

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

AND

IN THE MATTER OF AN APPEAL CONCERNING  
THE OWNERSHIP OF EGGS, LEVIES AND  
FREIGHT PICK-UP CHARGES

BETWEEN:

MORNINGSIDE FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

## REASONS FOR DECISION

APPEARANCES:

For the  
British Columbia Marketing Board

Mr. Doug Kitson, Panel Chair  
Mr. Ross Husdon, Panel Member  
Ms Christine Moffat, Panel Member  
Ms. Maggie Barrett, Panel Secretary

For the Appellant

Mr. Ian Christison, Owner  
Mr. Roy Jensen  
Mr. Ron Floritto

For the Respondent

Mr. Gerry Zaph, Chair  
Mr. Walter Siemens, Member  
Mr. Peter Whitlock, Controller

Date and Place of  
Hearing:

July 25, 1997  
Richmond, British Columbia

## INTRODUCTION

1. The matter before the British Columbia Marketing Board (BCMB) is an appeal by Morningside Farms Ltd. from a decision(s), as communicated in a letter dated March 11, 1997, of the British Columbia Egg Marketing Board (Egg Board) concerning the ownership of eggs, levies and freight pick-up charges.
2. Mr. Christison was assisted in making the Appellant's presentation by Mr. Floritto, each acting as witness in their particular part of the submission.
3. Mr. Zaph indicated that Mr. Whitlock was present to "help with some of the technical, day-to-day operating issues". (Transcript, Page 2) Mr. Zaph further indicated that Mr. Siemens might have some comments to make. In actual fact, the Respondent's case was presented solely by Mr. Zaph.
4. At the outset of the hearing it was discovered that whilst the Appellant had previously received the Respondent's Book of Documents (Exhibit 1), the Respondent had not, until that time, received the Appellant's Book of Documents (Exhibit 2). The Respondent agreed to the introduction of Exhibit 2 but retained its right to object to any or all of the various documents contained therein. No objections were made.
5. The Appellant introduced the matter of the incorporation of Fresh Start Foods Corporation. The Respondent objected on the grounds of relevancy. The evidence was admitted. However, in arriving at its decision the BCMB found that this evidence had no direct bearing on the issues on appeal.
6. Subsequent to the July 25, 1997 hearing, the BCMB requested additional information from the parties.
  - A. From the Respondent, by way of a July 30, 1997 letter from the BCMB, minutes of the Egg Industry Advisory Committee (EIAC) concerning the EIAC's advice on the Electronic Deposit System, and copies of the information slips given to producers concerning their shipments to their grader.
    - On August 5, 1997, the Respondent provided two documents presented to the EIAC members at the time of the discussions on producer payments and confirmed that the EIAC minutes made no specific reference to the electronic deposit system.
    - Also on August 5, 1997, the Respondent provided producer information slips detailing the deposits made to individual producer accounts.
  - B. From the Appellant, by way of an August 7, 1997 letter from the BCMB, further information on the matter of state trading.
    - On August 19, 1997, the Appellant responded by letter, including an August 11, 1997 memorandum from Dr. Linda Chase Wilde of

the Trade Competition Branch (TCB) of the Ministry of Agriculture, Fisheries and Food (MAFF).

The Panel received further correspondence on this issue as follows:

- September 2, 1997 from the Respondent;
- September 8, 1997 from the Appellant; and
- September 9, 1997 from the Respondent.

## **ISSUE**

7. The Appellant takes issue with the Respondent assuming ownership of eggs (directing product to itself, selling the product to the graders, receiving payment from the graders, and then paying producers for the product via an electronic transfer, direct deposit system). The Appellant also takes issue with the transparency of levies under such a system and the requirement for producer-vendors to pay the freight levy charged for farm-gate pickup.

## **BACKGROUND**

8. Towards the end of February, 1997, Mr. Whitlock contacted Mr. Christison and requested that Mr. Christison provide his bank account number to facilitate direct deposit payment for eggs graded. Mr. Christison refused to comply with this request until he was in receipt of more information concerning this change.
9. On February 28, 1997, Mr. Christison wrote to Mr. Zaph, requesting "any and all information pertaining to the Board policy change on how payment is made to producers for their eggs" (Exhibit 2, TAB 1) as well as information on the freight levy being charged to all producers and who qualified to receive it.
10. Mr. Zaph responded on March 11, 1997, but in Mr. Christison's opinion, this letter did not provide the requested information and he filed his appeal with the BCMB on April 18, 1997. The appeal was from the Egg Board's decisions to take ownership of all eggs produced by registered producers; its goal to obscure, disguise or cover up the term "Levy"; and the charging of a freight levy for the farm gate pick-up of eggs.
11. On May 5, 1997, Mr. Christison again wrote to the Egg Board requesting information on the three issues under appeal to the BCMB. On May 14, 1997 he received copies of information submitted by the Egg Board to the BCMB, including minutes of the Egg Board meeting of March 12, 1997 confirming that the Directors of the Egg Board passed a motion instructing that all registered and unregistered egg producers shipping to registered grading stations be directed to the Egg Board.

## **ARGUMENTS OF THE APPELLANT**

12. The Appellant argued that the 'British Columbia Egg Marketing Board Standing Order' (Standing Order) provides the rules under which the Respondent regulates

and controls the egg industry. The process of requiring all registered and unregistered producers to start shipping to the Respondent puts it in contravention of its own Standing Order. In addition, the Appellant argued that Section 2(f)(ii) (Exhibit 2, TAB 13) of the Standing Order requires the “operator of a registered egg station” to make payment or final settlement for the eggs received within 10 days.

13. That under Section 3(a) (Exhibit 2, TAB 12) of the Standing Order, the Respondent “may designate the agency” to which a producer markets their eggs, however, in directing all producers to itself, the Respondent contradicts Section 3(b) of its own Standing Order, which defines a marketing agency as a “Registered Grading Station”, which the Appellant argues the Respondent is not.
14. The Appellant further argued that in taking ownership of all regulated product, the Respondent is in effect pooling, and that there is no provision in the Standing Order allowing for pooling.
15. The Respondent is in contravention of the British Columbia Egg Marketing Scheme, 1967 (the Scheme) on two counts: viz. Section 37(k) regarding pooling and Section 37(b) regarding a central marketing agency, by virtue of the fact that there are no provisions in the Standing Order covering these two matters.
16. The Appellant argued that the ship chandler program is also pooling.
17. It was the Appellant’s assertion that if “the B.C. Egg Marketing Board is the purchaser of all eggs from registered producers then there is no regulation in the standing orders enabling them to be the sole agent, nor is there a regulation designating the time frame within which the Board must pay producers.” (Transcript, Page 25)
18. It was of particular concern to the Appellant that the Respondent’s Board of Directors had, at a meeting on March 12 and 13, 1997, passed the following motion: (Exhibit 2, TAB 11)

“It was duly MOVED and SECONDED that all egg producers including unregulated producers shipping to registered grading stations that are not presently directed to the Board be and they are hereby directed to the Board and that management bring these producers on line with respect to the direct deposit payment stream as soon as convenient logistical arrangements can be made with graders and the affected producers. - Carried.”
19. The Appellant argued that the “implementation of this motion...before ensuring that the standing orders have been complied with indicates a disregard for the rights of producers and the foresight involved in developing these regulations which protect both producers and the Board itself.” (Transcript, Page 25)
20. The Appellant, in lodging the appeal, raised not only the question of the Respondent assuming ownership of eggs, the product being directed to the Respondent, the Respondent selling the product to the graders and receiving payment from the graders, but specifically the method of payment to producers via an electronic transfer, direct deposit system.

21. The Appellant argued that, in a conversation with Mr. Whitlock on February 26, 1997 regarding direct deposit, Mr. Whitlock stated that the Respondent wanted to hide levies from the government. "I asked him to put the information in writing but he refused." (Transcript, Page 30) The Appellant further argued that an "organization that has been put in place by government to benefit producers should be very careful how it hides, bends or omits information. In order to insure support everyone must be confident the system is transparent." (Transcript, Page 30)
22. In response to a question (Transcript, Page 46) from the Panel, the Appellant gave evidence that it was not currently being paid by direct deposit but that its concern was that the levies may not show up under this system.
23. The Appellant, in evidence, stated that the Respondent, in making its decision regarding ownership of eggs, did not take into consideration the potential impact of Canada's responsibilities as a member of the World Trade Organization (WTO). the 'Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994' states in part: (Exhibit 2, TAB 16)

*"Members,*

*Noting* that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

*Noting* further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

*Recognizing* that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby *agree* as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade In Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchase or sales the level or direction of imports or exports."

24. The Appellant further argued that the "Trade Competition Branch of the Ministry of Agriculture has determined and notified the Multilateral Trade Policy Division of Agriculture and Agri- Food Canada that there are presently no State Traders in the province" and also contends that:- "With the B.C. Egg Marketing Board taking this ownership position the Provincial Government must be notified to allow them to re-assess the situation." (Transcript, Page 27)

25. In response to the request by the BCMB, the Appellant, in an August 19, 1997 letter, argued again that the Respondent met all of the requirements for a State Trader, re-iterating that the Respondent, under the ship chandler program, owns and sells for export eggs, which it subsidizes up to \$ .90 per dozen. The Appellant further asserted that at that point, the Respondent had “not shown due diligence” and shown “negligence” in not investigating the situation or the ramifications of this issue. Included with this letter was the memorandum from Dr. Chase Wilde of the TCB expressing concern and seeking clarification on this issue. The Appellant’s letter of September 8, 1997 states in part:-

“Mr. Zaph is only now investigating the question of State Traders and has not provided any credible information. He has left the responsibility for proving the relevance of this issue to the BCMB.”

26. Finally, the issue of the farm gate pick-up levy was addressed by Mr. Ron Floritto. Mr. Floritto is the Manager of Daybreak Farms (Daybreak) owned by the Appellant, in partnership with Mr. Jensen, and located in Terrace, British Columbia. It is situated “1450 km from Vancouver, 1100 km from Kamloops and 600 km from Prince George.” (Transcript, Page 35) Mr. Floritto reported that this operation had a dual function, as an egg producer and as an egg grader. It does not consist of a separate production unit and registered grading station. Rather, it is a producer-vendor operation both in designation and in fact, producing eggs and grading them. These two operations are integral parts of one unit. Currently the Respondent pays members of the B.C. Egg Processors Council, which represents the grading stations in the Province, \$500,000 per year or approximately \$ .01 per dozen to help defray the cost of picking up eggs from B.C. egg producers. As a producer-vendor, the Appellant is not able to receive this assistance, however, as a producer is required to pay a \$ .01 per dozen levy.

27. Mr. Floritto argued that although pick-up costs were not a concern, other costs were incurred. For example, because of Daybreak’s remote location, the Spent Fowl Removal Program was not available on a practical basis and consequently this necessitated Daybreak carrying the burden of removal itself. In addition, Daybreak incurs additional freight costs while competing in the same marketplace as grading stations who are subsidized by this levy.

28. In response to a question (Transcript, Page 51) from the Panel, Mr. Floritto stated that Daybreak had asked for an exemption from the freight pick-up levy at a hearing with the Respondent some two years prior and had been refused.

29. Earlier in the proceedings, the Appellant, addressing the Spent Fowl Removal Program, stated that:- “When we asked the BCMB for assistance in defraying some of these “Spent Fowl Removal” costs, we were told that “it is our choice to be located where we are and we alone are responsible for our extra costs”.” (Exhibit 2, Issue 3, ‘Producer Vendors’)

## ARGUMENTS OF THE RESPONDENT

30. The Respondent argued that the *Natural Products Marketing (BC) Act* (the Act), the Scheme and the Federal/Provincial Agreement for Eggs govern the activities of the Respondent and that the provisions of the Standing Order, created by the Respondent, govern the activities of the producers. It further stated that there needs to be a clear understanding of who governs whom.

31. The Respondent stated that, contrary to the assertions of the Appellant concerning communications, the Respondent had an extensive system of communications through producer association meetings attended occasionally by the Respondent's members or staff, and attending the four-times a year meetings of the Joint Producer Association. In addition, the Respondent publishes a newsletter, in conjunction with the other four supply managed commodities, six times per year and holds an Annual General Meeting as well as a variety of special meetings. In short, the Respondent asserted that "there is no lack of information provided to producers." (Transcript, Page 56)

32. The Respondent referred to a letter provided at Exhibit 1 (TAB 4). This is a letter dated March 20, 1997 from Mr. James Sandever, General Manager of the BCMB and addressed to the Respondent. This letter refers to an enquiry from the Appellant, asking about the appeal process prior to this appeal being launched, and states in part:

"...the Trade Competition Branch...as (SIC) received similar calls from graders and producer-vendors about the lack of information or discussion on this topic by the Egg Board."

33. The Respondent asserted that it had not received any calls complaining about the lack of information and that the producers certainly have the ability to obtain information concerning any of the events and issues raised in this appeal.

34. The Respondent expressed surprise at the inclusion of the matter of state trading, however, stated that its belief that it was already a state trading agency. Various comments were made with respect to the activities of the Canadian Egg Marketing Agency (CEMA). The outcome of this discussion was that the Respondent undertook to look into this matter further.

35. The September 2, 1997, letter from the Respondent stated, in part that:

"I discussed the issue of "state trading enterprises" with the Chair, Vice Chair and CEO of the Canadian Egg Marketing Agency. Mr. Christison has already provided the definition. No one with whom I have discussed the matter sees the relevance of ownership of eggs or payment for eggs by the Board as an issue as the WTO Agreement is an international trading agreement dealing with imports or exports. The Board does neither."

The letter suggested "two independent sources who can provide you (the BCMB) with the background required to deal with this argument." The letter concluded with the Respondent taking umbrage with comments in the Appellant's August 19, 1997 letter "that the BCMB has been negligent" regarding this issue.

36. The Respondent stated that, whilst the regulated system deals with the domestic market, there is a small amount of excess production exported. "The national system does not provide a mechanism for domestic levy to pay the subsidy on those exports; therefore, there's a producer levy, a direct producer levy for that. And it's always been in the system. It exists today, and it's always approximately one cent." (Transcript, Page 58)
37. The Respondent argued that it has been moving producers over onto the direct deposit system for some time. "We have a fairly complicated and complex accounting and data-accumulation system/computer at the board offices. Each grading station has its own accounting system, its own type of software", (Transcript, Page 58) necessitating the need to coordinate the systems used by the graders with that of the Respondent "in a piecemeal fashion." (Transcript, Page 59)
38. It was further argued by the Respondent that ownership and payment of the eggs had been changed from "the old way" (Transcript, Page 82) in which the eggs went from the producer to the grader with the title passing to the grader. The eggs were then graded and sold to the retailer with title passing to the retailer. The money flowed in reverse. The Respondent concluded:- "That's not quite right, but it will suffice for the explanation." (Transcript, Page 82) When the grader got the money, the grader paid the producer. Under the "new way" (Transcript, Page 82) the only change has been to direct the producers to the Respondent. The eggs still go the same way: producer, grader, customer but the ownership of eggs has changed by one step. The producer now sells title to the eggs to the Respondent which then sells title to the graders. The cash now flows from the retailer or the breaker to the grader and the grader pays the Respondent. The Respondent then pays the producer. The only change is that the Respondent has inserted itself into the ownership cash flow trail. Under the old system money was paid by cheque from graders to the Respondent. The Respondent then paid producers by cheque. Now, the graders continue to pay the Respondent by cheque, but the Respondent pays the producers (with a few exceptions) by direct deposit.
39. In response to questions from the Panel concerning the involvement of the EIAC, the Respondent was unclear as to whether the EIAC was in accord with the use of the direct deposit system.
40. On August 5, 1997, as a result of the BCMB's July 30, 1997 letter requesting minutes of the EIAC regarding the direct deposit system, the Respondent submitted a lengthy discussion paper, presumably prepared for the benefit of the EIAC but which did not, however, address the issue in question. The BCMB was informed that:- "Details relating to specific discussions are not normally shown in the minutes but are likely recorded (SIC) the shorthand transcript of the meeting." No notes were received.
41. The producer information slips were supplied by the Respondent as requested by the BCMB. Provided were samples of the slips given to the producers by the graders detailing how deposits to their accounts were calculated, as well as copies of the annual letters to producers advising of the levies to be deducted each week.

42. The Respondent, in answer to a question (Transcript, Page 89) from the Panel, agreed that the change of ownership was not simply an administrative change. With the Respondent now the owner of the eggs, there is a fundamental change which gives the Respondent a great deal of power.
43. The Respondent further argued that the changes in the retailing and distribution industries require the industry to adapt.
44. The Respondent argued that the authority to impose a pick-up levy was a matter within its jurisdiction, accomplished by a \$ .01 levy “applied to all producers uniformly”. (Transcript, Page 64) The distribution of the \$500,000 referred to in the Appellant’s argument is done in accordance with criteria established by the B.C. Egg Processors’ Council and not by the Respondent.

### **FINDINGS BY THE BCMB**

45. The BCMB finds without merit the Respondent’s argument that its Standing Order does not, in any way, govern the actions of the Respondent. The Respondent derives its authority from:
  - a. the Act and its regulations; and
  - b. the Scheme.

The Respondent is authorized to issue orders, which are subject to appeal and, in some cases, are subject to approval of the BCMB acting in its supervisory capacity. The Respondent, like its producers, must abide by its own orders except when they conflict with its governing legislation. The Respondent may, however, change such orders as appropriate, subject to the right of appeal and the BCMB’s supervisory authority. Indeed, the Respondent has an obligation to do so.

46. The Respondent is not contravening 37(b) or Section 37(k) of the Scheme simply because, as the Appellant argues at paragraph 15, the Respondent did not make provisions in its Standing Order concerning pooling and a central marketing agency.
47. In the matter of the ownership of eggs, the BCMB finds that the Respondent has erred procedurally.
  - A. There may well be good and sufficient reason for wishing to accomplish such ownership, however, the BCMB considers that the Respondent failed to introduce this change in a proper manner.
  - B. The BCMB is not convinced that, despite what ostensibly appears to be an extensive communications program, the Respondent effectively informed its constituents in a clear fashion of the ultimate purpose or consequence of the change.
  - C. The entire procedure appears to have been enacted without reference to the EIAC.

Section 36 of the Scheme states, in part and in reference to the EIAC, that :-

“The role of the committee is to advise the board, on the request of the board or on the initiative of the Committee, concerning any matter relating to the pricing or production decisions the board has made or may make.”

There is no indication that this procedure was followed. The BCMB recognizes that the new system was introduced, at least in part, prior to the establishment of the EIAC. However, with a change of such magnitude, the Respondent should have availed itself of the expertise within the EIAC, but not necessarily within the Respondent's own resources.

48. The BCMB finds that the Respondent acted prematurely in introducing a new direct deposit system without first seeking the advice of the EIAC.
49. The reference (paragraph 35) by the Respondent, in the matter of state trading, to “two independent sources” to provide “background required to deal with this argument”, does not assist this appeal. The BCMB finds, therefore, that there are grounds for further investigation and this matter will be dealt with elsewhere in this decision.
50. The BCMB finds that in the issue of the transparency of levies, the argument of the Respondent has little merit. It may be that the system should be changed to eliminate the term levy, but simply to “get rid of the word” (Transcript, Page 86) has all the appearances of a pretext. The Respondent testified, in response to a question from the BCMB concerning the situation elsewhere that: “None of others (SIC) do, because one province on its own can't.” (Transcript, Page 87) It was indicated that the four western provinces “are trying to find a mechanism to do that.” (Transcript, Page 87) There was no indication that the EIAC had made input into such considerations.
51. As it was not contradicted by the Respondent, the BCMB accepts the Appellant's claim, in paragraph 21 of this decision, that a staff member of the Respondent did state, in response to a question concerning direct deposit, that the Respondent wanted to hide the levies.
52. The BCMB finds that the issue of the requirement for producer-vendors to pay the freight levy charged for farm gate pick-up is out of time. In evidence, it was determined that this issue had been dealt with by the Respondent approximately two years ago. The BCMB further finds that there are no special circumstances warranting an extension in the time for filing an appeal of this issue, as required by Section 8(1) of the Act.

## **DECISION**

53. The following issues are referred back to the Respondent for reconsideration in accordance with Section 8(9)(b) of the Act:
- a. the ownership of eggs by the Respondent;
  - b. the payment by the Respondent via an electronic transfer, direct deposit system;
  - c. the transparency of levies; and
  - d. the matter of state trading.
54. The Appellant's application concerning the requirement for producer-vendors to pay the freight levy charged for farm gate pick-up is denied.
55. As neither party requested costs be awarded, no such order will be made.

## **DIRECTION**

56. The Respondent is to resolve and report to the BCMB on the issues in paragraph 53 within 60 days from the date of this decision. The BCMB, in this decision, has not ruled on the Respondent's legal jurisdiction or its asserting ownership of eggs, but requires the Respondent, in addressing the BCMB's directions and after conducting the requisite consultations, to clearly set out its legal jurisdiction and any policy justification with respect to these matters.
57. In support of the decision in paragraph 53 and the direction in paragraph 56, the Respondent is to consult, in a timely fashion, with:
- a. the EIAC with regard to all matters concerning price and ownership arising from this appeal; and
  - b. the TCB and the BCMB on all matters referred back to it.
58. The BCMB further directs the Respondent to:
- a. advise the Respondent's constituency of the matter of pricing and ownership as in 57(a) above and invite comment from all producers and graders to be directed to the EIAC in a timely fashion; and
  - b. determine how to best advise all producers of eggs, and other affected stakeholders, of the eventual outcome of the Respondent's decision(s).
59. Pending the BCMB's review of the Respondent's report in compliance with this decision, the Respondent will be responsible for the methods for the acquisition and payment for eggs.

## **RECOMMENDATION**

60. The BCMB recommends the Respondent seek the advice of the EIAC concerning the issue of the producer-vendor levy charged for farm gate pick-up and then revisit this matter.

## **REMARKS**

61. The BCMB is fully appreciative of the difficult economic climate facing the industry. Whilst the BCMB understands the need for change, it has serious concerns that the Respondent's constituency has not been made aware of, or understood the many changes occurring in the marketplace.

Dated at Victoria, British Columbia, this 23rd day of September, 1997

British Columbia Marketing Board  
Per

*(Original signed by):*

Doug Kitson, Panel Chair  
Ross Husdon, Panel Member  
Christine Moffat, Panel Member