

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
AN APPEAL FROM TWO DECISIONS CONCERNING THE TRANSFER OF
SPECIALTY EGG PRODUCTION BETWEEN GRADING STATIONS

BETWEEN:

ISLAND EGG SALES LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

SUPPLEMENTARY DECISION

APPEARANCES:

For the British Columbia Marketing Board

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

For the Appellant

Mr. Christopher Harvey, QC
Counsel

For the Respondent

Mr. Robert P. Hrabinsky, Counsel

Place of Hearing

Nanaimo, BC

Date of Hearing

March 28-30, 2000

INTRODUCTION

1. The Appellant, Island Egg Sales Ltd., appealed two separate decisions of the British Columbia Egg Marketing Board (the “Egg Board”) denying the transfer of free-run eggs to Island Egg Sales Ltd. from another grading station.
2. The Panel released its written decision on the merits of the appeal on August 4, 2000. However, the Panel was unable, on the evidence presented, to come to a decision regarding an appropriate remedy. Nor did we render our decision on the question of costs, referred to at paras. 6, 48 and 100 of that decision. In our decision, written submissions were requested from the parties on the following issues:
 - a) What are the circumstances surrounding any alleged over-production of the Appellant from February 18, 1999 to the present?
 - b) During what time period from February 18, 1999 to the present was the Appellant allegedly over-produced?
 - c) What is the amount of over-quota levy calculated on that over-production?
3. The Panel has considered those submissions and is now prepared to address the issue of the appropriate remedy, and of costs.

DECISION

4. Paragraph 3 of our August 4, 2000 decision raised the issue whether the Panel should set aside over-quota levies assessed against Island Eggs Ltd. (the producer arm of the Appellant). As set out in the earlier decision, there is a rather complicated corporate structure involved in the circumstances leading up to this appeal.
5. Mr. Roy Jensen and Mr. Ian Christison are involved in the egg business. Mr. Jensen operates as a producer on Vancouver Island under the corporate entity “Island Eggs Ltd.”. He operates a grading station under the corporate entity “Island Egg Sales Ltd.”. He is also involved in egg production in the Terrace area with Mr. Christison. Both gentlemen are the sole shareholders of two numbered companies that produce eggs in the Terrace area. Mr. Christison and Mr. Jensen also operate a grading station in Terrace through their corporate vehicle “Daybreak Terrace Ltd.”.
6. As a result of the actions set out in our earlier reasons, the Egg Board has assessed over-quota levies as follows:

Up to February 19, 1999

- a) against Island Eggs Ltd., and Mr. Jensen, the sum of \$23,216.68;
- b) against Island Egg Sales Ltd. and Mr. Jensen, the sum of \$25,313.00;

Up to April 1, 1999

- c) against 414611 BC Ltd., 414612 BC Ltd., Mr. Jensen and Mr. Christison, the sum of \$58,565.36;

Up to June 9, 2000

- d) against 414611 BC Ltd., 414612 BC Ltd., Mr. Jensen and Mr. Christison, the sum of \$19,594.32.

7. The Egg Board maintains that no over-quota levies are due from the Appellant. It now takes a strict view of the corporate structure and disputes the ability of the Appellant grading station to seek the relief of setting aside over-quota levies against a third party.
8. In our earlier decision, the Panel stated as follows:
 95. We acknowledge that our legislation is broad and that we could set the levies aside as a matter of discretion. However, even given our finding that the Egg Board did not exercise correct judgment in dealing with the Appellant's applications for more specialty product, it does not necessarily follow that we should grant relief from the assessed over-quota levies. To accept the proposition that persons should be relieved of the consequences of illegal action because they disagree with an earlier decision by a commodity board would in our view be both undesirable and dangerous. Thus, the BCMB (British Columbia Marketing Board) would normally only entertain granting such relief in very limited circumstances
9. The Egg Board imposed the over-quota levies after specifically rejecting the Appellant's request to grade and market more eggs. The Appellant admits to the illegal production, and does not take direct issue with the Egg Board's jurisdiction to impose the over-quota levies. The Appellant only seeks to challenge the levies indirectly on the grounds that the earlier refusals for more eggs were wrong.
10. To accept the proposition that a person should be relieved of the consequences of illegal action because they disagree with an earlier decision would in our view be both undesirable and dangerous.
11. The reality is that these penalties are not, as the Appellant suggests, a direct consequence of the administrative unfairness of the Egg Board. Rather, they are a direct consequence of the conscious decision by the Appellant's principal to take matters into his own hands through his various companies to operate illegally while

this matter was under appeal. The Appellant could have applied earlier for interim relief from the BCMB, or failing that, from the Court. He did not. Instead, he simply went ahead and knowingly placed an illegal flock. The illegality of those actions has nothing to do with how the BCMB eventually answered the questions about the earlier judgments of the Egg Board.

12. It is a very important principle of law that decisions of courts and tribunals be respected until set aside, by due process of law, in interim or final proceedings. The integrity of regulated marketing is no exception to the general principle that laws and regulatory systems would fall into disrepute if people could react to flawed decisions simply by ignoring them and taking matters into their own hands. We acknowledge that our legislation is broad and that we could set the levies aside as a matter of discretion. However, we do not find circumstances here sufficiently exceptional to override the important principle that persons appearing before the BCMB and those associated with them must obey commodity board decisions unless and until they are overturned or stayed by the BCMB.
13. What if any is the effect of the interim relief granted to the Appellant? The Egg Board applied to adjourn this appeal from its original dates of March 2-3, 2000. In addition to opposing the application for an adjournment, the Appellant applied for interim relief that “no over quota assessments be imposed on the Appellant with respect to production during the month of April, 2000.” The Appellant argued that “[i]t would be clearly unreasonable to allow fines to be levied against Island Egg or Daybreak Terrace which result directly from the [Egg Board’s] adjournment application.”
14. By letter dated February 21, 2000, the BCMB ordered that “any imposition of over-quota levies on the Appellant by the Respondent be stayed pending the hearing of these appeals by the BCMB.” After a request by both Counsel for the Egg Board and the Appellant for a clarification of the terms of the stay, the BCMB reconfirmed its decision in a letter dated February 23, 2000 as follows:

The Panel has issued a stay on the imposition of over-quota penalties pending the March 28-30 hearing. As part of the hearing of the merits of these appeals, the Panel is prepared to consider applications by the parties with respect to the over-quota penalty issue, including whether there should be any interim relief offered to the Appellants.
15. At the commencement of the appeal on March 28, 2000, Counsel for the Egg Board renewed his request for clarification that the February 21 stay extended only to the enforcement and collection of over-quota levies and not to the imposition of levies. Counsel for the Appellant took the position that what the Egg Board was seeking was in the nature of an appeal of the interim relief order and not clarification. The Panel declined to expand on its February 23 letter pending the conclusion of the appeal and subsequent deliberations.

16. As stated earlier, the Panel is not prepared to set aside the over-quota levies assessed against the Appellant's principal for the period prior to the application for interim relief. However, the Panel is of the opinion that given our decision on the merits of the two appeals, it is inappropriate to consider the imposition of any further over-quota levies against the Appellant or any of its related companies, for the period of time after the stay was granted on February 21, 2000.
17. It should be noted that this decision does not in any way limit or restrict the Egg Board's ability to pursue over-quota levies against Daybreak Terrace assessed up to April 1, 1999. The validity of the Terrace over-quota assessments was not at issue in this appeal and as such the Panel is not prepared to set those levies, in the amount of \$58,565.36, aside.

Return of Terrace Quota

18. The Appellant has requested that the Terrace quota be returned to the operations of Daybreak Terrace. All parties except the Egg Board agree to this transfer. Given that the effect of our decision is to overturn the 1998 and 1999 decisions of the Egg Board, the Panel is of the opinion that the Appellant should be returned as close as possible to its pre-1998 situation.
19. The Panel orders that the Terrace quota can be returned to Daybreak Terrace.

ORDER

20. Accordingly, the BCMB makes the following order:
 - a) The over quota levies assessed against the Appellant prior to February 21, 2000 in the amount of \$48,529.68, are confirmed.
 - b) The over-quota levies assessed for the period between February 22, 2000 and the date of this decision, in the amount of \$19,594.32 are set aside; and
 - c) The Terrace quota can be returned to Daybreak Terrace.

COSTS

21. As noted above, the issue of costs was advanced as an issue on appeal, was pursued by the Appellant in argument, and was identified as an unresolved issue by this Panel in its August 4, 2000 decision. In all the circumstances, we believe that this is an appropriate case in which to direct that costs be paid by the Respondent.
22. Prior to December 22, 1999, the BCMB's jurisdiction regarding costs was set out as follows in s. 8(11) of the *Natural Products Marketing (BC) Act* ("the Act"):

- 8(11) In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay the actual costs, within prescribed limits, as calculated by the Provincial Board
- (a) of another party to the appeal, or
 - (b) of the Provincial board, payable to the Minister of Finance and Corporate Relations.

23. In *British Columbia Broiler Hatching Egg Commission v. Reid* (December 17, 1996, Vancouver Registry No. A962845, B.C.S.C.), the Supreme Court confirmed that “the clear intention of the Legislature in enacting (then) s. 11(9) of the Act was to empower the Board to calculate and grant the actual costs of a party to the appeal proceedings”, whether or not a tariff had been “prescribed” by Cabinet.
24. The power to award actual costs was rarely used by the BCMB. It was felt that the determination of “actual costs” presented procedural complications, which could ultimately lead to a further hearing in which “actual costs” would need to be proven. In addition, it was felt that an award of actual costs could be very harsh and would deter aggrieved parties from exercising their appeal rights. As such, it was felt that this power was best used in limited situations.
25. Effective December 22, 1999, s. 8(11) of the *Act* was amended to provide as follows:
- 8(11) In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board
- (a) of another party to the appeal, or
 - (b) of the Provincial board, payable to the Minister of Finance and Corporate Relations.
26. A principal difference between the subsections is that the previous version appeared to contemplate only an order of “actual costs”. The section now gives express flexibility to award “any or all actual costs”. Given the context and the legislative history, we take this to mean that it is open to the BCMB to direct that costs be paid as indemnification for legal costs incurred by the successful party, and to do so in an amount less than actual costs, according for example to conventional standards we might choose to adopt, where considered appropriate, such as those set out in the Supreme Court Rules.
27. While not wishing to be regarded as adopting the judicial practice that “costs follow the event”, particularly with regard to commodity boards which must frequently make difficult judgment calls in a complex area, we are satisfied that the unique facts of this case reach the standard for an order of costs to be made against the Egg Board. For the reasons set out in our August 4, 2000 decision at paragraphs 71-93, the Egg Board’s decisions in this case, while made in good faith, disclosed a number of significant errors in practice and judgment, the cumulative

effect of which had a serious adverse effect on the Appellant and the industry, which in our judgment makes a direction of costs appropriate.

28. Having concluded that indemnification by way of legal costs is appropriate, we conclude that an order of actual costs would be unduly harsh and that indemnification on a basis less than actual costs is appropriate.
29. In considering the most appropriate and principled standard for an amount less than actual costs, we are satisfied that the proper balancing of factors is achieved in this case directing that the Respondent pay the Appellant's costs according to the Tariff for party and party costs set out in Appendix B of the Supreme Court Rules, at Scale 3 for a three day hearing. We adopt that approach to indemnification as being appropriate in this appeal given the nature of the issues involved on this appeal, and would consider a higher scale inappropriate in the circumstances. Consistent with the reality that the appeal proceeded as a full hearing with evidence, the items in the Tariff are to be applied as if the appeal were a trial.
30. In the event that the parties are unable to resolve the specific amount of the Appellant's bill of costs, the Panel remains seized to decide and calculate the final amount.

Dated at Victoria, British Columbia, this 10th day of October, 2000.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

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