

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL FROM A DECISION OF THE  
BRITISH COLUMBIA EGG MARKETING BOARD  
CONCERNING A FLOCK SEIZURE

**BETWEEN:**

BILL POTTRUFF

**APPELLANT**

**AND:**

BRITISH COLUMBIA EGG MARKETING BOARD

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia Marketing Board	Ms. Christine J. Elsaesser, Vice Chair Ms. Karen Webster, Member Mr. Richard Bullock, Member
For the Appellant	Mr. Bill Pottruff
For the Respondent	Mr. Peter Whitlock, Interim General Manager
Date of Hearing	September 30, 1999
Place of Hearing	Nanaimo, British Columbia

## INTRODUCTION

1. On July 14, 1999, the British Columbia Egg Marketing Board (the "Egg Board") obtained a Search Warrant for the farm of Mr. Bill Pottruff (the "Appellant") at Ladysmith, British Columbia. The Warrant was obtained for the purpose of determining whether the Appellant was producing regulated product, eggs, from a flock in excess of that allowed under the regulatory authority of the *British Columbia Egg Marketing Scheme, 1967* (the "*Scheme*") and the Egg Board's Standing Orders. Two Field Representatives of the Egg Board attended at the Appellant's premises on July 14, 1999 in the company of two members of the RCMP and enforced the Search Warrant. As a result of confirming that the Appellant had in excess of 99 laying hens and was thus in contravention of section 2(a) of the Egg Board's Standing Orders, the Field Representatives issued a Seizure Notice on the Appellant's flock.
2. The Appellant takes issue with the process employed by the Egg Board and its Representatives leading up to the issuance of the Seizure Notice.

## ISSUES

3. In seizing the flock, were the actions of the Egg Board appropriate?
4. In issuing a Seizure Notice, did the Egg Board breach their Standing Orders?
5. Was the process followed by the Egg Board similar for past seizures on Vancouver Island if any, or was singular treatment directed against the Appellant?
6. Should compensation sought for lost chickens, plus potential of lost chickens, be awarded?

## FACTS

7. In approximately 1994, the Appellant Bill Pottruff and his wife Phyllis Pottruff purchased two acres of agricultural land in Ladysmith, BC. The Appellant built a barn on the property and some time in 1995 began raising laying hens. At the time of the seizure, the Appellant had approximately 900 hens in his flock.
8. In the spring of 1999, in response to reports of unregulated flocks on Vancouver Island, the Egg Board conducted an audit of the Vancouver Island grading stations. As a result of the audit, two producers were identified as appearing to produce eggs outside the Egg Board's regulations. The two producers were Mr. Bill Pottruff and his father, Mr. Pete Pottruff. The Egg Board requested that its Field Representatives investigate the operations of both producers. As a result of the investigations, the Egg Board seized the flock of Mr. Pete Pottruff in April 1999.

9. During the next few months, the Egg Board continued to investigate the Appellant. The Field Representatives decided to conduct an on-site investigation of his farm on their next visit to Vancouver Island.
10. Some time between 3:30 and 4:30 p.m. on July 12, 1999, two Egg Board Field Representatives, Mr. Elmer Friesen and Ms. Jan Legere, attended at the Appellant's farm at 3259 Hallberg Road in Ladysmith. After checking at the house and out buildings, the Field Representatives concluded that no one was at home and left a business card. The two Field Representatives returned to the farm at approximately 6:00 p.m. that same day and again found no one at home.
11. On July 13, 1999, Mr. Friesen and Ms. Legere returned to the Pottruff farm between 8:30 and 9:30 a.m.. Although no one was at home, Mr. Brad Moes, an acquaintance of the Appellant, approached them. Mr. Friesen advised that he was trying to contact Mr. Pottruff and gave Mr. Moes a business card. There is some uncertainty in the evidence. Mr. Moes states that he advised the Field Representatives that the Appellant would be home that evening between 6:00 and 6:30 p.m.. The evidence of the Appellant and the Field Representatives is that they were advised between 5:30 and 6:00 p.m.. Not much turns on this distinction. That evening, Mr. Moes gave the business card to the Appellant at the Volunteer Firefighters' practice.
12. Later that day and after discussions with Mr. Peter Whitlock, Interim General Manager of the Egg Board, the Field Representatives contacted the Appellant's father, Mr. Pete Pottruff, a former Field Representative of the Egg Board, to inquire as to whether he had a key to his son's barn and whether he would let them in. Mr. Pottruff declined to assist the Field Representatives; in his opinion it was none of his business.
13. That evening at approximately 8:00 p.m., Mr. Friesen and Ms. Legere returned to the Appellant's farm and again found no one home. On their return on the morning of July 14, 1999, somewhere between 5:00 and 5:30 a.m., they found Mrs. Phyllis Pottruff at home. She advised the Field Representatives that the Appellant had already left for work and would be home at 5:30 p.m.. She gave Mr. Friesen her husband's cell phone number but two attempts to reach him were unsuccessful. Mr. Friesen requested that Mrs. Pottruff let them into the barn. She advised that she did not have a key as, due to allergies, she did not enter the barn.
14. The Field Representatives left the Pottruff farm and contacted Mr. Whitlock at the Egg Board office. A decision was made that, as it appeared that Mr. Pottruff was attempting to avoid the Field Representatives, they would proceed with a Search Warrant. They appeared before a Justice of the Peace in Nanaimo at 9:00 a.m. on July 14, 1999. The first attempt at obtaining a Search Warrant was unsuccessful and the Field Representatives were required to obtain more information from the Egg Board office records. After obtaining the necessary information, the Field Representatives obtained the Search Warrant on the grounds that:

Regulated product being laying hens and records with respect to their production and marketing are located at farm premises and that an offence has been committed under Section 4(a) to (c) of the Standing Order of the British Columbia Egg Marketing Board in that an opportunity to examine and inspect and seize such regulated product and records has been denied the informant who is authorized to conduct such an inspection and examination.

15. The Search Warrant authorised a search at the Appellant's residence at 3259 Hallberg Road in Ladysmith between the hours of 1:00 p.m. and 9:00 p.m. on July 14, 1999. Mr. Friesen and Ms. Legere then attended at the RCMP detachment and requested the assistance of an RCMP escort in carrying out the Search Warrant.
16. At approximately 3:00 p.m. on the afternoon of July 14, 1999, the two Field Representatives in the company of two RCMP members carried out their search of the Appellant's farm. As there was no one at home, Mr. Friesen used a crowbar to gain access to the Appellant's barn. Given that he was unable to gain access through the rear door, the lock on the front door was also broken. Both Mr. Friesen and Ms. Legere entered the barn and performed a visual count, which confirmed there were in excess of 99 laying hens. As a result, a Seizure Notice was posted on the door of the barn.
17. After leaving the Appellant's farm, Mr. Friesen contacted Mr. Dave Biddlecombe, a part-time employee of the Appellant's, and advised him of the need for some one to secure the Appellant's barn as result of their forced entry.
18. The Appellant returned home that evening and found that both doors of his barn had been forced opened. As a result of his belief that the process followed by the Egg Board was an abuse of authority, he filed an appeal.

#### **ARGUMENT OF THE APPELLANT**

19. The Appellant argues that the Egg Board has abused its power to obtain a Search Warrant and issue a Seizure Notice. He argues that in the circumstances a letter setting out the Egg Board's position would have sufficed. The allegations made by the Appellant are serious; he describes the Egg Board's conduct as "Oppressive and Malicious". He feels that he has suffered an invasion of privacy and destruction of his property at the hands of the Egg Board.
20. Further, the Appellant argues that the conduct of the Egg Board in forcibly entering his barn without first speaking to him is "inappropriate" and "a disgusting abuse of authority". He does not believe that the Field Representatives made an adequate attempt to contact him. The Appellant argues that the Field Representatives should have attended at his farm on July 13, 1999 during the time when Mr. Moes advised that the Appellant would be home. In addition, the Appellant maintains that it was wrong for the Field Representatives to exercise the Search Warrant in light of Mrs Pottruff's advice that he would be home at 5:30 p.m. on the evening of the 14<sup>th</sup>.

21. The Appellant challenges the grounds on which the Search Warrant was obtained. He maintains that it is incumbent on the Egg Board to "have all their I's dotted and all of their T's crossed". A Search Warrant must be done properly or else it is invalid and should be "repealed". He points to the suggestion that the feed bin was full. Although it is a small point, he argues that there is no way the Field Representatives could know how full it was based on banging it as high as a person could reach. He also maintains that his wife did not deny the Field Representatives access to the barn, rather she did not possess a key. This is for "security" reasons so that relatives or children could not be let into the barn in his absence. The precise nature of his wife's comments was not adequately portrayed in the Information to Obtain a Search Warrant.

22. The Appellant argues that from their evidence, it is clear that both Field Representatives assumed they were being avoided. This assumption came from their incorrect belief that the Appellant's car had moved over their three days of investigation. It was this incorrect assumption that led them to obtain the Search Warrant. The Appellant argues that assumptions should not form the basis on which a Search Warrant is obtained. The Appellant also points to what he believes is a technical flaw in the issuance of the Notice of Seizure. According to s. 17(f)(ii), the Appellant argues the Notice of Seizure must be given to:

...any adult person in, upon or about the premises where the same is found or to any adult person who appears at the time of seizure to be in charge at any place, premises or vehicle in, on or about or near which the regulated product is found.

23. The Appellant argues that as this was not done, the Seizure Notice is invalid and must be set aside.

24. The Appellant also argues that by proceeding to a Search Warrant, the Egg Board breached its own Standing Orders. Section 17 sets out several steps that the Egg Board is to follow before attempting a flock seizure. Section 17(a) provides that where a Representative believes there is a contravention of Egg Board orders, the "contravener" will be given written notice of the breach and requested to rectify the breach. If the "contravener" fails to rectify the breach, according to s. 17(b), the Egg Board Representative shall refer the matter to the Egg Board who will, pursuant to s. 17(c), notify the "contravener" of his opportunity to be heard in respect of the apparent contravention. Section 17(d) and (e) set out the right to a hearing and subsequent right of appeal of any decision. The Appellant argues that only when the Egg Board has used the remedies under s. 17(a) through (e), should it then exercise its right to seize a flock. He argues that there is no reason why the Egg Board could not have started the process by using written notification as opposed to the heavy handed approach of a seizure. Even if it is a "paper seizure", the Appellant argues that the process followed by the Egg Board is not in line with expected standards of conduct.

25. The Appellant argues that the Egg Board has singled him out for unduly harsh treatment. The Appellant points to the Seizure Notice issued to his father in the living room of his father's home. There was no forcible entry. He also points to a seizure that his father initiated at Douglas Lake Ranch in 1993. The issue relating to this seizure has still not been resolved and in fact the flock was "re-seized" in 1998. The Appellant argues that the Egg Board has been lenient in other situations and yet has pursued him vigorously without any explanation.
26. Finally, the Appellant seeks compensation as a result of the alleged heavy-handed conduct of the Egg Board. The claim can be broken down as follows:

a) Damage to barn structure and locks	\$600.00
b) Invoice Handling Fee	60.00
c) Replacement cost, 9 layers	72.00
d) Lost potential income from 9 layers	202.50
e) Appeal costs (filing fee)	100.00
f) Appellant's Time (83.5 hrs @ 22.84 + 0.5 OT adj.)	2,860.71
g) 3 days lost employment (3 @ 8Hrs @ 22.84)	548.16
(3 @ 1Hr @ 22.84-Travel Time)	68.52
(3 @ 1.5 Hr @ 21.44-Driving OT)	96.48
h) Misc. long distance charges	250.00
i) Misc. photocopy and paper costs	175.00
j) Lost time compensation, (4 witnesses @ 200.00)	800.00
k) Misc. office costs	250.00
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Total Costs	\$6,083.37

27. In addition to his claim for compensation, the Appellant also seeks punitive damages against the Egg Board in the amount of \$6,083.37.

#### **ARGUMENT OF THE RESPONDENT**

28. The Egg Board takes the position that under authority granted by the *Scheme* and the Standing Orders, it has the power to regulate the egg industry in British Columbia. Not all egg production within BC is covered by quota. The *Scheme* and Standing Orders specifically allow for unregistered flocks not in excess of 99 birds. However, should a grower choose to expand beyond 99 birds without purchasing quota, they are committing a violation of the Standing Orders. Where the Egg Board suspects that a grower is illegally operating a flock in excess of 99 birds, the *Natural Products Marketing (BC) Act* (the "Act"), *Scheme* and Standing Orders allow for search and seizure. This power of search and seizure is used sparingly as a method of getting a matter before the Egg Board for a full hearing. Although a flock is "seized", the seizure is on paper only. Thus, a grower can continue to operate his flock until such time as the Egg Board hears the matter and makes a ruling.

29. In the circumstances of this case, the Egg Board takes the position that they have acted reasonably and within their Standing Orders based on the information available to them at the time. The Egg Board responded to concerns regarding unregistered flocks on Vancouver Island by carrying out an audit of the Island grading stations in the spring of 1999. As a result of the audit, the Egg Board identified two growers who appeared to be operating unregistered flocks significantly in excess of the allowed 99-bird limit. These two growers were Mr. Peter Pottruff and his son, the Appellant. As a result of investigations, the Egg Board seized Mr. Pete Pottruff's flock on April 19, 1999.
30. Starting on July 12, 1999, the Egg Board's Field Representatives attempted to contact the Appellant at his farm. They made repeated visits over the next three-day period. Despite making contact with an acquaintance of the Appellant and speaking to the Appellant's wife and father, the Field Representatives were unable to gain access to the Appellant's barn. As a result, the Field Representatives concluded that the Appellant was attempting to avoid them and a decision was made to obtain a Search Warrant.
31. The Egg Board argues that it is accountable for its actions. In this situation, they had knowledge that the Appellant was carrying out an illegal activity. As a result of investigations and a desire to deal with the information in a timely matter, the Egg Board made a decision to obtain a Search Warrant. While it is up to the British Columbia Marketing Board (the "BCMB") to review the facts and determine whether the Field Representatives' conclusion that they were being avoided was reasonable, the Egg Board takes the position that its conduct was appropriate based on the information it had at the time. Given the Field Representatives' unsuccessful attempts to contact the Appellant on the evening of July 13, 1999, they had no reason to believe Mrs. Pottruff when she stated her husband would be home at 5:30 on July 14, 1999.
32. The Appellant is seeking the repeal of the Seizure Notice. The Egg Board argues that the Appellant is operating illegally. To repeal the Seizure Notice does not assist in a resolution of the issues. Rather it will result in a further delay while the Egg Board uses a different process to bring this matter to a hearing.
33. The Appellant alleges that the Egg Board breached its Standing Orders by not first sending a written notice as set out under s. 17(a) that he was in violation of the Standing Orders. The Egg Board takes the position that the process outlined in section 17 is normally used for situations involving registered producers. These steps will be used for an unregistered producer if appropriate. However, the purpose is the same, to make contact with the producer and start the process to review an alleged breach. The difficulty that presents itself in dealing with an unregistered producer is that there usually has been no historical contact between them and the Egg Board.

Thus, in order for the Egg Board to confirm a breach, it must physically attend the farm.

34. The Appellant has also alleged that he was singled out by the Egg Board for harsh treatment as the process followed for the seizure on his farm does not accord with past seizures on Vancouver Island. The Egg Board denies this allegation. However, where a producer is responsive to the Egg Board's request for information, as in the case of Mr. Pete Pottruff or Douglas Lake Ranch, there is no need to obtain a Search Warrant. In addition, the Egg Board submits that the situation with Douglas Lake Ranch was quite different as it involved a long time producer who likely qualified for an exemption of a 499-bird flock under the "grandfather" provisions. This is in contrast to the Appellant who had set up a new operation and as such would not qualify for the historical exemption.
35. Finally, the Appellant is seeking compensation for damages incurred as a result of the search and seizure and this appeal. In addition, the Appellant is seeking punitive damages against the Egg Board. The Egg Board maintains that the process it followed was reasonable and in accordance with its Standing Orders. Accordingly, the Egg Board submits that the Appellant is not entitled to any compensation.
36. The Egg Board also argues that the Appellant has operated outside the regulated system for a period of four years. He claims not to know what the rules were and states that the Egg Board should have provided him with the necessary information. The Egg Board argues that it was incumbent on the Appellant to approach the Egg Board if he had any questions regarding the business he was undertaking. Given that the Appellant's father was a former Field Representative for the Egg Board, it is difficult for the Appellant to argue he did not know of the Egg Board or its rules.

## **DECISION**

### **Questions this Board has to decide**

37. At the outset, it is important for this Board to be clear about what it is deciding and what it is not deciding.
38. The BCMB is not deciding on the validity of the Search Warrant and has no power to "repeal" the Warrant, as the Appellant requests. A Warrant is a legal instrument issued by a Justice of the Peace. The BCMB, which is confined by the rule of law to reviewing the decisions of commodity boards, has no legal authority to review decisions made by the officers of the Provincial Court. The law is clear that direct challenges to the decisions of the Provincial Court are for the Supreme Court. Where there is no offence pending such that the issue might be addressed by the trial court, the appropriate approach is to apply to the Supreme Court for the remedy of certiorari on judicial review: *Canadianoxy Chemicals Ltd. v. Canada (Attorney General)*,

[1996] B.C.J. No. 1482 (S.C.) [Q.L.], at para. 8-15, decision later reversed on other grounds [1999] 1 SCR 743.

39. As noted, the BCMB is concerned exclusively with appeals from the “order, decision or determination” of a commodity board: *Act*, s. 8(1). In this case, the commodity board in question made two determinations that are open to BCMB review. The first decision was the decision to apply for a Search Warrant, which s. 16(2) of the *Act* allows when a commodity board has reasonable grounds to believe that its orders are not being complied with. The second decision was the decision under s. 16(3)(c) of the *Act* to act on that Search Warrant, enter the barn and then issue a Seizure Notice in the circumstances disclosed on this appeal. These decisions are properly subject to BCMB appellate review and potential remedy under s. 8(9) of the *Act*.

### **Review Of Egg Board Conduct**

40. The Egg Board like other supply managed commodity boards has the power to regulate production through the use of a quota system. In order to enforce its quota system, the Egg Board has the authority to deal with producers who choose to operate outside the system and in breach of the *Scheme* and Standing Orders. The Egg Board has a great deal of power, which must be exercised in a responsible, fair and transparent manner. If a marketing board or commission has reasonable grounds to believe that a provision of the *Act*, its *Scheme* or its orders are not being complied with, s. 16 of the *Act* gives the board or commission the power to obtain a Search Warrant to enter land or premises and perform a search.
41. Thus in reviewing the decision of the Egg Board to seek the Search Warrant, the Panel must first consider whether the Egg Board had reasonable grounds to believe that the Appellant was not complying with Egg Board rules and regulations. This analysis necessarily involves a consideration of the information in the hands of the Egg Board and its Representatives prior to obtaining the Search Warrant. Thus, the Panel must look at the perspective of the Egg Board at the time it made the decision to apply for the Search Warrant on July 14, 1999.
42. Before performing a physical investigation, the Egg Board was aware from its audit that the Appellant had been shipping eggs to two grading stations, Galey Brothers and Five Cedars. The reported grading station figures from Galey Brothers alone confirm that the Appellant had shipped over 18,000 dozen eggs in the previous year. It is physically impossible for a flock of 99 birds to produce that volume of eggs annually.
43. By July 14, 1999, the Egg Board had attended at the Appellant's farm. The observations of the Field Representatives confirmed the presence of a barn with operating ventilation fans and a feed bin that appeared full. The two Field Representatives left a business card at the Appellant's farm after their first visit on July 12, 1999. They spoke to Mr. Moes, an acquaintance of the Appellant's on the

13<sup>th</sup> and gave him a business card and a message that the Egg Board wanted to speak to the Appellant. They also spoke to Mr. Pete Pottruff, the Appellant's father, who refused to give them access to the Appellant's barn. Mr. Moes saw the Appellant at fire practice that evening and gave the Appellant the business card. Mr. Pete Pottruff called his son and advised him that the Egg Board was attempting to get in touch with him. Thus, the Egg Board's belief that by the evening of July 13<sup>th</sup> the Appellant knew it was trying to contact him was correct.

44. There is some suggestion that the Field Representatives were told that the Appellant would be back on the evening of the 13<sup>th</sup> between 5:30 and 6:00 p.m. (or 6:00 and 6:30 p.m.). They attended at the farm at approximately 8:00 p.m. and no one was at home. The Appellant seems to suggest that the Field Representatives were deliberately trying to miss him. The more reasonable interpretation is that they did not understand that he was only going to be home for half an hour and then go pick up his wife who was camping. Both the Appellant and his wife returned home later that evening.
45. The Panel is of the opinion that by July 14, 1999, the Egg Board had reasonable grounds to apply for a Search Warrant. Given the evidence that the Appellant was producing eggs from a flock in excess of 99 birds, the Egg Board had reason to believe that the Appellant was not in compliance with the Size Exemption provision under s. 2(c) of the Standing Orders.
46. However, that is not the end of the analysis. On the early morning of July 14, 1999, the Field Representatives found Mrs. Pottruff at home. She refused the Field Representatives' request to enter the barn, as she did not have a key. She advised however, that her husband would be at home at 5:30 p.m.. Mrs. Pottruff called her husband's cell phone but was unsuccessful at reaching him. The Field Representatives attempt to contact the Appellant's cell phone later that morning was also unsuccessful. The Field Representatives then decided to attend before a Justice of the Peace to obtain a Search Warrant.
47. Was it reasonable for the Egg Board to act on the Search Warrant in the face of Mrs. Pottruff's advice that her husband would be home at 5:30 p.m.? The Panel believes it was. The Field Representatives collectively have a great deal of experience. In fact, Mr. Elmer Friesen had been with the Egg Board 22 years and had trained Mr. Pete Pottruff. In their opinion, the Appellant and his wife were being less than co-operative in providing access to their barn. There was no reason to believe that the Appellant would return at 5:30 p.m. as he was not home when they attended on the previous evening. In their opinion, the owner of the farm (Mrs. Pottruff) denied them access to the barn for the purpose of determining whether there was compliance with the orders of the Egg Board and thus violated s. 4(c) of the Standing Orders.

48. Although Mrs. Pottruff was polite and had an excuse as to why she would not enter the barn, based on their experience the Field Representatives were entitled to conclude that it was highly unusual that she did not have a key in her possession. Even if Mrs. Pottruff suffered from allergies, one would think that safety requirements alone would demand that she have access to all out buildings in the event of an emergency. The Appellant maintained that his wife did not have a key so that she would not be inclined to let relatives or grandchildren into the barn when he was absent. He maintained that in the case of emergency, the barn door could be kicked down. The Panel still does not accept that it was reasonable or likely that Mrs. Pottruff would not have a key to the barn.
49. Further and with the benefit of hindsight, the Panel concludes that the Field Representatives were correct in their conclusion that Mrs. Pottruff was not co-operative and were correct to interpret her conduct as a denial of access. This conclusion is supported by the fact that Mrs. Pottruff knew the part-time employee, Mr. Biddlecombe, would be at the barn within minutes of the Field Representatives attendance yet she chose not to advise them of this fact. This is not co-operative behaviour.
50. The process of obtaining the Search Warrant took several hours. Once the Field Representatives had their Warrant, they attended at the RCMP detachment to get a police escort. When two members became available, they attended at the Appellant's farm. It appears that the Egg Board having started a process simply followed it through to its conclusion. As it turned out, the Search Warrant was enforced at around 3:00 p.m.. The Appellant returned home at 5:00 p.m. that evening.
51. With the benefit of hindsight, it would not have been unreasonable for the Egg Board to wait the additional two hours to see if the Appellant returned. There was sufficient time left on the warrant that had the Appellant not returned, they could have attended at the RCMP detachment and requested an escort. However, the Egg Board had no reason to believe the Appellant would return as scheduled nor did they know whether an RCMP escort would be readily available if they chose to enforce the Warrant later. Having spent three days attempting to contact the Appellant and having gone through the effort of obtaining a Search Warrant, it would be understandable that the Egg Board would want to enforce it in a timely fashion and not have it expire. Also, the Field Representatives having spent three days on Vancouver Island dealing with this issue, likely planned to catch a ferry to the Lower Mainland in order to meet other commitments elsewhere in the Province.
52. Although a more cautious approach would have been to wait, given the circumstances known to the Egg Board at the time, the Panel is not prepared to find that the Egg Board acted unreasonably or outside its authority. However, the Panel is very aware that the consequence of proceeding in the manner described above was to inflame the situation and make a mediated or facilitated resolution of the issues between the

Appellant as an unregulated producer and the Egg Board more difficult to resolve. This is unfortunate.

### **Conduct of the Appellant**

53. At this juncture, the Panel believes it is appropriate to review the conduct of the Appellant over the three-day period from July 12-14<sup>th</sup>. It is fair to say that by the evening of July 13, 1999, the Appellant was aware that the Egg Board's Field Representatives wanted to speak with him and count his flock. He also knew that his father's flock had been subject to a flock seizure three months earlier.
54. Despite being aware that the Field Representatives were attempting to make contact with him, the Appellant made no attempt to contact the Egg Board even after hours simply to leave a message. He is very quick to criticise the Field Representatives for not phoning him when it does not appear he took any positive steps himself to contact the Egg Board. The Appellant also did not leave any affirmative instructions with his wife or his part-time employee Mr. Biddlecombe, regarding what to do if the Field Representatives returned.
55. The Appellant stated practice was not to leave a key with his wife, in order to prevent her letting relatives or children into the barn when he was not present. As stated earlier, the Panel finds this highly unusual and remarkably unsafe. It is not reasonable that the Appellant would expect his wife to kick in the barn door in the event of an emergency. However, even accepting this somewhat unusual practice of the Appellant's, it does not explain why the Appellant did not leave Mrs. Pottruff with a key on July 14, 1999. He knew that the Field Representatives were trying to contact him and he knew his wife's plan was to be home the morning of the 14<sup>th</sup>. Such an action would have been prudent in light of the Appellant's knowledge that the Egg Board was trying to contact him. In addition, the Appellant had a cell phone in his possession. Had he wished to contact the Egg Board, he could have done so on the morning of July 14, 1999, if only to leave a message. Alternatively, if the Appellant did not think he would be able to contact the Egg Board during office hours, he could have authorised Mr. Biddlecombe or his wife to contact the Egg Board and arrange a time to let the Field Representatives into the barn to perform a count.
56. The Appellant criticises the Field Representatives for not contacting Mr. Biddlecombe prior to exercising the Search Warrant. However, the Egg Board had been in contact with the Appellant's father, a person who could potentially have authority to allow the Field Representatives to enter the Appellant's barn. Mr. Pete Pottruff was not prepared to assist the Egg Board. More importantly, the Field Representatives received no co-operation from Mrs. Pottruff, co-owner of the operation. Clearly, she is a person with authority to allow the Field Representatives access. Having received no co-operation from her, it is understandable that the Field

Representatives did not think it appropriate to go behind her authority and seek permission from an occasional part-time employee.

57. More significantly, had the Appellant's wife advised the Field Representatives on the morning of July 14, 1999, that Mr. Biddlecombe would be at the farm in 10 to 15 minutes, it is doubtful that they would have left the farm. It is also doubtful that it would have been necessary to obtain a Search Warrant. Given the foregoing, it is difficult to accept that Mrs. Pottruff was being co-operative or had any desire to allow the Egg Board access to the barn.
58. Mr. Pete Pottruff stated that in his opinion his son did not have a responsibility to contact the Egg Board and that the onus remained with the Egg Board to make contact. It would appear from the Appellant's conduct that this is a fair analysis of his position. The Panel disagrees with this position. It is difficult for the Appellant to complain that he has been dealt with harshly when his own conduct appears responsible at least in part for the escalation of matters and the need to obtain a Search Warrant.

#### **Egg Board Breach of Standing Orders**

59. The Appellant also raises two arguments based on the Egg Board's Standing Orders, which he argues should nullify the Seizure Notice. The Appellant argues that the Egg Board breached its Standing Orders by not issuing a written notice before obtaining a Search Warrant. The Panel has reviewed s. 17 of the Standing Orders. There is no requirement on the Egg Board to proceed with a written notice before obtaining a Search Warrant. In fact, in the circumstances of this case, until the Field Representatives entered the Appellant's barn and performed a count they had no specific knowledge of a breach. Had the Field Representatives made contact with the Appellant, a Seizure Notice would still have been issued given that the Appellant's flock was substantially in excess of 99 birds.
60. The Appellant also argues that by failing to give the Seizure Notice to an adult on the premises, the Egg Board failed to meet a technical requirement of the Standing Orders and the Seizure Notice should be set aside. The Panel does not agree with this interpretation of s. 17(f)(ii). This section imposes a requirement on the Field Representatives to post a seizure tag at the location of a seizure and if an adult is present to give them notice in writing of the seizure. The section does not speak to the circumstance where, as here, there was no adult present at the time of seizure. The Panel does not interpret this section to preclude a search where no adult is present.

## **Singular Treatment by the Egg Board**

61. The Appellant has argued that the process followed by the Egg Board in seizing his flock was different than other seizures on Vancouver Island. He believes that he has been singled out for unusually harsh treatment. On the evidence before the Panel, it does not appear that the Egg Board has had to obtain many Search Warrants over the past ten years. However, according to Mr. Friesen, he has periodically been required to forcibly enter a barn. The seizure of Mr. Pete Pottruff's flock and the Douglas Lake flock are not readily comparable as both were done with the co-operation of the producer. In the Appellant's case, the Egg Board perceived it was being avoided and thus, a Search Warrant was necessary. The "singular treatment" complained of by the Appellant appears to be a direct result of his conduct and his belief that the onus remained on the Egg Board to contact him in some manner before taking any action.

## **Claim for Damages**

62. Section 9(2)(c) of the *Act* gives the BCMB the authority on hearing an appeal to "make another order it considers appropriate in the circumstances." Section 19 of the *Act* gives specific immunity to persons who act or purport to act as a member of a marketing board or commission for anything done in good faith in the performance of their duties. In addition, employees of a board or commission are protected as long as they are acting within the scope of their authority. Given the foregoing, the Panel is of the view that if we have jurisdiction to award compensation in the nature of damages, that jurisdiction can only be exercised where we are satisfied that a member or employee of a board or commission has acted in bad faith or outside the scope of their authority. Given that the Panel is of the view that the Egg Board and its staff acted reasonably in obtaining the Search Warrant, based on the information known on the morning of July 14, 1999, we are not prepared to consider the Appellant's claim for compensation or punitive damages.
63. The *Act* in s. 8(11) does give the BCMB the authority to award "actual costs" in circumstances it considers appropriate. Usually this power is not exercised unless the BCMB determines that there has been egregious conduct by a party or that in the Panel's opinion, the appeal was frivolous or vexatious. Given the finding that the Egg Board acted reasonably, the Appellant is not entitled to his costs on this appeal. The Panel also declines to award costs to the Egg Board.
64. Throughout this appeal, it is clear that the Appellant believes that he has been dealt with unfairly and been done a grave injustice. However, he has operated a laying operation outside the Egg Board's regulations for four years. He has not paid the levy on his eggs and as such has received a financial benefit over and above that which a regulated producer would have received. Despite making no financial contribution, the Appellant appears to expect a remarkable amount of service from the Egg Board.

65. He has made little or no attempt to familiarise himself with the rules and regulations or alternatively, he has chosen to ignore them. The Panel is of the view that the latter is probably more accurate, given that the Appellant's father, Mr. Pete Pottruff, was in fact a Field Representative of the Egg Board for four years. The Appellant has levelled harsh accusations and criticisms at the Egg Board which, in the Panel's opinion, have proven to be unfounded.
66. The Egg Board is empowered by the *Scheme* to ensure the orderly production and marketing of a regulated product, eggs. Its Standing Orders allow for a size exemption for unregulated production from 99 or less laying hens. Above that number, producers must obtain quota and be subject to Egg Board regulations with respect to that quota. In this case, the Egg Board had reasonable grounds to believe that the Appellant was in breach of the size exemption under the Standing Orders. The Egg Board had the legal authority under the *Act* and *Scheme* to enforce its orders. After spending three days attempting to contact the Appellant in a non-confrontational manner, the Egg Board acted reasonably and within its authority to use its power to obtain and exercise a Search Warrant.

#### **ORDER**

67. The Appellant's appeal relating to the July 14, 1999 Seizure Notice, on the grounds argued before us on this appeal, is dismissed.
68. There will be no order as to costs.

#### **RECOMMENDATIONS**

69. The Appellant's original appeal included issues relating to the speciality egg market and how that market should be properly accommodated within the regulated marketing system. Prior to this hearing, the parties agreed to resolve that issue outside of an appeal within the context of the BCMB's supervisory role. That process is ongoing.
70. In addition to its review of the speciality egg market, the Panel recommends that, given the issues raised on this appeal, it would also be appropriate for the Egg Board to review its collective enforcement procedures at both the Board and staff level. In the Panel's opinion, the investigative process, which ultimately leads to the decision to obtain a Search Warrant, should be clearly documented so that persons in the position of the Appellant understand why certain decisions have been made. In addition, it is critical that Egg Board staff understands why they are undertaking a particular course of action. The Egg Board should also ensure that the entire investigative process is well documented prior to obtaining the Search Warrant. This would no doubt include a written Field Representative's report.

71. Finally, the Panel recommends that the Egg Board satisfy itself that its current policies and procedures surrounding investigations into alleged breaches are adequate and appropriate to the circumstances.

Dated at Victoria, British Columbia this 12th day of November 1999.

BRITISH COLUMBIA MARKETING BOARD

Per



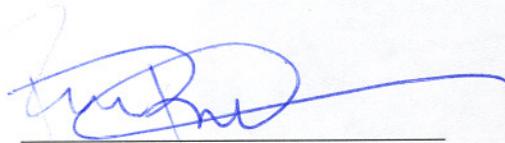
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Christine J. Elsaesser, Vice Chair



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Karen Webster, Member



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Richard Bullock, Member