

BRITISH COLUMBIA MARKETING BOARD

Between:

Art Kleine

Appellant

And:

British Columbia Egg Marketing Board

Respondent

Members of the Board:

- Mr. C. Emery, Chairman
- Mr. N. Taylor
- Mr. M. Hunter
- Mrs. M. Brun

Mr. and Mrs. Art Kleine appearing on their own behalf

Mr. Bruce Fraser appearing on behalf of the Respondent

Mr. John Koot appearing on behalf of the appellant on

January 6, 1982.

Burnaby, B.C.

January 14, 1982

This is an appeal by Mr. Art Kleine to this Board from the decision of the British Columbia Egg Marketing Board dated October 17, 1981. For purposes of disposing of this appeal the facts can be stated rather briefly:

The appellant, Art Kleine, was notified on September 21, 1981 that he was in contravention of s. 2(a) of the standing orders of the British Columbia Egg Marketing Board. Section 2(a) reads as follows:

Licence Issuance - No person shall grow or produce for marketing, pack, store, transport or market the regulated product within British Columbia unless he is qualified to and applies to and does obtain from the Board annually, one or more appropriate licences of the types hereinafter described:

1. Registered Producer Licence.
2. Producer-Vendor Licence.
3. Commercial Hatching Egg Producer Licence.
4. Registered Grading Station Operator Licence.
5. Chick hatchery Operator Licence.

The specific allegation against Kleine was that he kept or maintained layers in a manner greater than 500 for the purpose of egg production and has failed to obtain a licence from the Board permitting him to do so.

By resolution of the British Columbia Egg Marketing Board, dated September 18, 1981 all layers kept by the appellant in excess of 500 were ordered seized and not to be disposed of until further notice from the Board. At the same time that this notice of seizure was issued, the appellant was advised that he could apply by notice in writing to the Egg Marketing Board to show cause why the layers so seized should not be sold or disposed of by the Board.

The show cause hearing took place on September 28, 1981. Both Mr. and Mrs. Kleine were present at the hearing and were given an opportunity to show cause why the seizure order should not be executed. No decision was arrived at on this date. The hearing was resumed on October 15, 1981 and on October 17, 1981 the Board made three orders which are paraphrased herein as follows:

1. That Mr. and Mrs. Art Kleine kept layers in a number greater than 500 for the purpose of egg production and hence, were in contravention of the standing order of the Board without due cause.
2. Any eggs marketed by Mr. Art Kleine be seized and disposed of by authorized representatives of the B.C. Egg Marketing Board

and any proceeds of such seizure be held in trust for final disposition.

3. That Mr. Kleine be advised in writing of the determination of the Board and of his rights to appeal to the British Columbia Marketing Board.

On October 19, 1981 a notice of seizure was issued to Mr. Art Kleine and it read in its entirety as follows:

WHEREAS Kleine has been notified on September 21, 1981 that he is in contravention of the standing order of the Board.

WHEREAS Kleine has been heard by a committee of the Board on September 28, 1981 and an appeal before the Board on October 15, 1981 with regard to this contravention.

AND WHEREAS the Board is satisfied by resolution that there is a contravention of a standing order of the Board, and that Kleine has not mitigated this contravention.

YOU ARE HEREBY NOTIFIED THAT

1. You are found to be knowingly in contravention of the standing order of the Board.
2. By resolution of the Board dated October 17, 1981, all eggs marketed by you are ordered seized by authorized representatives of the Board; and further that these eggs are to be disposed of and the proceeds held in trust pending a final determination.
3. You may appeal this decision of the Board by serving written notice of appeal to the British Columbia Marketing Board within 7 days of receiving this notice and including a deposit of \$100.00 (One hundred dollars).

4. That the notice of seizure of layers dated September 21, 1981 is suspended and by resolution of the Board dated October 17, 1981 you were ordered to dispose forthwith of all layers held by you in a number greater than 500.

The appellant appealed the above-mentioned decision on the following grounds:

1. The order or decision could not be complied with by myself as the layers and eggs being the subject of the order are not owned outright by me but are jointly owned with Jenny Kleine and the order fails to make provision for the ownership of Jenny Kleine.
2. The order is oppressive and unreasonable under the circumstances.

The hearing of this appeal first took place in Richmond, B.C. on December 3, 1981. Although the appellant did not abandon any reliance upon the first ground of his appeal, most of his submissions were directed to the second ground, i.e., that the order was oppressive and unreasonable under the circumstances. In cross-examination by counsel for the respondent, the appellant admitted that he knowingly violated the Standing Orders of the Board.

In the course of deliberating upon the merits of the appeal, this Board became concerned with the validity of the Standing Orders of the British Columbia Egg Marketing Board and invited the parties to reappear before us on January 6, 1982 to make

submissions with respect to three questions which were as follows:

- A. Whether the Standing Orders of the B.C. Egg Marketing Board have ever been filed?
- B. Assuming that the said Standing Orders have not been filed, whether there is any requirement in law that they be filed?
- C. Whether the failure to file the Standing Orders should affect the outcome of the appeal?

Counsel for the respondent, conceded that the Standing Orders of the B.C. Egg Marketing Board in question had never been filed. Notwithstanding this failure to file, counsel for the respondent adopted two positions:

- 1. That there was no need in law to file the Standing Orders;
- 2. That even if the Standing Orders were required to be filed by law, that the seizure of the appellant's eggs was justified by the Order-in-Council constituting the B.C. Egg Marketing Board and approving the B.C. Egg Marketing Scheme being B.C. Reg. 173/67.

We will address both of these contentions in their order.

The Regulation Act, R.S.B.C. 1979 ch. 361 s. 2(1) reads as follows:

- (1) Every regulation, or a copy of it, shall be filed with the Registrar.
- (2) A regulation comes into force on the day after it is filed unless
 - (a) a later date is prescribed in the regulation; or
 - (b) an earlier date is authorized in the Act under which or by the authority of which a regulation is made, and the earlier date is provided in the regulation.
- (3) A regulation that is not filed has no effect.
- (4) A regulation made before September 1, 1973 ceases to have effect after December 1, 1973 unless it is filed under this Act or was filed under the Act repealed by this Act.

In the Regulation Act regulation is defined as follows:

"Regulation" means every regulation, rule, order, proclamation and bylaw of a legislative nature made under or by the authority of any Act and includes any document designated by the minister under section 7 to be a regulation, but does not include

- (a) a bylaw of a municipal corporation;
- (b) a memorandum, bylaw or resolution of any other corporation; and
- (c) a document designated by the minister under section 7 not to be a regulation.

Counsel for the respondent maintain that the Standing Order in question i.e., section 2(a), was not an order of a legislative nature and hence, was not a regulation within the meaning of the Regulation Act. It was his contention that the Standing Order in question was merely of an administrative nature. He noted that under the scheme to the Act being B.C. Reg. 173/67, the Board is given the authority inter alia:

To require any or all persons engaged in the production, transportation, packing, storing, or marketing of the regulated product to register with and obtain licences from the Board.

Counsel for the respondent also referred us to section 3.15, 3.16, and 3.17 of B.C. Reg. 173/67 to support his contention that the Standing Order in question was administrative only.

Admittedly, the distinction between legislative and administrative acts is not an easy one to draw, and indeed, some acts might be described as having characteristics of both. Nor is there a great deal of authority to assist us in our task in determining whether or not the Standing Orders in question were of a legislative or administrative character.

In Black's Law Dictionary 4th ed. "legislative" is defined as:

"Actions which relate to subjects of permanent or general character...".

In the same dictionary "administrative acts" are defined as:

.."...those acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body..."

The Ontario Court of Appeal had occasion to consider the definition of regulation within the meaning of the Regulation Act, R.S.O. 1950, ch. 337 which also depended upon the order being of a legislative nature. Aylesworth, J.A. concluded that the Order-in-Council there in question was of a legislative nature and not administrative. His Lordship stated:

"The action of the Lieutenant Governor in Council, as set out in the Order-in-Council referred to, in our opinion, clearly is of a legislative nature as I have said. We think that to an extent generally applicable to the public or large segments thereof, it alters rights and responsibilities and even the nature and extent of those responsibilities. Upon that ground alone we think sufficient has been said to indicate the legislative nature of the action taken by the Lieutenant Governor in Council as set out in the Order-in-Council referred to...In coming to a conclusion as to the nature of the act performed, not only must one look at the substance rather than the form but indeed in the inquiry upon which one must embark, all the surrounding circumstances must be looked at and by that I include the nature of the body enacting the order in question, the subject matter of the order, the rights and responsibilities, if any, altered or changed by that order."

In our view, s. 2(a) of the B.C. Egg Marketing Board Standing Order is legislative in nature and hence, must be filed pursuant to s. 2 of the Regulation Act. Had the Act or the Regulations required all persons engaged in the production etc. of a regulated product to obtain a licence from the Board the details of which to be determined by Standing Orders of the Board, a different conclusion might have followed. That of course, was not the case here. Although B.C. Reg. 173/67 empowered the Egg Marketing Board to require producers to obtain a licence, that was a policy decision left to the B.C. Egg Marketing Board. The Board could have chosen not to impose the requirement of a

licence on producers in the Province. In enacting s. 2(a) of the Standing Orders, the B.C. Egg Marketing Board made a policy decision which, to paraphrase the decision of the Ontario Court of Appeal in Rhodes v. The Queen, was generally applicable to the public or large segments thereof and altered the rights and responsibilities of those members of the public. As counsel for the appellant noted, it is by means of orders, rules, and regulations as provided in s. 4.01 (o) of B.C. Reg. 173/67 that these policy decisions of the Egg Board are in fact implemented and made law. "Order" is defined in s. 1.02 (j) of B.C. Reg. 173/67 to mean "the Standing Order of the British Columbia Egg Marketing Board."

Since it is our opinion that s. 2(a) of the Standing Order was a regulation within the meaning of the Regulation Act and since it was not filed as required by the Regulation Act it follows that the regulation is of no effect. To the extent therefore that the seizure of the appellant's eggs was founded upon s. 2(a) of the Standing Orders, it follows, of course, that the seizure order was of no effect and the appeal must be allowed.

Counsel for the respondent's second position was that the seizure of the appellant's eggs could be justified on the basis of B.C. Reg. 173/67 and hence, was not dependent upon the validity of Standing Order s. 2(a). In our opinion, this contention also must fail. B.C. Reg. 173/67 s. 4.01 (m) empowers the Board to "seize and dispose of any of the regulated product kept, transported, processed, packed, stored, or marketed, in violation of any order of the Board (emphasis added).

It follows that any seizure is dependent upon there being an order of the Board, and this leads us back to s. 2(a) of the Standing Orders.

If an order of the Board is of no effect, then the seizure authorized in violation of that Order, would similarly be ineffective.

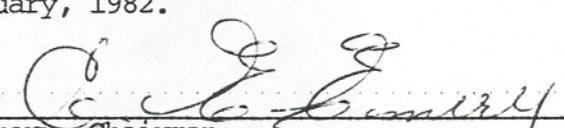
Counsel for the respondent points to sections 3.15, 3.16, and 3.17 of B.C. Reg. 173/67 as imposing a requirement on any person in the province, who produces a regulated product, to obtain a licence. In our view, no such requirement is found in those sections or any other section of B.C. Reg. 173/67.

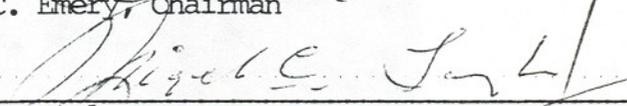
It is therefore the opinion of this Board that the seizure of the appellant's eggs, although made in good faith was not valid and done without lawful authority. We therefore allow the appeal and order the B.C. Egg Marketing Board to return to the appellant the proceeds from the disposition of the eggs seized, together with any interest which has accrued to date.

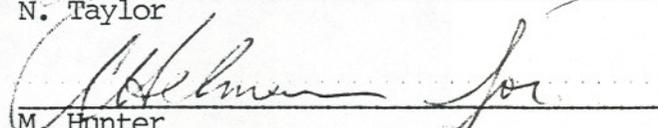
Given our conclusion, we think it both unnecessary and inadvisable to give any opinion as to the merits of the appeal, particularly as to whether or not the order of the B.C. Egg Marketing Board was unreasonable or oppressive as claimed by the appellant.

Pursuant to s. 6(1) of the Natural Products Marketing (B.C.) Act, R.S.B.C. 1979 ch. 296, the Board orders that the deposit of \$100.00 (One Hundred Dollars) paid by the appellant shall be returned in its entirety to the appellant. There shall not be any other order as to costs.

DATED at Burnaby, B.C. this 14 day of January, 1982.


C. Emery, Chairman


N. Taylor


M. Hunter


M. Brun