

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION
CONCERNING PAYMENT OF LEVIES AND INTEREST

BETWEEN:

FIVE CEDAR POULTRY FARM LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair
Mr. Harley Jensen, Member
Mr. Hamish Bruce, Member

For the Appellant

Mr. Mehboob (Bob) Devji

For the Respondent

Mr. Peter Whitlock, General Manager

Date of Hearing

February 20, 2001

Place of Hearing

Victoria, British Columbia

INTRODUCTION

1. Five Cedar Poultry Farm Ltd. (“Five Cedar”) is appealing a decision of the British Columbia Egg Marketing Board (the “Egg Board”) to charge interest on outstanding levy payments.
2. Five Cedar has paid the outstanding levies as well as the sum of \$9000 in interest. It alleges that subsequently, the Egg Board waived the interest fees of another producer, and on this basis, it seeks reimbursement of the interest paid.

ISSUES

3. Were s. 6(c)(iii) and s. 6 (g) of the Egg Board’s Standing Order, concerning payment of levies and interest due on outstanding levy accounts, applied fairly to the Appellant?

FACTS

4. The Appellant has been operating an egg farm in Nanaimo since 1984. Mr. Mehboob (Bob) Devji, who spoke on behalf of the company, is a 50% shareholder and holds the office of secretary with the company. Mr. Devji’s father is the other 50% shareholder.
5. In 1992, the Appellant expended \$400,000 on renovations and in purchasing layer quota. In 1994, it undertook extensive renovations and equipment upgrades to its production facility. The cost of these renovations was approximately \$250,000. As a result of difficulties encountered by the equipment supply company, the renovation project took considerably longer, resulting in significant cost overruns. The equipment company ultimately went out of business leaving the contract uncompleted. As a result, the Appellant incurred considerable extra costs to complete the renovation.
6. As a result of the unanticipated expense and delay in completion of the production facility, the Appellant fell behind in its payment of egg production levies. In addition, the late payment of levies was subject to interest charges of 1.5% per month.
7. The Egg Board sought payment of levies plus interest charges from the Appellant. The Appellant, who objected to the amount of the interest penalty assessed, sought to pay something less than the full amount of interest requested by the Egg Board. As no agreement was reached, the Appellant withheld further levy payments as of March 30, 1998.
8. On July 6, 1998, the Egg Board notified the Appellant that it would be given an opportunity to be heard on July 28, 1998 regarding the matter of the outstanding levies in the amount of \$16,744.96 including G.S.T.. In addition, there were interest charges in the amount of \$26,886.54, including G.S.T..

9. On July 28, 1998, Mr. Devji and his lawyer attended the Egg Board hearing on behalf of the Appellant. Following this meeting, the Appellant agreed to pay \$12,000 in full settlement of the then outstanding interest. Mr. Devji made a verbal proviso to this agreement that if he could produce proof that another producer had been forgiven all or a larger percentage of the interest then he wanted similar treatment.
10. On July 29, 1998, the Appellant provided the Egg Board with a faxed statement from Helmut and Gisella Peters of Sunshine Acres in Black Creek near Campbell River. The statement confirmed that they did not have to pay any penalty interest provided they paid their late levies in full. The Egg Board did not amend its earlier agreement.
11. On October 20, 1998, the Appellant filed its appeal.
12. On December 15, 1998, the Appellant and the Egg Board mediated a resolution to this dispute. Mr. Bob Devji, on behalf of the Appellant, agreed to pay \$9000 in full settlement of the interest penalty on the condition that the Appellant keeps its levy payments in good standing with the Egg Board for a period of two years.
13. Following the mediation, Mr. Bob Devji's father, a shareholder in the Appellant, advised that he was not in agreement with the two year "good standing" clause and proposed a one year period instead. After further negotiation, an amendment was proposed to reduce the "good standing clause" from two years (December 31, 2000) to 18 months (June 30, 2000). The Appellant paid the \$9000 owing on that basis.
14. The Egg Board did not agree to this amendment and chose not to sign the proposed mediated agreement. Consequently the appeal remained adjourned indefinitely.
15. On November 13, 2000, the Appellant re-activated its appeal and sought repayment of the \$9000 in interest paid to the Respondent.
16. On January 17, 2001, the Egg Board signed the mediated agreement with the 18 month "good standing" clause and returned it to the Appellant.
17. The appeal was heard on February 20, 2001.

ARGUMENT OF THE APPELLANT

18. The Appellant takes issue with the rate of interest charged by the Respondent on late payment of levies. In addition, the Appellant argues that the Egg Board does not treat all producers equally. This assertion is made in both a general context as well as in the particular instance of enforcement of the interest penalty.

19. With respect to the rate of interest charged by the Egg Board on outstanding levies, the Appellant asserts that the rate is too high and it should not be cumulative. Had the Appellant been made aware of the consequences of not paying his levies on time, he would have sought financing through a lending institution. Had he done so, the cost of financing would have been approximately \$3-4000. The Appellant offered to pay the Egg Board this amount on account of interest but it was refused.
20. The Appellant argues that as a producer board, it is the function of the Egg Board to assist producers when they encounter difficulties. The Egg Board should not be profiting from these difficulties.
21. In addition, the Appellant argues that with respect to collecting interest, the Egg Board does not treat its producers equally. The Appellant points to the situation of Helmut and Gisella Peters of Sunshine Acres who were successful in avoiding paying any interest penalty on their outstanding levies. The Appellant argues that the Egg Board, having forgiven the interest owed by Sunshine Acres, has set a precedent. Based on principles of fairness and equity, the Appellant who owed considerably less should also be forgiven the full amount of interest penalty.
22. The Appellant also argues that as the Egg Board is a producer board, it is incumbent on that board to treat producers, who are all in competition with one another, equally. One producer should not be given an advantage over another.
23. The Appellant points to the Egg Board's broader conduct and argues that the Egg Board has failed in its duty to treat producers in a fair and equal manner. The Appellant points to a request that it made for information on the Temporary Restricted Licence Quota Program ("TRLQ") on January 7, 1999. The Respondent did not respond to this request until May 17, 2000. As a result of this delay, the Appellant argues that it was denied the opportunity to meet the Egg Board's terms and conditions for obtaining a permit. In addition, had the Egg Board responded in a timely fashion to the Appellant's request, the Appellant could have been second on the list for TRLQ. As it is now, the Appellant's opportunity to participate in this program is limited by his low placement on the list.
24. The Appellant points to another example of unfair treatment at the hands of the Egg Board. Despite advising the Egg Board that the direct deposit system works a hardship on its accounting system, the Appellant has been required by the Egg Board to receive payment through direct deposit. The Appellant knows of at least three other producers who continue to receive cheques and are not required by the Egg Board to receive payment through direct deposits.

25. The Appellant points to the fact that the interest owed results from three instances of late levy payment in 1992, 1994 and 1998. The latter instance was employed as a bargaining device to force the issue with the Egg Board. Based on the foregoing and the inequality of treatment by the Egg Board, the Appellant argues that it should not be required to pay any interest on late levy payments. As such, the Appellant asks for a refund of the \$9000 paid to the Egg Board on account of interest.

ARGUMENT OF THE RESPONDENT

26. The Egg Board denies the Appellant's allegations of unfair and singular treatment both generally and specifically in regard to assessment of interest charges for late payment of levies.
27. With respect to the Appellant's specific allegation of unfair and inequitable treatment in enforcing interest on late payment of levies, the Egg Board believes it has been fair in penalising producers. The Egg Board argues that it is necessary to charge interest on late payment of levies in order to encourage timely payment, a benefit to all producers. Producers must be discouraged from financing their operations through late payment of levies. Producers must be encouraged to seek financing from lending institutions when necessary and not through indirect means from the Egg Board.
28. With respect to the waiver of interest charges against the Peters and Sunshine Acres, the Egg Board argues that this entire situation is a regrettable consequence of an unfortunate series of events. The Egg Board delayed enforcement of late payment of levies by Sunshine Acres as a result of two ongoing court cases, one in British Columbia, the other in Ontario, which could potentially have had an impact on the Egg Board's ability to collect levies. By the time these cases were resolved, the levies and interest owed by Sunshine Acres had accumulated to such an amount that the producer had a significant bargaining position. As a result, the Egg Board in conjunction with the Canadian Egg Marketing Agency ("CEMA") came to resolution with Sunshine Acres. This involved the Egg Board waiving \$312,377.28 in interest against the producer but receiving a portion of the levies from CEMA on account of interest.
29. The Egg Board intends to deal more promptly with cases like Sunshine Acres in the future and take the necessary legal steps to ensure that such an incident does not reoccur. The Egg Board argues that this situation was highly unusual and should not be viewed as a precedent.
30. The Egg Board argues that its usual manner in dealing with late payment of levies is to assess interest. Other than Sunshine Acres, the Egg Board's practise has been to waive a portion of the outstanding interest for those producers who owed a significant amount of interest. The amount varies but the producer usually pays between 35-60% of the interest owed. In the case of the Appellant, the Egg Board ultimately agreed to accept \$9000 and waive \$25,070.39. The Egg Board argues the arrangement made with the Appellant is fair and equitable and in line with how other producers in similar situations have been treated.

31. The Appellant also argued that there has been a pattern of unfair treatment by the Egg Board. The Appellant points to a January 7, 1999 letter inquiring into a permit for free-run production which was not responded to by the Egg Board. The Egg Board acknowledges that through inadvertence, this letter did not receive a response. However, the Egg Board argues that its failure to respond to the letter did not prejudice the Appellant, as the TRLQ program did not apply to free-run production at that time. In order to qualify for a free-range permit, the Appellant would have had to convert his entire operation.
32. The Appellant also argued that it had been required to use a direct deposit system despite the fact it posed administrative difficulties. Three other producers had been exempted from the system. The Egg Board argues that this is not an example of unfair treatment. Rather, had the Egg Board wanted to take a technical approach, the Appellant, as a producer-grader who sells eggs to another producer-grader, does not qualify for the freight subsidy. The subsidy only applies to sales between a producer and grader. However, with the direct deposit system, the Appellant in effect sells its eggs to the Egg Board and not to a grader. Thus, the Appellant is not selling directly to another grader and as such still qualifies for the freight subsidy. Thus, the Egg Board argues that the direct deposit system benefits to the Appellant and is not an example of mistreatment.

DECISION

33. The Appellant argues that it should not be required to pay interest on late payment of levies and seeks repayment of \$9000 in interest charges already paid to the Egg Board. The Appellant's reasons for seeking reimbursement are two-fold. First, there is a precedent in which the Egg Board waived payment of all interest owed by Sunshine Acres upon payment of outstanding levies. The Appellant asserts that all producers should be treated equally and as such, it too should have its interest penalties waived. Second, the Appellant argues that it has been subject to unfair treatment by the Egg Board. The assessment of penalties is just part of a string of inequitable conduct on the part of the Egg Board. In the interests of fairness and equity, the Appellant argues that it should have its interest penalty waived.
34. The Panel has reviewed the circumstances regarding the waiver of interest for Sunshine Acres. It is clear that there was a long-standing dispute between the Egg Board and Sunshine Acres that resulted in levy payments of between \$500-800,000 being withheld. The interest owed on these levies was approximately \$312,000. The Panel is satisfied that this dispute was unusual and in part contributed to by uncertainty created by two legal challenges to the levy system. The Egg Board, in conjunction with CEMA, crafted a special arrangement in order to bring about a resolution.

35. The Panel accepts that having come to this settlement with Sunshine Acres, the Egg Board is not now required to abandon its penalty system. A system whereby producers are charged a penalty for late payment of levies has social utility. It encourages prompt payment of levies and creates a disincentive for producers financing operations through the Egg Board. The Egg Board is not a bank. Producers who are in financial difficulty should be seeking financing through an appropriate lending institution and not indirectly at the expense of other producers.
36. The Appellant argues that had it realised how high the interest charges on late payment of levies were, it would have gone to its bank. The Appellant's lack of knowledge regarding interest charges is not an excuse that now justifies a waiver. Clearly, the Appellant has a choice as to how it manages its financial affairs. The Egg Board cannot be faulted that its rates are not competitive with that of a lending institution.
37. The Egg Board is entitled to deal with producers' delinquent levy accounts in the most effective manner possible. In dealing with producers, the Egg Board does not need to treat every producer exactly the same; rather all that is necessary is that the Egg Board is fair.
38. In the present instance, the Egg Board agreed to accept 25% of the accumulated interest (\$9000) and waive the balance (\$25,070.39). This arrangement is in line with how the Egg Board has treated other delinquent accounts of similar magnitude. The Panel does not find any error in the Egg Board's assessment of the appropriate amount of interest to charge the Appellant.
39. The Appellant also argues that the Egg Board has treated it unfairly and argues that the enforcement of interest penalties is just one of a number of examples of unfair treatment. The Appellant argues that as a result of this inequitable treatment by the Egg Board, the Panel should rescind the \$9000 in interest paid by the Appellant. As set out above, the Panel does not find that the assessment of interest charges against the Appellant is unfair or inequitable.
40. Looking to the alleged Egg Board misconduct, the Appellant has set out two instances of unfair treatment. First the Appellant takes issue with being paid by direct deposit when three other producers have not. The Egg Board's position is that direct deposit was required in order to give the Appellant the benefit of the freight subsidy. Ordinarily, grader to grader transfers do not qualify. However, by going to a direct deposit system, the Appellant gets the benefit of the producer farm gate price. The Panel does not find that imposing the direct deposit system on the Appellant was inequitable or unfair.
41. The second example of alleged misconduct was the failure of the Egg Board to respond to the Appellant's request for information regarding whether there was a permit for producing free-run as opposed to free-range eggs. The Appellant did not receive a response for almost a year and a half. The Egg Board explained that this letter was inadvertently misplaced.

42. With respect to the merits of the inquiry, the Egg Board argues that at the time the letter was written, the TRLQ permit program was only for free-range or organic production and producers were required to convert their entire production to qualify. Given that it is unlikely that the Appellant would have entertained these terms, the Egg Board maintains that the Appellant did not lose anything as a result of its letter not being answered.
43. Despite the fact that the Appellant did not lose anything by the failure of the Egg Board to respond to its letter, it is unfortunate that the letter was not dealt with in a timely and business-like manner. Commodity boards have a duty to regulate their particular industry in a fair and transparent manner. When phone calls or letters go unanswered, there is a perception that the board is not operating in the interests of the producers it is supposed to serve. When commodity boards regularly misspell the names of their producers, there is a perception that the particular producer is unimportant and perhaps that his concerns are trivial. These perceptions exist regardless of whether they are in fact true. Commodity boards must work hard to meet the standards of fairness, equity and transparency.
44. In these circumstances, the Panel is satisfied that the Egg Board's failure to respond to the Appellant's request was an oversight and not part of any deliberate attempt to ignore or inconvenience the Appellant.

ORDER

45. The appeal is dismissed.
46. The Egg Board is not required to reimburse to the Appellant the sum of \$9000 paid on account of interest owed on late levy payments.
47. There will be no order as to costs.

RECOMMENDATION

48. An issue arose during the course of the hearing relating to the manner in which the Egg Board conducts hearings when faced with producers represented by Counsel. On July 28, 1998, Mr. Devji and his lawyer attended for a hearing into Five Cedar's outstanding levy issue. According to Mr. Devji, as the Egg Board did not have its lawyer present, it refused to allow Mr. Devji to be represented during the hearing. A rather convoluted settlement process was then embarked upon with Mr. Devji and his lawyer outside the hearing room and other producers acting as go between with the Egg Board.

49. The Panel is at a loss to understand this process. Simply because a producer chooses to attend a hearing with legal representation does not require the Egg Board to adjourn its hearing to obtain counsel. In this context, the hearing process between the producer and the Egg Board is not adversarial. Given that the Egg Board is acting in an adjudicative fashion, it is not disadvantaged by virtue of the producer choosing to attend with counsel. If anything, the Egg Board should benefit from a well argued presentation on the issues before them. The Egg Board following the hearing could deal with any technical or legal issues requiring legal advice.
50. Once again, the Egg Board's process in this instance creates, at least for the Appellant, an unfortunate perception. This could be easily avoided by adopting for a more open and transparent process in which legal representation, if desired by a producer or other stakeholder, is not discouraged.

Dated at Victoria, British Columbia this 19th day of June 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair
Harley Jensen, Member
Hamish Bruce, Member