IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (BC) ACT

AND

IN THE MATTER OF AN APPEAL TO THE
BRITISH COLUMBIA MARKETING BOARD
AGAINST AN ORDER OF THE
BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION
DATED JUNE 26, 1990

BETWEEN:

WESTERN HATCHERY LTD.
OKANAGAN HATCHERY LTD.
LILYDALE COOPERATIVE LTD., AND
HORIZON HATCHERY LTD.

APPELLANT

AND:

BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

RESPONDENT

REASONS FOR DECISION

Appearances: K. Fuller, Western Hatchery Ltd.
A. Fauchon, Horizon Hatchery Ltd.
B. Skeels, Lilydale Cooperative Ltd.
N. Gray, Past Chairman,
B.C. Broiler Hatching Egg Commission
J. Shiell, B.C. Chicken Marketing Board
J. Hunter, Legal Counsel

APPELLANT

D. Stauber, Member
J. Durham, General Manager
W.R.D. Underhill, Legal Counsel

RESPONDENT

DATE OF HEARING September 6, 1990
October 30, 1990

1. The matter before the British Columbia Marketing Board ("the Board") is an appeal by Western Hatchery Ltd., Horizon Hatchery Ltd., Okanagan Hatchery Ltd. and Lilydale Cooperative Ltd. ("Appellants") against Order No. 34/90 of the British Columbia Broiler Hatching Egg Commission ("Respondents") dated June 26, 1990.

2. The appeal was filed with the Board on July 30, 1990, and was set to commence on September 6, 1990.

3. On September 6, 1990, the Appellants requested that the hearing be adjourned to permit them to retain legal representation. The Board granted an adjournment on the following terms and conditions which were agreeable to all parties.

   a) The Appellants would pay the administrative levy fixed by the Respondent, such charges to be deposited to an interest bearing trust account held in trust by counsel for the Respondent, with the money that is paid in, together with any interest which accrues on it, being released to the appropriate party upon the end or resolution of the appeal.

   b) The acting chairman of the Pricing Committee, Mr. Barrie Peterson, continue to chair the committee until a new chairman is appointed.

   c) Both parties agreed they would have no objection to a different panel hearing the appeal when it resumed.

4. The appeal was heard on October 30, 1990. The Appellants and the Respondent were represented by counsel. Opportunity was given to call and cross-examine witnesses, file documentary evidence, file written submissions and make oral submissions on the facts and the law.

5. The Appellants argued that the Respondent lacks jurisdiction to impose an administration levy ("levy") on the purchasers of the product for the following reasons:

   a) Section 13(1)(k) of the Act permits levies to be fixed on designated persons but does not define designated persons. The levy should not be extended to a party not within the contemplated regulatory ambit of the British Columbia Broiler Hatching Egg Scheme ("the Scheme");

b) The imposition of the levy based on the quantity of regulated product purchased, is functionally identical to a price increase. The Respondent relinquished its price-fixing powers by executing an undertaking to be bound by the determinations of the Pricing Committee.

6. The Appellant argued further that if the Board should find that the Respondent does have the jurisdiction to impose the levy, the levy should not be sustained for reasons of policy, including:

a) Virtually all boards and commissions under the purview of the Board only levy producers of the regulated product;

b) The Respondent was constrained at its very inception from exercising the full range of price setting powers, which also signifies a restrained role in the more complex two-board regulatory environment in the chicken industry.

7. In response to the Respondent's argument that the levy was designed to fund services requested by the hatcheries, the Appellants stated that their representatives have not attempted to recover their expenses for participating on the Standards and Pricing Committees, that they are not requesting services from the Respondent nor do they wish the Respondent to be paying money to them or on their behalf. The Appellants stated further that there is no cogent reasons why they should pay for a scheme which they did not request and are not represented in.

8. The Appellants requested that the Board cancel Order No. 34/90 and direct the Respondent to live within the revenues provided through the pricing formula and levies paid by its producers.

9. The submissions made by the Respondent include

a) By Section 8(1)(a) of the Scheme, all of the powers contained in Section 13 of the Act are conferred on the British Columbia Broiler Hatching Egg Commission.

b) Section 13(1)(k) of the Act authorizes a board to fix and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of the regulated product. The Appellants are licenced by the Respondent and are clearly in a commercial and marketing relationship with hatching egg producers and are subject to the authority of the Respondent to impose levies.

c) The levy is lawful and is not a disguised price increase. It has impact on the cost to producers but is in no way an intrusion on the pricing authority or the pricing undertaking given by the Respondent in the course of the establishment of the Commission.

d) The levy is justified and is a proper charge to support the costs and programs that the Commission has undertaken for the benefit of the industry, which includes the consumers of the product.

e) This is the only industry wherein pricing undertakings or pricing commitments have been given and removed or taken outside the ambit of a board or commission's authority.

10. Having considered all of the evidence and submissions presented at the hearing of this appeal, the Board finds that based on the authority granted to the Respondent in Section 8(1)(a) of the Scheme, the issuance of Order No. 34/90 is within the jurisdiction of the Respondent.

11. However, based on the fact that the Appellants have not made claims on the Respondent for the payment of per diems and expenses and as the Appellants do not agree that there is a need for the research conducted at U.B.C. the Board finds that the Respondent's reasons for imposing the levy cannot be supported by the facts. If the situation were to change and the Respondent was required to pay the per diems and expenses for the hatchery representatives on the committees, then it might be appropriate that a sufficient levy to recover those costs should be imposed.

12. It is the order of this Board that Order No. 34/90 of the British Columbia Broiler Hatching Egg Commission is cancelled. All monies collected under Order No. 34/90 which are being held in trust, together with the interest accruing from these monies, be returned to the Appellants.

13. In accordance with this Board's rules of appeal, one half of the Appellant's deposit shall be refunded.

Dated this 23rd day of January, 1991 in Victoria, British Columbia

(Original signed by):

D. Iverson, Chairperson
E. M. Brun, Vice-Chairperson
G. Aylard, Member
O. Austring, Member
J. Reger, Member