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IN THE MATTER OF THE NATURAL PRODUCTS
MARKETING (BC) ACT

AND

IN THE MATTER OF AN APPEAL TO THE
BRITISH COLUMBIA MARKETING BOARD
FROM THE DECISION OF THE
BRITISH COLUMBIA EGG MARKETING BOARD
MADE NOVEMBER 4, 1988
CONCERNING LIVINGSTON EGGS CO. LTD.

BETWEEN:

LIVINGSTON EGGS CO. LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

REASONS FOR DECISION

Appearances:

APPELLANT

Livingston Eggs Co. Ltd
Valerie Osborne, Legal Counsel
Mehboob Jaffer, Principal

RESPONDENT

British Columbia Egg Marketing Board
Bruce Fraser, Legal Counsel
Al Giesbrecht, Chairman
Neill Carey, General Manager
Peter Whitlock, Controller

DATE OF HEARINGS:

DECEMBER 14, 1988
MARCH 7, 1989

1. The matter before the British Columbia Marketing Board ("the Board") is an appeal by Livingston Eggs Co. Ltd. ("the Appellant") from a decision of the British Columbia Egg Marketing Board ("the Respondent") that the Respondent will not accept any claims from the Appellant for price adjustments under the Ship Chandlers Claims Program ("the Program") after December 31, 1988 ("the Respondent's Decision"), which decision was communicated to the Appellant in a letter from the Respondent dated November 4, 1988.
2. The appeal was filed with the Board on November 25, 1988 and was heard at the Richmond Inn in Richmond, British Columbia on December 14, 1988 and March 7, 1989.
3. Both the Appellant and the Respondent were represented by legal counsel and were given the opportunity to call and cross-examine witnesses, present documentary evidence, file written submissions and make oral submissions on the facts and the law.
4. At the hearing on December 14, 1988 counsel for the Appellant made three requests:
 - i) that the hearing be adjourned to allow her and the Appellant adequate time to prepare for the case to be made;
 - ii) that the Appellant be provided with written reasons for the Respondent's Decision which is under appeal;
 - iii) that the Respondent's Decision be suspended pending the hearing and disposition of the appeal.

After hearing submissions on these three points from both counsel, and upon due consideration, the Board adjourned the hearing to March 7, 1989. Counsel for the Respondent provided counsel for the Appellant with a copy of his Hearing Brief, containing a number of documents relating to the Respondent's Decision, and also expanded orally on the Respondent's Decision, which counsel for the Appellant accepted in lieu of written reasons for the Respondent's Decision. At the conclusion of the hearing, counsel for the Respondent agreed to seek an undertaking from the Respondent, that if it suspended the Appellant from the Program as of December 31, 1988, and if the Appellant was ultimately successful in this appeal, the Respondent would indemnify the Appellant for any losses he may incur in this regard between December 31, 1988 and the date of a favourable decision from the Board. If the Respondent was unwilling or unable to provide such an undertaking, it was agreed that the Respondent's Decision would be suspended pending the hearing and disposition of the appeal.

Subsequent to this hearing, the Respondent varied the terms of the proposed undertaking, to retain the Appellant on the Program on the condition that the Appellant would reimburse the Respondent for subsidies paid with respect to sales made between January 1, 1989 and the hearing date, in the event that the Appellant is unsuccessful at that hearing. The Appellant accepted this undertaking under protest and for reasons of expediency and economy.

5. The hearing of the appeal re-convened on March 7, 1989 at the Richmond Inn. It should be noted Mrs. Brun had to leave the appeal and therefore did not take part in the decision. The Chairman advised the Appellant and Respondent of Mrs. Brun's departure from the appeal and asked if they were agreeable to proceeding, given the Board still had a quorum to listen to the appeal. Both the Appellant and Respondent indicated they wanted to proceed with the appeal
6. At the hearing on December 14, 1988 and again on March 7, the question arose as to whether the Board had jurisdiction to hear this appeal.
7. Counsel for the Respondent argued that the Board did not have jurisdiction to hear the appeal for the following reasons:
 - The Program was a business arrangement, and the Respondent's Decision was a business as opposed to a regulatory decision;
 - The Respondent's regulatory authority is basically aimed at the producer and relates to quotas, to levies, to licenses, and is directed at the farmgate;
 - The Program is not a program of the Respondent but a program of the Canadian Egg Marketing Agency (CEMA), and in fact is a variation of the surplus removal program operated by CEMA pursuant to its mandate under the Federal - Provincial Agreement for Eggs, Part IV(f): "to be responsible for the cost of removing from the shell egg market all eggs in excess of demand that are produced within the provincial allocation of the province, provided the province is in compliance with this Agreement;"
 - The Program is far removed from the regulatory body of the Respondent, and is really a contract between the Appellant as wholesaler and CEMA, with the Respondent acting as agent of CEMA, as evidenced in the letters between the parties - it is an open-ended contract with no time limit and no guarantees,
 - The only question is the question of reasonable notice to determine this contract.
8. Counsel for the Appellant argued that the Board did have jurisdiction to hear the appeal for the following reasons:
 - Section 16 of the British Columbia Egg Marketing Scheme, 1967 ("the Scheme") confirms that the purpose and intent of the Scheme is to provide for the effective promotion, control and regulation of a number of things including the promotion of the marketing of eggs in B.C.;

- Section 17 of the Scheme states that the Scheme applies to all persons who are involved in the production, transportation, packing, storing or marketing of the regulated product;
- Section 37 of the Scheme specifically gives the Respondent the authority to carry out that purpose and intent by making such orders as are deemed by the Respondent necessary or advisable to promote, control and regulate effectively the marketing of eggs;
- Privy Council Order No. 677 which was made on April 10th, 1968, pursuant to the Agricultural Products Marketing Act of Canada, granted authority to the Respondent to exercise similar powers with respect to interprovincial or export trading in eggs - in other words, the kind of activity that has been occurring under the Program;
- Under Section 11 of the Natural Products Marketing (BC) Act, subsection (1), the Legislature made clear that any person who is dissatisfied with an order or decision of a marketing board can apply to the Board for redress;
- CEMA and the Respondent set up the Program in 1985 following a proposal from the Appellant;
- In a letter dated May 7, 1985 the Respondent confirmed to the Appellant that the express purpose of the Program was to promote the sale of British Columbia eggs;
- The Program did not create a contractual relationship between the Appellant and the Respondent - it was a program set up and available to anybody in British Columbia, to promote the marketing of B.C. eggs, and that the Legislature in enacting the provisions referred to above intended and was thinking of these types of programs;
- The legislation set up the Respondent and gave it the necessary powers that these types of programs be set up but removed from the realm of contractual law and out of the already over-burdened civil courts;
- To characterize the Program as a pure matter of contract law would be equivalent to characterizing any of the quota systems or programs that are set up between the Respondent and anybody involved in the production, transportation or marketing of eggs as a contractual matter and not under the regulatory authority of the Respondent.

9. After hearing the arguments, reviewing the submissions, and considering the facts and the law, the Board concludes that it has jurisdiction to hear the appeal for the following reasons:

- When asked by counsel for the Board, counsel for the Respondent conceded that the B.C. Marketing Board has jurisdiction to hear this appeal;
- In a letter dated November 21, 1988, CEMA advise the Appellant of its right to appeal the Respondent's decision to either the Board or the National Farm Products Marketing Council (the "Council");
- Privy Council Order No. 677 clearly gives to the Respondent the power to regulate the marketing of B.C. eggs in inter-provincial and export trade;
- Although the authority to regulate inter-provincial and export trade is delegated from the federal government to the B.C. Egg Marketing Board, the Board has jurisdiction to review decisions of a provincial marketing board relating to exports or other powers granted to it by the federal parliament - B.C., Tree Fruit Marketing Board v. R.H. MacDonald & Sons Ltd. and British Columbia Marketing Board (1983) 47 B.C.L.R. 133;
- The Respondent conceded that participation in the program was in the nature of a privilege and that subsidy payments made to participants in the program were subject to a 5 percent administration fee to cover the Respondent's cost of administering the program;
- Section 11(1) of the Natural Products Marketing (B.C.) Act states:
"Where a person is aggrieved or dissatisfied by an order, decision or a determination of a marketing board or commission, he may appeal the order, decision or determination to the provincial board by serving on it, not more than 30 days after he has notice of the order, decision or determination, written notice of his appeal."

Section 11(7) states:

"The provincial board may, on an appeal under this section, dismiss the appeal, or confirm or vary the marketing board or commission on the terms and conditions it considers appropriate."
- It is clear from the Natural Products Marketing (BC) Act that this board has the jurisdiction to hear this appeal. The Appellant is appealing the decision of the Respondent to refuse to accept

any claims from the Appellant for the price adjustments under the program. The administration of this program and the decision making power of the B.C. Egg Marketing Board are clearly authorized by the Act and the Regulations. The Board does not accept the Respondent's submission that the relationship between the Respondent and the Appellant is a matter of contract and the decision to no longer accept any claims from the Appellant for price adjustments under the Ship Chandlers Claims Program is a business decision. Even if the Egg Board's decision was a business decision and not a regulatory decision, The Natural Products Marketing (BC) Act does not distinguish between business decisions and other types of decisions. It makes no difference whether the Respondent's decision to disqualify the Appellant from participation in the price adjustments under the Ship Chandlers Program is a business decision or a regulatory decision. The B.C. Marketing Board has jurisdiction in either case. In any event, this Board finds that the powers and decisions made by the B.C. Egg Marketing Board are regulatory in nature.

10. On the substantive issues under appeal, the Respondent provided evidence on the details of the Program, the problems encountered with the Appellant's participation in the Program and the Respondent's reasons for terminating the Appellant's participation in the Program.

Any eggs that are being exported qualify for the Program. A Revenue Canada Customs and Excise Ships Stores Declaration and Clearance Certificate, Form K 36A is used by the ship chandler to document the name of the ship; the date it was loaded; the destination; the volume, size and grade of eggs loaded. When stamped by Customs, it provides proof that the eggs have left the country. The ship chandler may then claim from the Respondent the difference between the domestic breaker (i.e., processing) price in Canada and the grading station price, recently about 50 cents per dozen. The necessary monies are provided by CEMA, through levies paid by all Canadian egg producers.

The Program, or variations of it, had been operating from time to time prior to 1985. As a result of correspondence between the Appellant, the Respondent and CEMA, the Program was re-established in 1985. There are presently four participants in British Columbia. A similar program operates out of Montreal.

Initially, the Respondent absorbed the administrative costs of running the Program, but within a few months it was found that there are a large number of clerical and accounting errors which were becoming a burden to the Respondent's staff. Consequently, a five per cent administration fee was deducted from subsidy payments made to participants.

In August of 1988, the Respondent noticed that the Appellant's claims under the Program were becoming very large. In particular, claims related to one ship, the Regent Star, were so excessive that the

Respondent decided to do some investigation. It contacted a travel agent to determine the number of passengers on this ship and how often it returned to port. The original calculations indicated that the number of eggs being consumed by passengers on this ship far exceeded the national average, so the Respondent investigated further. Through the travel agent they obtained the name of the ship's owner in New York City and from them the name of the ship chandler who was supplying the ship, Apollo Ship Chandlers of Miami, Florida. Preliminary information provided over the telephone indicated that the number of eggs delivered by the Appellant was about half the number claimed on the Appellant's K 36A forms.

With this information, the Respondent approached its accountants, who advised the Respondent to obtain copies of invoices from Apollo Ship Chandlers and to refer the matter to the Respondent's solicitors.

The Respondent provided copies of a number of the Appellant's K 36A forms, invoices to Apollo Ship Chandlers and invoices to the Respondent for claims under the Program, all pertaining to two of Apollo's ships the Regent Star and the Explorer Starship. One K 36A form and the relevant invoices were examined in detail.

11. After consulting with its accountants and solicitors and after referring the matter to the R.C.M.P., the B.C. Egg Marketing Board decided to suspend the Respondent from participation in the program. The Appellant was not asked to explain the apparent accounting problems. The Appellant was not given an opportunity to hear the allegations against him or to explain the discrepancies in the accounting. It is clear from the evidence before this Board that the Appellant, through an honest accounting error, mistakenly over claimed double its sales and subsidy entitlement with respect to the two Appollo ships. This accounting error occurred over a three and a half month period. As soon as the error was brought to the attention of the Appellant, the overpayment was immediately corrected.

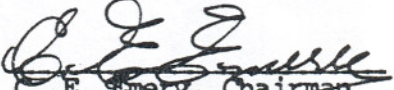
This Board finds that the B.C. Egg Marketing Board acted unfairly and improperly when dealing with the apparent accounting problem. The Egg Marketing Board acted arbitrarily and without the benefit of hearing the explanation offered by the Appellant.

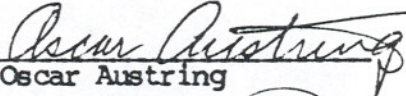
12. Additionally, the Board found the accounting practices of the B.C. Egg Marketing Board and the Appellant related to this program to be loose and lacking in the necessary accounting controls. The Board encourages the B.C. Egg Marketing Board to seriously consider putting in place improved accounting procedures to ensure problems such as occurred in this appeal can be minimized.
13. This Board has had the opportunity to hear all of the evidence and submissions by the Appellant and the Respondent. Based upon these

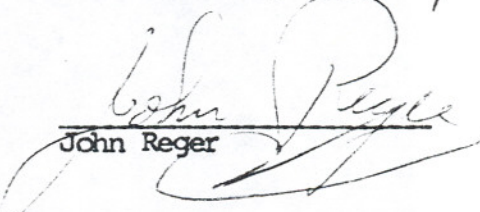
submissions the Board concludes that Appellant was unfairly treated by the B.C. Egg Marketing Board and that the Appellant should be restored to the program.

14. In accordance with this Board's Rules of Appeal, the whole of the Appellant's deposit shall be returned.

Dated this 12th day of May, 1989 in Richmond, British Columbia.


C. E. Emery, Chairman


Oscar Austring


John Reger