* was designed solely for undifferentiated product, and did not anticipate variations in classes of eggs.

111. <u>*Hatching eggs*</u>: The Appellants sought to bolster their argument by making reference to the history of broiler hatching egg regulation. In distinction to table eggs, which are sold to graders and then to market, broiler hatching eggs are fertilised eggs that are sold to hatcheries, hatched, then sold to chicken producers for growing and eventual processing as chicken. The Appellants point out that the *Egg Scheme*'s definition of regulated product would, on a literal reading, seem to apply to broiler hatching eggs. They are "eggs of the domestic hen". Yet it is a fact that the Egg Board does not regulate hatching eggs. In this regard, the Appellants relied on the evidence of Irving Reid who testified that:

- When he became a broiler hatching egg producer in 1966, there was no marketing board regulation of those eggs;
- At some point after 1967, broiler hatching eggs came to fall under Egg Board Regulation when the Hatching Egg Association requested Egg Board protection;
- Sometime later, regulation of broiler hatching eggs was moved to the Broiler Marketing Board, as it became clear that the amount of broiler chicks required by the market was more a function of the Broiler Board's needs;
- In the 1980s, regulation of broiler hatching eggs was again moved when a separate Broiler Hatching Egg Commission was established.

112. The Appellants argue that just as broiler hatching eggs are an implicit exclusion from the *Egg Scheme*, it is valid to argue that COABC eggs are another implicit exclusion from the *Egg Scheme*.

113. The Appellants' argument is conspicuous for its lack of specific reference to the relevant legislative provisions bearing on the regulation of broiler hatching eggs. With reference to the points made by both Fred and Irving Reid, a review of those provisions reveals the following:

- No eggs of the domestic hen were regulated in 1966. The *Egg Scheme* did not come into force until July 13, 1967: BC Reg. 173/67.

- Section 1.02 of the original *Egg Scheme* defined "regulated product" as "all classes of eggs of the domestic hen". On its face, this definition included table eggs and broiler hatching eggs. Significantly, there was no change in the definition when, as Irving Reid testified, broiler hatching egg producers asked for Egg Board regulatory protection owing to their vulnerability. Their "request" led to administrative action by the Egg Board to regulate them. As correctly argued by the Egg Board, such a request, let alone the requesters "consent", did not (and could not) change the legal scope of the *Egg Scheme*: see *British Columbia Milk Marketing Board v. Bari Cheese Ltd. et al* (August 11, 1993, unreported, BCSC) at paras. 172-175.

- This regulatory reality lasted until 1972-73, when the Lieutenant Governor in Council made key legislative changes making clear that, given the closer integration of broiler hatching eggs with the chicken industry than the egg industry, hatching egg producers would specifically be regulated under the *Broiler Marketing Scheme* rather than the *Egg Scheme*.[14] The *Broiler Marketing Scheme* was amended by adding a definition of "hatchery" and repealing and replacing the definition of "regulated product" as follows:

  > (ee) "hatchery" means a facility operated by a person for the hatching or incubation of any class of the regulated product for the purpose of sale of the regulated product to a grower: B.C. Reg. 136/72
  >
  > (i) "regulated product" means any class of chicken under six months of age not raised or used for egg production and also means broiler breeders and broiler hatching eggs and any article of food or drink wholly or partly manufactured from the regulated product: BC Reg. 102/73

- This state of affairs lasted until 1988, when the *British Columbia Broiler Hatching Egg Scheme*("*Hatching Egg Scheme*") was established: BC Reg. 432/88, which scheme defined "regulated product" to mean "broiler hatching eggs, broiler breeders, or both". The same regulation (Schedule 2)

[14] In 1980, the *British Columbia Broiler Marketing Scheme* was renamed the *British Columbia Chicken Marketing Scheme*: B.C. Reg. 546/80.

amended the *Chicken Scheme* to remove "broiler breeders and broiler hatching eggs" from the definition of regulated product.

- These 1972-73 changes to the *Broiler Marketing Scheme*, and the 1988 creation of a separate *British Columbia Broiler Hatching Egg Commission*, were not accompanied by a specific *Egg Scheme* amendment excluding broiler hatching eggs. The *Egg Scheme's* original definition of "regulated product" was however amended in December 1972 (B.C. Reg. 297/72) in a fashion clearly focused on table eggs:

> "regulated product" means layers and all classes of eggs of the domestic hen, *including eggs wholly or partly manufactured or processed*. [emphasis added]

114. The foregoing review makes clear that, since 1972, the reason hatching eggs have been properly understood as an implicit exclusion from the *Egg Scheme* is because they have been specifically regulated elsewhere. As noted in Sullivan, *Driedger on the Construction of Statutes* (3rd ed, 1994) at p. 186:

> *Implied exclusion (generalia specialibus non derogant).* Where two provisions are in conflict and one of them deals specifically with the matter in question while the other is of general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

115. The Appellants suggest that hatching eggs were never included in the *Egg Scheme* despite its definition of "regulated product" leading up to 1972-73. We need not consider the interesting question whether, prior to the *Broiler Marketing Scheme* amendments of 1972-73, hatching egg producers, their Association and the Egg Board operated under a mutual mistake of law regarding the *Egg Scheme*. In principle, there is no reason why the *Egg Scheme* could not have effectively regulated both table eggs and hatching eggs, taking into account the unique qualities and markets of both classes of eggs. For present purposes, it is sufficient to note that there is no valid analogy between hatching eggs and COABC table eggs. Hatching eggs are an essential part of the chicken production cycle. They are fertilised eggs, sold first to hatcheries who hatch the eggs. The hatchery chicks are then sold to farmers who raise the chicks, and in turn sell the grown chickens to processors who kill and market the chickens we consume as food. Hatching eggs are thus the first step in the chicken production system, a system that is planned, integrated and calibrated many months in advance. The unique history and evolution of hatching egg regulation reflects the integrated nature of its relationship with chicken production.

116. In sharp contrast, COABC table eggs are a class of table egg. It is crystal clear that table eggs, in all their classes, are the natural product the *Egg Scheme* was intended

to regulate since the amendments of 1972-73[15]. Certified organic eggs are produced and destined for consumption on the table egg market. The question of how they are raised does not create any ambiguity in the definition of "regulated product". They are one of a number of classes of eggs regulated by the *Egg Scheme*. Free-range, free run, brown, organic and Born 3 eggs are all distinct products within the market place yet all fall within the definition of "regulated product" and are regulated by the Egg Board. COABC organic eggs are no different, just as COABC *hatching* eggs could not plausibly be excluded from the *Hatching Egg Scheme*.

117. Charter arguments: The Appellants rely on the case of *R. v. Advance Cutting & Coring Ltd*. 2001 SCC 70 to argue that their interpretation of the *Egg Scheme* must prevail because it is the only one consistent with the *Canadian Charter of Rights and Freedoms* – in particular freedom of association protected by s. 2(d). This argument is without merit. The "*Charter* values" interpretive principle applies *only* where there is genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations: *Bell Express Vu*, *supra*, at para. 62. As we have found, a thorough application of the Driedger approach does not result in any *genuine* ambiguity. The Appellants' interpretation is not plausible, let alone equally plausible, to the construction we have adopted.

118. Moreover, it is settled law that the marketing of eggs is not a constitutionally protected activity, and it does not become so simply by virtue of the fact that individuals wish to market eggs in association with some persons and not others. Freedom of association does not protect marketing activity unlawful under regulated marketing regimes: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157. The marketing of eggs through a marketing board with powers to make special provision for niche and specialty marketing is not "enforced ideological conformity" as discussed in *Advance Cutting*.

119. In conclusion, and for the reasons given above, we find that organic table eggs certified under the *Agri-Food Choice and Quality Act* and the *Organic Agricultural Products Certification Regulation* are part of the "regulated product" included in the *Egg Scheme*. The first ground of appeal is thereby dismissed.

V. ISSUE 2: MARKETING LICENCE FEES

120. Having dismissed the first ground of appeal, it is necessary for the Panel to consider the second issue. As stated above:

> … the substance of this second issue is that if the Appellants' production does fall within the *Egg Scheme*, the Egg Board should not be allowed to collect or enforce levies that may have arisen by operation of the Egg Board's Standing Orders prior to (a) the Egg Board's December 12, 2000 letter to the Certified Organic Associations of British Columbia ("COABC") asserting regulatory authority over organic producers; or (b) the Egg Board's

[15] See also BC Reg. 166/74 and BC Reg. 409/80 which are the regulations authorizing the Egg Board's inclusion in the fabric of federal-provincial supply management in table eggs; and see *Reference re: Agricultural Products Marketing Act*, [1978] 2 SCR 1198.

January 9, 2001 letter to registered grading stations regarding collection of marketing licence fees

121. This issue arises because the Egg Board's August 1, 2001 decision sought to enforce and collect marketing licence fees on the Appellants for their activities dating back to week 26 of 1999. The Appellants say this is unfair, inappropriate and an error in the exercise of Egg Board discretion because, in their submission:

(a) the Egg Board's statements and conduct from 1999 to 2001 may be taken to have exempted COABC producers and graders from enforcement under s. 37(e) of the *Egg Scheme*;[16]
(b) that same conduct, even if not characterised as an exemption, acts as an estoppel on the Egg Board enforcing those levies;
(c) the Egg Board is also estopped from enforcing or collecting the fees as a result of its bad faith by singling out and targeting the Appellants for enforcement while continuing to exempt all other COABC organic producers and graders.

A. Licence fees arose by operation of law

122. We start our discussion on this issue by noting that the licence fees themselves arose by operation of law, independently of the Egg Board decision under appeal. Egg Board Standing Order 12, an order of general application to the industry and in force throughout 1999-2001, requires that *all* persons engaged in the marketing of eggs be licenced and pay the licence fees prescribed from time to time by the Egg Board.

123. Thus, the Egg Board's August 1, 2001 decision under appeal did not "create" the marketing fees at issue. The Egg Board merely (a) determined that the Appellants contravened the Standing Orders because they fall under the *Egg Scheme*; (b) calculated the quantum of fees that were due under the Standing Orders; and (c) determined that legal action should be commenced requiring the Appellants, *inter alia*, to repay unpaid levies.

124. As noted above, the Appellants take no issue with the Egg Board's arithmetic. They argue that we should overturn the Egg Board's decision with regard to step (a) and (c).

B. Did the Egg Board exempt the Appellants' production from regulation?

125. The Appellants' first argument is that the Egg Board's statements and conduct during the negotiations of 1999-2001 amounted to a decision to exempt organic production from the Standing Orders under s. 37(e) of the *Egg Scheme*. The

[16] Section 37(e) of the *Egg Scheme* empowers the Egg Board "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.".

Egg Board cannot claim fees from product it has previously exempted under the *Egg Scheme*.

126. This argument must fail. The power to grant exemptions under s. 37(e) is an important power granted to commodity boards. Its exercise requires a deliberate and identifiable decision to exempt product or producers (subject to terms and conditions) from regulation. The Egg Board never exempted COABC product generally, or the Appellants' product in particular. The only exemption it has given is the general 99-bird limit available to all producers contained in its Standing Order, which remained unamended during the relevant period: *Standing Order*, ss. 2(c), (d). The Egg Board's agreement to engage in discussion rather than enforcement with COABC during the period between 1999 and 2001 cannot properly or reasonably be taken as having exempted COABC product from Standing Order 12, nor can the fact that the Egg Board sent Olera a grading station licence in January 2001 somehow suggest that Mr. Reid, as a producer, was retroactively exempt from Egg Board orders.

127. We appreciate that the Appellants argue that there was some sort of *de facto* exemption. However, the Appellants' argument on this point belies the reality of the situation. The evidence is that the Egg Board did, during the negotiation process, offer various production exemption levels as a solution to the impasse, but these were rejected by COABC. The evidence shows that COABC rejected an early Egg Board exemption proposal in February 1999 and this led to further proposals being discussed in the processes that followed.[17] COABC's April 30, 2000 submission to the Minister made clear that the parties had still not arrived at a meeting of minds on the exemption issue. For its part, the Egg Board's TRLQ program (first announced in July 1999) *expressly* applied to "certified organic" production. The history of the matter is simply inconsistent with the position that the Egg Board "exempted" COABC product during this period. Clearly, the Egg Board's Standing Orders were applicable to the Appellants.

128. In our view, the real issue is not whether the Egg Board exempted COABC production. Beyond the 99-bird exemption applicable to everyone, it did not do so. The real issue is whether, as a result of special circumstances arising from the Egg Board's statements and/or conduct between 1999-2001, the Egg Board should have, in its August 1, 2001 decision under appeal, decided to *enforce* its Standing Order back to the June 1999 layer count. We turn to this issue next.

[17] In COABC's letter to Mr. Whitlock dated Feb 8, 1999, then COABC President Mr. Doherty rejected the Egg Board's offer of a 500 bird per grower limit and a 5000 bird cap for organic production as unrealistic. For his part, Mr. Doherty proposed recognition of "BC Certified Organic" eggs as different from conventional egg production, no upper limit on organic egg production, any levies payable over a small administrative levy by organic egg producers should be designated for organic egg market development and initially farm size should be limited to 4-6000 birds. He also identified a number of administrative concerns relating to organic egg production.

C. Estoppel

129. The Appellants argue that even if the Standing Order was applicable in law, the Egg Board is legally estopped from claiming or enforcing any fees prior to 2001 and submit that "...the Egg Board has shown through both statements and conduct, that COABC producers and graders would not be subject to fees and levies until such time as agreement was reached." Their treatment as "an equal party" in the various discussions created a legitimate expectation that they were not subject to the Egg Scheme, and that it was bad faith for the Egg Board to enforce or collect fees dating back to 1999. The Appellants submit that, had the Egg Board taken the position during negotiations, that levies and fees were to be enforced even while discussions continued, those discussions would not have continued.

130. The Appellants rely on the cases of *Fraser Valley Credit Union v. Siba*, 2001 BCSC 744, *Alberta (Energy Resources Conservation Board) v. Sarg Oils Ltd.*, [1998] AJ No. 1039 (QB) and *Aurchem Exploration Ltd. v. Canada*, [1992] FC No. 427 (TD).

131. *Fraser Valley Credit Union v. Siba* summarises the private law of estoppel [para. 1]:

> The doctrine of equitable estoppel, in its various forms, provides that where one party relies to its detriment on another party's representation or promise, the latter party is estopped from later denying what is represented or promised where it would be inequitable for it to do so. The two types of equitable estoppel that are relevant in this matter are: (a) representative estoppel, and (b) promissory estoppel.

132. The doctrine of representative estoppel, upon which the Appellants reply, is summarised in *Fraser Valley Credit Union v. Siba* as follows (paras. 22-23):

> The elements of representative estoppel were listed by MacAdam J. in *Dover Financial Corp. v. Basin View Village Ltd.* (1995), 399 APR 1 (NSSC), referring to Spencer Bower & Turner, *The Law Relating to Estoppel by Representation*, 3rd ed. (Butterworths, 1977) at p. 287. These elements were said to be the following: (1) the plaintiff must have made a mistake as to his or her legal rights; (2) the plaintiff must have expended some money or done some act on the faith of the mistaken belief; (3) the defendant must know of the existence of his or her own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief regarding his or her rights; and (5) the defendant must have encouraged the plaintiff in his or her expenditure of money, or other acts that the plaintiff has done, either directly or by abstaining from asserting his or her legal right.
>
> This description of representative estoppel requires further precision with respect to the final element. The "encouraging" of the plaintiff described therein does not refer to anything that might tend to encourage, but instead refers to encouragement by <u>representation</u>, as the name of the doctrine suggests. Further, a representation is a statement of fact, that is, a statement that refers to an existing or past state of affairs. A statement as to future intention is not a representation but a promise. Promises are enforceable at common law only where there is agreement and consideration, and enforceable in equity only under the doctrines of promissory and proprietary estoppel: Spencer Bower at pp. 34-35. Although promises are sometimes referred to as "representations", where the statement at issue is in fact a promise, the equitable doctrine applied by the courts is promissory, not representative, estoppel: *Hansen v. British Columbia* (2000), 76 BCLR (3d) 241 (C.A.), 2000 BCCA 338 at paras. 10-13; S. Wilken

> & T. Villiers, *Waiver, Variation and Estoppel* (John Wiley & Sons, 1998) at pp. 120-21, 192-93. [underlining in original]

133. The doctrine of promissory estoppel is summarised as follows (para. 24):

> The elements necessary to a successful claim in promissory estoppel are: a promise or assurance intended to affect the legal relations between the parties; the party seeking to raise the estoppel having relied upon that promise or assurance to its detriment; and that it would be inequitable to permit the party who made the assurance to insist on the strict legal relations between the parties as if no such assurance had been given: *Maracle v. Travellers Indemnity Co. of Canada,* [1991] 2 SCR 50; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] SCR 607 at p. 615; *Combe v. Combe*, [1951] 1 All ER 767 at p. 770.

134. *Sarg and Aurchem* both show that the public law context is important in applying the doctrine of estoppel. This point that was made explicit by two Supreme Court of Canada justices who recently stated that estoppel may be available against a public authority "in narrow circumstances": *Mount Sinai Hospital Centre v. Quebec (Minister of Social Services),* 2001 SCC 41 at paras. 39-51.

135. *Sarg and Aurchem* recognise that in the public law context, an important distinction must be drawn. Estoppel cannot be used to defeat the application of a law simply because it has not been applied or enforced in the past: see also *Bill Pottruff v. British Columbia Egg Marketing Board,* January 17, 2001, BCMB, paras. 71-72. However, in both *Sarg and Aurchem*, estoppel was held to apply where a regulator had engaged in a widespread and longstanding practice of granting various approvals under a regulatory scheme where certain conditions were met, only to later refuse an approval to the applicant under the same conditions. As noted by Strayer J. in *Aurchem*:

> Estoppel could not, of course, preclude the respondents from enforcing the strict terms of the law simply because they had not been enforced in the past [See e.g., *Cohen v. MNR.* (1991), 40 FTR 225 at 233.]. But here the law leaves a discretion to the Mining Recorder to waive certain requirements which he has lawfully done on many occasions. This is not to say that the Mining Recorder was precluded from changing practice and not exercising in the same way the discretionary power provided under subsection 43(1). But, *given the wide-spread practice* [in agreeing to record a mining claim] which, according to the evidence, has been going on at least six years, it was incumbent on the Mining Recorder to make reasonable efforts to bring to the attention of prospectors his intention to require strict and literal compliance with the Act and not to waive those requirements in the future.

136. This is not a case where the Appellants applied for and were refused an approval. The Appellants have steadfastly refused to make any application for any approvals or permits under the *Egg Scheme*. Their attempt to apply the principle of estoppel applies in a very different context; they seek to avoid enforcement of the consequences of illegal activities.

137. Given the view we have taken on the marketing policy questions discussed below, we do not find it necessary to engage in a detailed discussion of the application of the doctrine of estoppel in these circumstances.

138. It will suffice to say that the doctrine of promissory estoppel would not apply here. While the Egg Board certainly decided that it would not enforce its orders during the discussions, the evidence does not establish that Egg Board made any express promise or assurance that it would never take action to enforce outstanding fees accrued under the Standing Order if discussions failed.

139. The strict requirements of the doctrine of representative estoppel would also not apply here. All other factors aside, we are not satisfied that the Egg Board knew of any mistaken legal belief by the Appellants, let alone that the Egg Board encouraged the expenditure of funds. As reflected in their correspondence, the Appellants knew full well that their legal position was tenuous at best, which is why they expended significant efforts to obtain a government exemption from the *Egg Scheme*.

D. Sound marketing policy

140. In our view, the proper resolution of this enforcement issue does not turn on doctrines of estoppel, but on the evidence and arguments made by the parties as they relate to fairness as a matter of sound marketing policy. From the outset this issue has been framed in terms of fairness in enforcement policy. The Court of Appeal has recently and specifically affirmed the BCMB's appellate power to consider issues of fairness. Our decisions have always made clear that enforcement must, as a matter of sound marketing policy, be fair and credible, as enforcement decisions affect both the individual and all those subject to the regulated marketing system. Fair enforcement is a fundamental feature of sound marketing policy.

141. We start from the position that, unless there are very exceptional circumstances, a commodity board cannot and should not be prevented from enforcing the law simply because it has not done so in the past. There are many valid reasons why a commodity board may defer enforcement or hold it in abeyance. The fact the Egg Board did not take enforcement actions between 1998 and 2001 was not because of any promises or representations it made to the Appellants, but because, as the evidence shows, the Egg Board was invited and encouraged to make every possible effort to seek a non-litigious and less adversarial solution than has marked other commodity industries, such as milk, in the past.

142. It is a reality of any enforcement system, including the regulated marketing system, that many factors must inform enforcement decision-making. As we stated in *Bill Pottruff v. British Columbia Egg Marketing Board* (para. 71):

> Even if it could be shown that the Egg Board did know about other illegal producers and should have taken enforcement action against them, this does not assist another illegal producer against whom the Egg Board did enforce the law. While the Egg Board may well need to consider the extent to which it will address other illegal flocks by way of TRLQ, enforcement action against producers and graders, or by other means, we find that the seizure notice was appropriate in the circumstances of the Appellants.

> As with any illegal activity carried out over a lengthy period of time, a person who produces eggs illegally takes a chance that they will be at or close to the front of the line when enforcement activities take place. For such persons, it is no answer to enforcement to suggest that they came first; even less is it open to say that a period of illegal activity creates an amnesty….

143. In some ways, the Appellants may be seen as being in a similar position to Mr. Pottruff, albeit at a much larger scale. Mr. Reid took an obvious and calculated risk when he decided to engage in table egg production starting in 1996. Following the seizure of Mr. Easterbrook's flock in 1998, the Appellants continued to grow their production. They lobbied aggressively for an exemption from the regulated system, which effort was unsuccessful and did not result in any exemption by Lieutenant Governor in Council. Mr. Reid refused to apply for a TRLQ permit, and even refused the invitation as part of COABC to participate or provide input into the development of the TRLQ program. As reflected in his evidence, Mr. Reid's approach has been "all or nothing".

144. While no promises were made regarding enforcement of ongoing marketing fees, the Appellants arrived at the reasonably held view that, until the Egg Board advised them otherwise, there would be no enforcement of fees that arose during the ongoing discussions seeking to find a policy solution.

145. It must be remembered that the lengthy discussion process between the commodity boards and COABC was encouraged by both the BCMB and the Ministry.[18] As Mr. Whitlock stated in evidence, the Egg Board made a conscious decision starting in 1998 not to enforce marketing fees against COABC producers during the discussion process: "in our minds we were basically not enforcing our regulations until we came to an agreement and then we would be enforcing them". This statement is consistent with the Egg Board's offer in July 2000 of amnesty from previous infractions for organic producers upon application for TRLQ.

146. Mr. Whitlock stated later in his evidence that what the Egg Board was really doing was holding in abeyance the enforcement of marketing fees that arose during this period. However, we find that several factors in late 2000 and early 2001 are more consistent with the position that the Egg Board would and should only be taking prospective enforcement action after notice to the producer.

147. First, the BCMB only approved the terms of the TRLQ program in late November 2000. The previous iterations of that program were not satisfactory for specialty producers, a factor which was no doubt a policy consideration relevant to sound enforcement.

148. Second, it was only on December 12, 2000 that the Egg Board gave notice to COABC that:

[18] The latter of which even took the controversial step of appointing one of its own staff to assist and advocate for COABC during the relevant period.

> …effective January 2, 2001, the BCEP will be visiting each organic producer who holds more than 99 birds to determine if they are in possession of Federal Quota for egg production or have applied for TRLQ. If not the flock will be placed under seizure and the producer given 10 days to apply for TRLQ or explain to the BCEP why further actions should not be taken to bring the farm *within the current regulations*. [emphasis added]

149. The above passage is the first enforcement letter issued since 1998. The Egg Board's reference to "current regulations" strongly suggests a prospective application of the Standing Orders.

150. Third, on January 1, 2001, the Egg Board, on its own initiative, issued a registered grading station licence to Olera. The licence states on its face that, to the knowledge of the Egg Board as of that date, Olera "has complied with the said Standing Order…." We disagree with the Appellants that this letter is properly understood as reflecting the grant of a past "exemption" from the Orders. However, when considered with the December 12, 2000 letter, it clearly reflects a positioning by the Egg Board for prospective enforcement action.

151. Fourth, the Egg Board, through its General Manager, wrote a letter to all registered Grading Stations on January 9, 2001, stating as follows:

> Over the past few years there has been a proliferation of registered grading stations in B.C. many of which are marketing specialty eggs. While the COABC, representing the organic specialty egg producers, was in negotiations with the BC Ministry of Agriculture and the BC Egg Producers regarding their entry into the supply management system, the BC Egg Producers were not collecting all the levy and Marketing Licence Fees due from these producers. *Not collecting these levies created a "subsidy" to those marketing eggs in a highly competitive marketplace, skewing that market in favour of those receiving the "subsidy".*
>
> ...
>
> *Effective January 2, 2001, the BC Egg Producers removed the "subsidy" and will be monitoring all registered grading stations to ensure all levies and marketing licence fees are collected and remitted, including those due from the unregistered producers who market through a registered grading station.* [emphasis added]

152. In our view, this language is consistent with the letter of December 12, 2000 and strongly indicates a decision by the Egg Board to prospectively enforce the Standing Order.

153. Given the very unique circumstances at play in this matter, it is our view that it was not, as a matter of sound marketing policy, fair for the Egg Board to decide to enforce marketing fees that arose prior to January 2, 2001. It is evident that the Egg Board identified January 2, 2001 in both its December 12, 2000 and January 9, 2001 letters as the date that the enforcement reality would change and had changed. Mr. Reid's attitude, reflected in the hearing before us, that he would never engage with the regulated marketing system does not change this reality.

154. We hasten to emphasize that, but for the Egg Board's decision to seek past marketing levies, its enforcement decision-making was otherwise entirely fair and appropriate. Given the lengthy consultations that preceded the final TRLQ program, COABC growers were, in December 2000, given fair notice that they were required to apply for TRLQ if they wished to avoid enforcement action. The Appellants themselves were, in February and March, 2001 given separate and independent warning of Egg Board enforcement action, and yet declined to participate in the hearing. That the Egg Board deferred its enforcement hearing pending one final individual mediation attempt only emphasises our conclusion regarding the Egg Board's process.

155. We also wish to emphasise that the evidence does not even come close to establishing that Mr. Reid is being targeted for a malicious purpose. That his case has been identified for first enforcement is obviously unpleasant for Mr. Reid. However, the fact is that he is a large, illegal producer and he has made it very clear to date that he has no intention of making application for TRLQ in its existing or any potentially modified form. He simply refuses to have anything to do with the *Egg Scheme*. All reasonable and non-adversarial means have been tried and failed. In these circumstances, to fail to enforce against him would bring the credibility of the Egg Board into serious disrepute.

VI. CONCLUSION

156. For the reasons we have given, the Appellants' first ground of appeal is dismissed. However, the second ground of appeal is allowed to the extent that the Egg Board calculated marketing licence fees as being payable from week 26 of 1999.

157. We find that the relevant marketing licence fees under the Egg Board's Standing Order, calculated in accordance with the flock count conducted in June 1999, be payable effective January 2, 2001.

158. We wish to confirm that the dismissal of this appeal does not limit the Egg Board's flexibility, as part of its enforcement activities, to arrive at a different accommodation with the Appellants, or to amend its claims against the Appellants in the event that the evidence discloses higher layer counts since January 2, 2001.

159. We also reiterate that, given how this appeal was argued, we have not considered policy issues relating to the content, terms and administration of the TRLQ program, and any adjustments that might be useful and wise in light of the experience of the two years since it was approved by the BCMB. These are questions for the Egg Board, the BCMB in its supervisory capacity or for appeals where those questions arise. As we have recognised before, commodity boards have a responsibility to maintain a system that operates at a reasonable level of expense for all producers, to ensure a competitive, market-responsive system which provides for development in all segments of the market.

160. There will be no order for costs.

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

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Karen Webster, Member
Hamish Bruce, Member