



October 31, 2001

File: 44200-50/EMB 01-07

DELIVERED BY FAX AND REGISTERED MAIL

John Jansen
Eggstream Farms Ltd.
10665 Standeven Road
Chilliwack, BC V2P 6H4

L.D. Russell & Company
Barristers and Solicitors
310 - 900 Howe Street
Vancouver, BC V6Z 2M4
Attention: Loryl D. Russell

Dear Sirs/Mesdames:

**AN APPEAL FROM A DECISION, AS COMMUNICATED IN A LETTER DATED
MARCH 19, 2001, CONCERNING TRLQ ALLOCATION**

Background

This decision is about whether the British Columbia Marketing Board ("BCMB") can or should authorise Eggstream Egg Farms Ltd. ("Eggstream") to "reinstate" an appeal it originally filed on March 22, 2001 and withdrew on July 16, 2001.

In its original appeal letter, the subject matter of the appeal was a March 19, 2001 decision of the British Columbia Egg Marketing Board ("Egg Board") refusing a request for Temporary Restricted Licence Quota ("TRLQ") production on the basis that "the likelihood of the market requiring additional organic production for some time is unlikely." Eggstream framed its appeal letter as follows:

Please accept this letter and our enclosed \$100 filing fee as our application to appeal a decision of the BCEMB . . . denying our farm the allocation of organic TRLQ, and in so doing being inconsistent (sic) with their published policies and statements and therefore being inequitable and unfair in the administration of the TRLQ program....

As this appeal involves an existing flock of 5,000 certified organic pullets which will commence laying at the end of April, we respectfully request that this matter be dealt with as soon as possible.

We are prepared to attempt to resolve this matter through a mediated process should the BCEMB be agreeable to this.

The parties then engaged in discussions. The Panel has not been privy to the contents of these discussions. However, on July 16, 2001, Eggstream wrote to the BCMB as follows:

British Columbia
Marketing Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
3rd Floor, 1007 Fort Street
Victoria BC V8V 3K5
Email: bcmb@agf.gov.bc.ca
Website: <http://www.agf.gov.bc.ca/ministry/bcmb>

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Further to your letter of April 5, 2001, this is to advise that our appeal relative to TRLQ allocation is herewith withdrawn.

Three months later, on October 17, 2001, Eggstream wrote to the BCMB seeking to "rescind" the July 16, 2001 withdrawal, and "to proceed" with the original appeal on an expedited basis. Its grounds were stated as follows:

1. The BCEMB did not, in spite of earlier correspondence indicating approval, render final approval for the revised TRLQ and continues to impose changing conditions prior to rendering such final approval.
2. Further contrary actions by the BCEMB regarding our attempt to acquire quota has seriously frustrated our ability to mitigate our production losses relative to our mediated settlement to a lower TRLQ request.

On October 19, 2001, the Egg Board responded, through counsel, opposing the request to reinstate the appeal. The Egg Board's view is that Eggstream has failed to live up to the settlement, and has sought preferential treatment. The Egg Board says that Eggstream should be held to its decision to withdraw its appeal. Finally, the Egg Board says that issue "2" above is an entirely separate issue.

On October 23, 2001, Eggstream replied. It makes the following points: (a) the Egg Board's April 12, 2001 letter imposed no conditions on the agreement, which it provided to Eggstream, and which Eggstream signed, and was the basis on which the appeal was withdrawn; (b) the Egg Board subsequently changed its mind; (c) Eggstream wishes to "impartially adjudicate this frustrated mediated settlement"; (d) the second issue relates to the Egg Board's refusal to issue a policy variance.

Decision

The Panel has carefully considered the unusual facts that have presented themselves here in light of its obligation to ensure the lawful and practical disposition of disputes arising under the *Natural Products Marketing (BC) Act* ("the Act").

On July 16, 2001, Eggstream withdrew its original appeal. Upon withdrawal, that appeal was terminated. That appeal ceased to exist as a matter of law. This is also consistent with the public policy that withdrawals of appeal, particularly when they are the result of settlements, should be respected.

This said, it does sometimes happen in litigation that a party who withdraws litigation based on the belief that he had a deal, feels the other party reneged on the deal. In that case, however, the remedy is to file a new proceeding alleging a breach of the agreement. While that is inconvenient, it is, to some extent, the price to be paid for not ensuring that key points of agreement are committed to writing. It is also logical since the dispute is really centred on the later events rather than the events of the original litigation. Where the fault of the breach lies solely with the other party, the Court can remedy the inconvenience of having to file the second proceeding with an award of costs, which is also within the power of the BCMB.

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The Panel believes that, by analogy, the same approach is required under the *Act*. The original appeal was withdrawn. Based on its letters, Eggstream's objection appears to centre on subsequent events, it seeks in its words "an opportunity to impartially adjudicate this frustrated mediated settlement". This dispute, which has arisen subsequent to the withdrawal, requires a new notice of appeal. While it may or may not raise some issues similar to those arising in the original appeal, it is clearly a fresh dispute. To the extent that the 30 day time limit may be in issue, Eggstream should list its grounds of appeal with some care, and advise in its notice of appeal what special circumstances warrant accepting those grounds beyond the 30 days, under s. 8(1)(b) of the *Act*. If the appeal proceeds, and the BCMB is prepared to hear it on an expedited basis, the BCMB can deal in due course with any submissions a party might make regarding the matter of costs.

Subject to the comments made herein, the application to reinstate the original appeal is dismissed. There will be no order for costs at this time.

Right of Appeal

If a person, marketing board or commission is aggrieved or dissatisfied by an order or referral of the BCMB under section 9(1) of the *Act*, the person, marketing board or commission may appeal the order or referral on a question of law to the Supreme Court if the appeal is commenced within 30 days of being served with a copy of the order or referral.

BRITISH COLUMBIA MARKETING BOARD
Per

(Original signed by):

Christine Elsaesser, Panel Chair