

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING BUY-BACK REMUNERATION

BETWEEN:

BRITISH COLUMBIA EGG PROCESSORS COUNCIL

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board Ms. Christine J. Elsaesser, Vice Chair
 Ms. Karen Webster, Member
 Mr. Hamish Bruce, Member

For the Appellant Mr. Ralph Payne

For the Respondent Mr. Robert P. Hrabinsky, Counsel

Date of Hearing November 14, 2000

Place of Hearing Abbotsford, British Columbia

INTRODUCTION

1. At its meeting on August 2-3, 2000, the British Columbia Egg Marketing Board (the "Egg Board"), after considering the recommendations of the Egg Industry Advisory Committee (the "EIAC"), decided to reduce the buy-back remuneration paid to processors from 8.1 to 6.5 cents per dozen on graded eggs and from 5.6 to 5 cents per dozen on nest-run eggs. The buy-back remuneration is paid to processors for the costs involved in the handling of industrial product, i.e. product that is sent to the breaker. This decision was communicated by letter dated August 9, 2000.
2. The British Columbia Egg Processors Council (the "BCEPC") filed an appeal of the decision to reduce the buy-back remuneration to the British Columbia Marketing Board (the "BCMB") on August 31, 2000. The hearing proceeded on November 14, 2000.

ISSUES

3. Should the decision concerning the amount of buy-back remuneration, communicated in the Egg Board's August 9, 2000 letter, be rescinded so that the previous buy-back remuneration amount remains in effect?
4. In the alternative, should the decision be amended to implement a buy-back remuneration based on the Canadian average buy-back remuneration instead of on the average of the three western provinces?

FACTS

5. Current buy-back fees, 8.1 cents per dozen for graded product and 5.6 cents per dozen for nest-run (ungraded) product, date from December 1991, with some minor changes being made in 1994. A portion, presently 3.0 cents per dozen, of these fees is paid by the Canadian Egg Marketing Agency, the remainder is paid directly from levies on BC egg producers.
6. Since 1993, the Egg Board has had discussions with the BCEPC in an attempt to reduce the buy-back remuneration.
7. In 2000, the Egg Board revisited the issue of the reduction of the buy-back remuneration. It was the position of the BCEPC on February 4, 2000, that any change in the buy-back fees should be tied to changes in the other western provinces. If the buy-back remuneration was changed in Alberta, Saskatchewan or Manitoba, the BCEPC agreed to a change equal to the average of the changes in the three western provinces. The BCEPC maintained that this would allow BC to remain competitive.
8. The Egg Board maintained that the BC buy-back remuneration should be the same as that of Alberta.

9. In March 2000, the BCEPC agreed to a $\frac{1}{2}$ cent per dozen reduction in the buy-back fees for graded and nest-run eggs and maintained that any future changes to the buy-back remuneration must be made in conjunction with changes in the three western provinces. It should be noted that on appeal the BCEPC's position was that the buy-back remuneration should be based on the Canadian average.
10. In April 2000, the Egg Board decided to refer the issue of the appropriate level of the buy-back remuneration to the EIAC for consideration.
11. On July 28, 2000, the EIAC recommended that the buy-back fees be set at 6.5 cents per dozen for graded eggs and 5.0 cents per dozen for nest-run eggs. This remuneration represented the average remuneration for the three western provinces. In addition, the EIAC recommended that should further change occur in any of the western provinces' buy-back remuneration, this matter should be subject to further review. In any event, the EIAC felt that another review should be conducted in July 2001.
12. On August 2-3, 2000, the Egg Board met and adopted the recommendations of the EIAC. The amended buy-back remuneration was effective September 3, 2000. This decision was communicated to the Appellant by letter dated August 9, 2000.
13. On August 31, 2000, the Appellant appealed the Egg Board's decision to reduce the buy-back remuneration.
14. On September 6, 2000, the Appellant wrote to all egg producers and advised "that effective September 10, 2000 all BCEPC Grader Members will be charging a flat washing fee in the amount of \$0.0025 per dozen (1/4 cent)." The purpose of the washing fee was to "offset the buy-back reduction."

ARGUMENT OF THE APPELLANT

15. The Appellant argues that the Egg Board has an obligation to make decisions that are fair to all stakeholders. The decision to reduce the buy-back remuneration is not fair to BC processors, as the net effect is a \$125,000 cost to the grading sector.
16. Producers in BC get the full producer price for surplus product. When surplus product is sent to the breakers, there is an \$0.85 shortfall per dozen. The cost of this shortfall is made up through producer levies and amounts to \$6 million each year. The Egg Board has stated that it is trying to reduce producer levies. However, rather than address this \$6 million shortfall, the Egg Board has instead chosen to reduce the buy-back remuneration. This costs graders \$125,000.

17. The Appellant argues that the Egg Board's decision is flawed, in that along with the reduction to the buy-back remuneration, the Egg Board also reduced the producer price by one cent. The Egg Board states that this price reduction is to compensate graders. However, as grader contracts with customers are set at the posted producer price plus a margin, the decision to reduce the producer price does not benefit graders. Graders suffer a \$125,000 loss and producers suffer a \$500,000 loss. Only the retailer and the consumer benefit.
18. Thus, the decision of the Egg Board to reduce the producer price does not offset the reduction to the buy-back remuneration. The Appellant argues that this is a tremendous cost to simply accomplish the goal of reducing the producer levy. This is not in the interests of the grading sector or the egg industry in BC.
19. The Appellant argues that renegotiating new customer contracts is not easy. Graders have to be very cautious. They cannot simply break contracts and increase the price to retailers. To do so would create a real risk of losing a substantial market.
20. The Respondent also takes issue with the flat washing fee imposed by some of the graders. The Appellant argues that the imposition of a flat washing fee is not relevant to this appeal and should not form part of the Panel's deliberations. It was not identified as an issue in the pre-hearing conference report and as such, the Appellant is not prepared to deal with it as part of this appeal.
21. In summary, the Appellant argues:
 - 1) There is not a justifiable reason for a reduction in the buy-back remuneration.
 - 2) This decision puts BC graders in an adverse position relative to their competitors in other provinces.
 - 3) The decision of the Egg Board does nothing more than take \$125,000 per year from the grading industry and transfer it to the Egg Board.
 - 4) The Egg Board has erred in moving the BC buy-back remuneration to the average paid in the three western provinces. Costs in BC are higher. The Egg Board does not price eggs based on the western provinces' average; therefore it should not use this criteria to set the buy-back fees.
22. The Appellant is seeking the following relief:
 - 1) The Egg Board's decision communicated on August 9, 2000 concerning the buy-back remuneration should be rescinded. The previous buy-back fees should remain in effect.

- 2) In the alternative, the decision communicated on August 9, 2000 should be amended to implement buy-back remuneration based on the average Canadian buy-back fees rather than just the three western provinces.

ARGUMENT OF THE RESPONDENT

23. The Respondent argues that sometimes the right decision is met with resistance simply because people are resistant to change. Reducing the buy-back remuneration is the right thing to do. The cost of handling industrial product, like other post farm gate costs, should not be in producer levies. Rather it should be found in grader margins.
24. When one looks at the reduction of the buy-back remuneration together with the concurrent reduction in producer price set by the Egg Board, the grader is in exactly the same position as the retailer and the consumer, if the margin contracts are renegotiated. The difference is that the system is more market responsive.
25. The Respondent argues that it is not suggesting that graders break their existing contracts with retailers. However, graders have an opportunity to renegotiate with their customers. That is why this issue has been ongoing since the early 1990's. In that time, the graders have not renegotiated their contracts. At some point, the Respondent argues that it had to act and make the decision to take a step in the right direction. That is precisely what has happened here.
26. The Respondent argues that the levies in BC are the highest in the four western provinces. That being so, it is sensible to look to avenues to reduce levies. Reducing the buy-back remuneration is one such avenue.
27. The Respondent argues that the buy-back fees are an industry inefficiency. That is evidenced by the fact that the graders have not responded to the reduction in the buy-back remuneration by leaving industrial product on the farms which is what would be expected if the actual cost of dealing with industrial product exceeded the buy-back fees.
28. In the Respondent's opinion, the reduction in the buy-back remuneration and as such this appeal relates only to a reduction of a profit centre for graders. To the extent that the buy-back fees are "fat on the levies", they ought to be reduced.
29. The Appellant argues that there is no justifiable reason for a reduction in the buy-back remuneration. The Respondent asserts that there is a justifiable reason for the reduction in the buy-back remuneration and that is to reduce the producer levy and move towards a more market responsive system.

30. The Appellant argues that the reduction in the buy-back remuneration places BC graders in an adverse position relative to their competitors in other provinces as no buy-back reduction has occurred elsewhere. The Respondent disagrees. The evidence demonstrates that reductions in buy-back fees have occurred elsewhere. Specifically, Saskatchewan and Manitoba reduced their buy-back remuneration prior to 1995 and Alberta reduced its buy-back remuneration after 1995. The reality of the situation is that BC is just now catching up to the reductions implemented by its neighbours. It is the last western province to attempt to reduce buy-back fees. Accordingly, the Respondent argues that the decision to reduce buy-back remuneration does not place BC in an adverse position. Looking at the average price of buy-back remuneration after the reduction, BC is squarely within the range of the other western provinces and Ontario.
31. The Appellant has argued that if the Panel is not prepared to return the buy-back fees to their previous levels, they should be amended to implement buy-back fees based on the average Canadian buy-back remuneration rather than an average of the three western provinces. The Respondent argues that the buy-back fees in Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland are quite a bit higher than in other provinces. The reason for this difference is because producers in these provinces are producer-graders and as such, the buy-back fees are essentially being paid to them. Accordingly, the Respondent argues that the buy-back fees in these Provinces are not comparable.
32. The Appellant has argued that reducing the buy-back fees does nothing more than remove \$125,000 per year from the grading industry and move it to the Egg Board. In closing, the Appellant argued instead that the reduction in buy-back fees actually benefits retailers and customers not the Egg Board. The Respondent argues that the Panel should not lose sight of the fact that the reduction in the buy-back remuneration (which equates to a $\frac{1}{4}$ cent reduction on the total grading station throughput of eggs) was accompanied by a full cent reduction in the price of eggs. This means that if graders renegotiate their contracts with their customers, not only could they not be affected by the reduction, they would be in a better market position because of the reduction in the price of eggs.
33. The Appellant argues that the Egg Board erred in moving the buy-back remuneration to the average paid in the Western Provinces, as costs in BC are higher. They also argue that the Egg Board does not price eggs at the Western Provinces' average and should not use these criteria in setting the buy-back remuneration. According to the evidence of Mr. Peter Whitlock, General Manager of the Egg Board, there is no relation between the price of eggs and the buy-back fees. The distinction is that egg price is a function of feed and transportation costs. That is why price tends to increase as you move westward. However, the costs of handling industrial product are lower in BC than in other provinces. This is a function of the proximity of producers to their graders.
34. The Respondent argues that it does not follow that there should be a connection between the price of eggs and the buy-back fees. However, in this case, a reduction in the buy-back fees was accompanied by a reduction in the price of eggs.

35. Finally, the Appellant argues that the BCEPC negotiated in good faith with the Egg Board and offered to take a ½ cent reduction in the buy-back fees and tie any future changes to changes made in the Western Provinces. The Respondent argues that discussions have been ongoing since 1993. The Egg Board has not acted precipitously. To the extent that the Appellant argues that changes in BC should be tied to changes in other provinces, it must be noted that there have been significant reductions in other provinces that BC has not matched. It is just now catching up to the changes made by other provinces.
36. As for the flat washing fee, the Respondent argues that this fee constitutes a contravention of the graders' obligation to pay the minimum Egg Board ordered price for eggs. The Egg Board is granted the authority to fix the price payable to registered producers for eggs in section 37(a) and (j.1) of the *British Columbia Egg Marketing Scheme, 1967* (the "Scheme"). In subsection 3(c) of the Egg Board's Standing Order, the registered grading station through which a registered producer's product is marketed is deemed to be the agency through which that registered producer markets the regulated product. Subsection 10(a) of the Egg Board's Standing Order provides that the price or prices fixed pursuant to the *Scheme* are the minimum F.O.B. farm-gate price paid to the registered producer for regulated product.
37. The Respondent argues that the very notion of graders charging a fee to producers is inconsistent with the reality that graders are purchasers of eggs. The flat washing fee described by the graders is more closely aligned with custom grading, where the grader performs a fee for service and ownership of the eggs does not pass to the grader. Such a fee is inconsistent with the reality of the marketplace and the common sense of graders passing on their costs of doing business to their customers. The Respondent argues that the Appellant's "flat washing fee" amounts to a reduction in the price paid to producers for eggs, and is a clear and obvious violation of the *Scheme* and the Standing Order.
38. The Respondent seeks an order that this appeal be dismissed and a declaration that the flat washing fee constitutes a contravention of the graders' obligation to pay the minimum Egg Board price for eggs. The Respondent is seeking the declaration at this stage as a matter of convenience and in order to avoid a multiplicity of proceedings.

DECISION

39. Buy-back fees have been paid to graders in BC since the 1960's. The purpose of these fees is to compensate graders for their handling of industrial product (delivering surplus eggs to the breakers). Since late 1991, this remuneration has remained unchanged. Buy-back fees are funded out of producer levies.
40. As producer levies in BC are the highest in the four western provinces, the Egg Board has sought ways to reduce them. The Egg Board argues that by reducing levies, the egg industry in BC will become more competitive. They are not only looking at reducing the buy-back fees but the \$500,000 transportation subsidy paid to graders. The Egg Board does not believe that these costs are properly borne by producer levies.

41. The Egg Board is responsible for regulating the egg industry. Maintaining appropriate producer levies is part of that responsibility. In this instance, the Egg Board has not arrived at its decision to reduce the buy-back fees lightly. Consultation with the grading sector began in 1993. These discussions continued to 2000. In addition, the Egg Board sought the assistance of the EIAC as to the appropriate buy-back fees. Ultimately, it accepted the EIAC recommendation to reduce the buy-back fees from 8.1 to 6.5 cents per dozen on graded eggs and from 5.6 to 5 cents per dozen on nest-run eggs. These represent the average buy-back remuneration paid in the three western provinces.
42. The Panel accepts the Egg Board's rationale for the reduction. The other three western provinces have reduced their buy-back fees over the past few years. BC has not. In addition, there is no justification for the cost of BC's industrial product removal being higher than in other provinces. The majority of BC egg producers are located in the Fraser Valley within a very short radius of their grading station. Thus, if anything, industrial product removal costs should be lower here than in other provinces.
43. It is clear that the Appellant does not like the reduction in the buy-back fees. In March 2000, its preference was for a $\frac{1}{2}$ cent reduction with any new changes being linked to changes in the western provinces' average remuneration. On appeal, it sought either a return to the previous buy-back fees or alternatively, buy-back fees based on the Canadian average. The Appellant did not attempt to justify the appropriateness of its March proposal. As such, the Panel has no factual basis from which to assess the adequacy of a $\frac{1}{2}$ cent reduction.
44. In addition, the Appellant did not explain why it now preferred the buy-back fees to be based on the Canadian average rather than the western provinces' average, which it sought in March. Perhaps the explanation is that in March, the Appellant was seeking to have all future changes to the buy-back fees linked to the western provinces' average. It appears that the Appellant's present preference for the Canadian average as an alternative is for no other reason than it results in higher fees being paid to graders.
45. This somewhat arbitrary approach does not counter the Respondent's argument that the western provinces' average was a more appropriate comparison as producers and graders in those provinces are independent. In the other provinces, such as Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, producers are producer-graders. Thus, it is more difficult to compare the BC buy-back remuneration with the Canadian average than with the western provinces' average.
46. Given the foregoing, the Appellant has not established that the Egg Board was wrong in reducing the buy-back remuneration in BC to the western provincial average. In light of the fact that the other western provinces all reduced their buy-back fees prior to BC doing so, some adjustment appears to have been in order. The Egg Board has carried out extensive consultation and it has sought the input of the EIAC. As such, the Panel is not prepared to interfere with the Egg Board's decision communicated on August 9, 2000.

47. The Respondent has also raised the issue of the flat washing fee imposed by the BCEPC on September 6, 2000. Apparently, the BCEPC imposed the ¼ cent flat washing fee to offset the reduction in buy-back remuneration. The Respondent seeks a declaration from the Panel that this is in direct contravention of the Egg Board's authority to set the minimum producer price.
48. The Appellant argues that this is not a proper issue for this appeal.
49. The Panel agrees with the Appellant. The issue before the Panel on this appeal is the reduction in the buy-back remuneration by the Egg Board. The issue is not whether the Egg Board has the authority to set and enforce its minimum pricing power.
50. Should the Egg Board make an order, decision or determination with respect to the imposition of a flat washing fee, and if the BCEPC is aggrieved or dissatisfied, the BCEPC has a right of appeal. The BCMB cannot pre-empt that right of appeal by making a determination on that issue now.

ORDER

51. The appeal is dismissed.
52. There will be no declaration with respect to whether the flat washing fee constitutes a contravention of a grader's obligation to pay the minimum Egg Board price for eggs.
53. There will be no order as to costs.

Dated at Victoria, British Columbia, this 22nd day of January 2001.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

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