

**IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND
IN THE MATTER OF AN APPEAL
FROM A DECISION CONCERNING THE CONTROL AND ADMINISTRATION
OF FARM GATE PICK UP FEES**

BETWEEN:

JAKE PENNER AND MILES MATERI
d.b.a. MOUNTAIN MORNING FARMS

APPELLANTS

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

AND:

BEN WOIKE, d.b.a. FARMER BEN'S EGGS
BRITISH COLUMBIA EGG PROCESSORS COUNCIL

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Barbara Buchanan, Panel Chair
Christine J. Elsaesser, Vice Chair
Wayne Wickens, Member

For the Appellants

Miles Materi and Jake Penner

For the Respondent

David Taylor, Chair
Arlene Lannon, General Manager
Peter Whitlock, Operations Manger

For the Intervenor, Farmer Ben's Eggs

Ian Woike

For the Intervenor, BC Egg Processors
Council

Peter Veecken, President
Ralph Payne

Date of Hearing

April 19, 2005

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. The Appellants, Jake Penner and Myles Materi are both egg producers. Together they operate a grading station known as Mountain Morning Farms (“Mountain”) located in the Salmon Arm area. The Appellants are appealing a decision of the British Columbia Egg Marketing Board (the “Egg Board” or “BCEP”) concerning the control and administration of farm gate pick-up fees paid for the transportation of eggs.
2. Ben Woike is also an egg producer and under the name Farmer Ben’s Eggs (“Farmer Ben’s”) grades eggs in the Duncan area. Farmer Ben’s applied for and was granted intervenor status in support of Mountain in this appeal. Ian Woike spoke on behalf of Farmer Ben’s at the hearing of the appeal.
3. The Egg Board was created by the *British Columbia Egg Marketing Scheme, 1967* (the “*Scheme*”). The Egg Board has general authority to promote, regulate, and control the production, transportation, packing, storage and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part (s. 37). The Egg Board has the specific authority to make such orders, rules and regulations as it deems necessary or advisable to promote, control and regulate the transportation of the regulated product and to amend or revoke the same: ss. 37(o). It is permitted to delegate some aspects of its authority to such extent and in such manner as it may from time to time deem necessary or advisable for the proper operation of the *Scheme*: ss. 37(r).
4. This appeal involves a delegation of authority from the Egg Board to the British Columbia Egg Processors Council (the “Council” or “BCEPC”) allowing it to control and administer farm gate pick-up fees for the transportation of eggs. The Council consists of the five largest egg graders, located in various parts of the province. The Council applied for and was granted Intervenor status in support of the Egg Board in this appeal.
5. This appeal was heard on April 19, 2005.

ISSUES AND GROUNDS FOR APPEAL

6. Did the Egg Board err in deciding to accept the June 2003 Facilitated Agreement concerning the control and administration of farm gate pick-up fees? The grounds on which the first issue is based are as follows:
 - (i) The farm gate pick-up program is funded by producers and control of these funds should remain with the Egg Board.
 - (ii) The Egg Board did not consult with other industry stakeholders (producers and graders) about this change.

- (iii) These funds should not be administered by an organisation of “competitors.”
 - (iv) The change in the way the funds are administered favours larger graders and impacts negatively on smaller graders.
7. Did the Egg Board err in its December 18, 2003 decision to approve the criteria established by the Council to administer these funds and subsequently discontinue the payment of farm gate pick-up fees to Mountain? The grounds on which the second issue is based are as follows:
- (i) Mountain was already receiving pick-up fees prior to the criteria coming into effect on January 1, 2004 and should have continued to receive the payments. The criteria only work for established graders.
 - (ii) It is not possible for new graders to meet all the criteria.
 - (iii) The requirement that a grader be “grading and wholesaling at least 50% of (its) annual egg supply” is unfair to Mountain and other small graders.
 - (iv) Discussions with the Council to resolve criteria-related issues have not been successful.
8. In the event the appeal is successful, Mountain is seeking to have farm gate pick-up fees administered and paid by the Egg Board or alternatively, the Council be required to amend its membership criteria to allow smaller graders to receive farm gate pick-up fees.

BACKGROUND

9. There was an earlier appeal by the Council in response to Egg Board decisions with respect to the administration of the farm gate pick up fee program which was resolved by a facilitated agreement (the “Facilitated Agreement”). Given that the Facilitated Agreement ultimately led to this appeal, some history is necessary to place this appeal into context.
10. In British Columbia, producer levies support a fund from which farm gate pick up fees are paid to members of the Council to offset costs in picking up eggs from producers. This fund has been in place since the 1990’s but has undergone changes over time. All egg producers contribute to the fund. Up until 2003, the Council controlled membership in the Council and therefore controlled which graders could participate in the fund.
11. Mountain became an egg grader in January 2003; it is licensed by the Canadian Food Inspection Agency and the Egg Board. The grading station is located on Mr. Materi’s farm and grades eggs from approximately 46,000 to 46,500 birds from four farms, two of which are Mr. Materi’s and Mr. Penner’s farms. The majority of Mountain’s eggs are graded as table eggs. As a registered grading station, Mountain applied to the Council for membership and to receive farm gate pick-up

fees commencing January 1, 2003. Mountain notified the Egg Board of its membership application by a letter dated February 8, 2003.

12. By letter dated February 13, 2003, Peter Veecken, Council President, informed Mountain that its request would be discussed at its next meeting. Mountain subsequently received an undated fax advising that its application was “put on hold pending development of guidelines for membership” and that the Council would advise when the guidelines were completed. Without the benefit of the farm gate pick-up fee, Mountain in effect pays \$.02/dozen over that of its competitors.
13. On April 4, 2003, the Egg Board sent a letter to the Council regarding farm gate pick-up fees advising of an Egg Board motion stating in part:

It was duly moved . . . that the current agreement with the . . . Council be terminated and that the buyback rates be decreased to 5 cents per dozen for nest run and 6 cents per dozen for graded (approximately \$206,000) and the farm-gate pick-up fees be increased pro rata from \$500,000 to \$936,000 per year (on average, .363 cents per bird week), effective May 4, 2003. Prior to December 31, 2003 the BCEP [the Egg Board] to conduct a third party “farm-gate pick-up costs” audit and work with the western provinces for conformity. Should an agreement with the western provinces by year end be unsuccessful, then effective January 4, 2004, 50% of the audited farm-gate pick-up costs will be paid in British Columbia.

Items included in the costs to be audited would be trucks, insurance, depreciation, fuel, driver wages, etc. Costs such as overhead for office and administration would not be included. The new farmgate pick-up rates for all BC graders will be billed by the stations and paid weekly by the Board.

Once the 50% of farm-gate pick-up component is implemented, the program will be expanded to all BC graders whose costs have been confirmed by the audit process.

14. By letter dated April 14, 2003, the Council requested that the Egg Board revise its decision taking issue with the Egg Board’s termination of the agreement. On May 2, 2003, the Council filed an appeal of the Egg Board’s decision.
15. Soon after the Council filed its appeal, the Egg Board met with Mr. Penner and Mr. Materi of Mountain. The Egg Board’s May 7-8, 2003 Minutes include a summary of this meeting. The Egg Board advised that it had made the decision that farm gate pick-up fees would be available to all graders and that the Provincial board had directed that the Council’s payment of farm gate pick-up fees to only its members must come to an end. The Minutes also reflect that after Mountain’s representatives left the meeting, the Egg Board approved a motion that Mountain and Farmer Ben’s be paid farm gate pick-up fees “at the Lower Mainland rate, pending results of grader audits, provided the eggs are transported by public road to the grading station and, that (then) General Manager Whitlock define the criteria”.
16. By letter dated May 15, 2003 to Mountain, the Egg Board acknowledged that fairness in the distribution of farm pick-up fees between graders both within and outside of the Council had been an issue. The Egg Board’s letter stated in part:

It has been evident for some time that the whole transportation issue needed to be revised. The issue of fairness between graders, both within the [Council] and outside of the Council, had been raised in appeals...and the [Egg Board] was under some considerable pressure to both take back ownership of the funds, and revise the distribution system to update the process to make it more efficient and fair to all graders. There are graders who wished to be included in the current agreement who have been unable to become members of the [Council] and thus, were denied participation.

The first step in this process was to take back the responsibility for the distribution of these funds. This step has been taken. The next step was to include the non-BCEPC members sooner than the January 4, 2004 date. This decision has now also been made...

The rate of farm gate pick-up will be calculated by the BCEP using the annual allowance of \$936,000 contained in the BCEP's motion of April, 2003. Current regional ratios will apply with the new grading stations paid at the Lower Mainland rate until the grading station audits are completed. At that time, rates will be adjusted to one half of the cost per bird per week, as determined by the audit process. . .

. . . the BCEPC has appealed the April 2,3, 2003 decision by the BCEP to terminate the previous farmgate pick-up agreement with the BCEPC. This decision also includes the harmonizing of the buyback rates with the other western provinces.

[emphasis added]

17. The Council was unhappy with the Egg Board's decision to take back responsibility for the distribution of the farm gate pick-up fee and these issues formed part of its appeal. Following the pre-hearing conference in the Council's appeal, Mr. Collins, a staff representative of the Provincial board, wrote to the parties on June 3, 2003 setting out the issues and the agreed course of action which included adjourning the appeal so that the Egg Board could identify and explore various options in discussion with the Council facilitated by the Provincial board in its supervisory capacity.
18. After the facilitated meeting on June 20, 2003, the Chair of the Provincial board set out his understanding of the agreements and commitments made by the two parties. The Egg Board agreed to consider amending the April 2003 motion changing the transportation policy to reflect:
 - an increase in farm-gate pick-up fees to a total amount of not less than \$936,000 or higher if there is an agreement between the western provinces;
 - the determination of actual farm-gate pick-up costs will be done through a common process with the western provinces;
 - revocation of the decision that graders not be reimbursed for costs unless they use a public road; and
 - revocation of the decision to terminate the original farm-gate pick-up policy and the Council will continue to administer the transportation fund.
19. The Egg Board also agreed to discuss the wording of any the amendment with the Council prior to finalising their decision. Once the amendment was finalised, the Council agreed to withdraw its appeal. In addition, the Council agreed to develop

within eight weeks a policy to provide transparent, accountable administration of the transportation funds to be presented to the Egg Board. As part of this policy development, the Council agreed to work to ensure that all graders receive equitable treatment and to confirm that the expected additional cost of \$16,000 for graders not currently receiving benefits be recognised in the \$936,000 provided by the Egg Board.

20. The Council ultimately developed its criteria and on December 18, 2003, the Egg Board approved the criteria for administering the fund. In a letter dated December 23, 2003, the Egg Board wrote to the Council confirming its understanding of the criteria:
 1. Membership is based on being licensed by CFIA of at least one year. The BCEPC will provide the BCEP with a copy of this licence for new members to establish the commencement date.
 2. To receive and retain membership a member must be grading and wholesaling at least 50% of their annual egg supply (less trades to other stations). Members agree to the BCEP confirming this to the BCEPC annually for payment in the next year.
 3. All members must be paid up members of the Canadian poultry and Egg Processors Council (CPEPC), at the time of being admitted to membership of the BCEPC. The BCEPC is responsible to advise the BCEP the current status and should a member's status change.
 4. Members must demonstrate an active participation in BCEPC business and attend no less than 75% of Council meetings, to retain membership. The BCEPC will advise the BCEP should the status of a member change.
21. By letter dated January 14, 2004, the Egg Board advised Mountain that effective January 1, 2004 as it was not a Council member, it did not qualify to receive farm gate pick-up fees according to Council rules and its last payment was week 52 of 2003.
22. On January 16, 2004, Mountain sent a letter to the Provincial board advising that its farm gate pick-up fees had been discontinued without prior notification or communication from the Egg Board or the Council.
23. By letter dated January 30, 2004, Farmer Ben's expressed its concerns to the Egg Board that it no longer qualified to receive farm gate pick-up fees on the basis of the new rules made by the Council. Farmer Ben's requested that the Egg Board revisit the issue of farm gate pick-up fees so that all graders were treated equally.
24. On February 13, 2004, Mountain appealed the Egg Board's January 14, 2004 decision to the Provincial board. Shortly after the appeal was filed, it was adjourned indefinitely because of the Avian Influenza crisis in the industry.
25. In March 2004, the Vancouver Island Egg Producers Association passed a motion in support of Mountain. The motion states as follows:
 4. Motion. The BCEP should treat all graders equally. Some examples of areas of concern follow;

- some graders receive payment from the Board for transporting their supplies back from the breakers while others do not.
- some graders receive farmgate pickup fees, while other producer/vendors do not.
- some graders received notification of the .25c medium special offered by the BCEPC while others did not.

26. As Mountain's appeal progressed, the Egg Board had concerns about the impact of its Facilitated Agreement reached in the Council appeal on the Mountain appeal and sought clarification from the Provincial board on July 19, 2004. The Chair of the Provincial board replied by letter dated July 27, 2004, indicating that the Provincial board did not have a continuing role as facilitator after the Agreement was reached and if either party felt that the Agreement had not been complied with or if the Agreement was no longer valid for some other reason, the Council appeal could go to hearing.
27. In its August 9, 2004 letter to the Council, the Egg Board took the position that other than the Council withdrawing its appeal, the Council and the Egg Board had met all of the conditions of the Facilitated Agreement. Although the Egg Board identified that two non-Council members had expressed concern that they were not receiving equitable treatment, it felt the conditions of membership in the Council were "achievable by any grader truly wishing to be a member". The Egg Board also suggested that as the subject of the Mountain appeal was the Facilitated Agreement between the Egg Board and the Council, the Council should proceed with its original appeal and have it heard with Mountain's appeal. Alternatively, the Council should withdraw its appeal and intervene in Mountain's appeal.
28. In September 2004, Farmer Ben's applied to be an intervenor in this appeal. The Council in December 2004 withdrew its own appeal and applied for intervenor status in the Mountain appeal. On February 7, 2005, the Provincial board formally dismissed the Council's appeal.
29. At the pre-hearing conference held on January 31, 2005, Mr. Collins raised the issue of whether Mountain's appeal was out of time to the extent that the appeal related to the Facilitated Agreement of June 2003 and the appeal was filed February 14, 2004. In her written reasons dated February 15, 2005, the Vice Chair of the Provincial board extended the time limit for filing this appeal stating:

...the underlying concern of these Appellants is the original June 2003 decision allowing the BCEPC, and not the Egg Board, to determine the criteria. The Appellants believe that as the fees are funded by producer levies, the Egg Board should have determined the eligibility criteria. The Appellants also believe that the Egg Board failed to properly consult with the industry before confirming the June 2003 agreement with the BCEPC. Notwithstanding this concern, the Appellants attempted unsuccessfully to reach an agreement with the BCEPC whereby the criteria would be modified so that the Appellants would be eligible to receive farm gate pick-up fees...

Given the importance of this issue to the industry and the extended discussions that took place between the Appellants and the BCEPC in an attempt to resolve this issue, the Egg Board submits that special circumstances exist for extending the time limit so that an appeal can be

taken from its original June 2003 decision. This is a fundamental issue of major importance to the industry. The Provincial board should hear and decide this issue.

In view of the above and in accordance with s. 24(2) of the *Administrative Tribunals Act*, I find that special circumstances exist for extending the time limit for filing an appeal of the June 2003 decision of the Egg Board to February 13, 2004. Accordingly, the appeal filed by the Appellants encompasses not only the Egg Board's December 2003 decision to approve the BCEPC criteria but also the underlying decision of the Egg Board made in June 2003 to allow the BCEPC to set the eligibility criteria.

30. This appeal was heard on April 19, 2005.

DECISION

31. There are two issues on this appeal, the first being whether the Egg Board erred in accepting the Facilitated Agreement and secondly, whether it erred in approving the criteria established by the Council to administer these funds.
32. The Appellants argue that the Egg Board established the farm gate pick-up program for all of British Columbia. Given that the farm gate pick-up program is funded by producers, control of these funds should remain with the Egg Board. By accepting the Facilitated Agreement, the Egg Board allowed control of these producer funds to remain with the Council and as a result, the funds are administered to favour larger graders over smaller graders. The Appellants operate as both producers and as a grader; as producers they pay levies which they cannot access as a grader. This is unfair and allows their competition to get the levies paid by the Appellants. This means that Mountain pays \$0.02/dozen more for its eggs. The Appellants argue that this economic disadvantage with its competitors is not only unfair given that Mountain actually loads and transports eggs; it is distasteful. The Appellants argue that these funds should not be administered by an organisation of "competitors" especially when Mountain has applied on two separate occasions to become a Council member and both times was unsuccessful. The Egg Board itself recognised that Mountain should receive farm gate pick-up fees and in fact paid them from May 2003 to December 31, 2003.
33. As for the Council criteria approved by the Egg Board, the Appellants argue that the Egg Board did not consult with Mountain regarding these criteria. Given that it is these criteria which exclude Mountain from Council membership, the Egg Board should have consulted with other industry stakeholders (producers and graders) before simply approving the criteria. The Appellants maintain that the Egg Board encouraged Mountain as it thought a small Interior grader would be valuable to the industry. If Mountain is an asset to the industry, it should at least get some cooperation from the Egg Board to receive farm gate pick up fees and thus, create a level playing field.
34. Ian Woike testified on behalf of Farmer Ben's and in support of Mountain. He too, takes issue with the inequitable treatment of small graders. Farmer Ben's is both a producer and a grader. It grades for two other producers in addition to grading

some of its own production; it picks up and transports several skids of eggs/week to its grading station located off-site. Yet it too cannot access farm gate pick-up fees.

35. The Egg Board's position on appeal was that it was in no better position than the Council to create the membership criteria. Further that as a result of the mediation in the Council's appeal, it agreed to let the Council determine the membership criteria. The Egg Board does concede that it had concerns about the farm gate pick-up fees especially paying farm gate pick-up fees to Council members where no actual work may have taken place. Mr. Taylor said:

That's where the public, the use of public roads for pick-up came in, but it was pointed out to us and we subsequently agreed, as part of the mediation, that we wouldn't press that issue. The Council could take that into account as they saw fit in setting the rules for administering the funds.

36. However, when the Egg Board paid farm gate pick-up fees out of the \$936,000 fund to non-members, the Council appealed. The Egg Board sought to avoid the appeal and the Facilitated Agreement is the result. As for the criteria, Mr. Taylor had the following comments:

It appears to me the number one issue is around this 50 per cent trade criteria for membership in the Council, and *I can't speak to the appropriateness of that or not*, but as I say, the undertaking the board made in that mediation was to allow the Processors Council to set the criteria for the administration of that fund. I think it's been corrected or made more clear that, in fact, the monies are not given to the Processors Council for their distribution to members, but the numbers are all, all go through the board.
[emphasis added]

37. Mr. Taylor was sympathetic to the disadvantages to the smaller graders such as Mountain and Farmer Ben's and quite candidly admitted that he has limited knowledge of the 50 % grading criteria and he depends on management for advice. He does agree that graders should be paid for work that is done. As for the Council's membership criteria, he stated:

. . . I'm not sure that I'm in a better position than members of the Processors Council are, to make the judgment as to what should the threshold criteria be there, so, we have made an agreement with the council on that.

38. Mr. Whitlock submitted that when the farm gate pick-up program was started in the 1990's, there was an assumption that all graders would be Council members. At that time, the Egg Board did not envision graders who were not members of the Council. To assist the Panel in understanding how farm gate pick-up fees were distributed, Mr. Whitlock used 2003 as an illustration. During this period, Mountain and Farmer Ben's received farm gate pick-up fees of \$10,000 and \$4,900 respectively. Golden Valley received \$554,000, Veekens received \$16,000 and Highland Eggs received \$71,000. In 2004, when Farmer Ben's and Mountain were excluded from farm gate pick-up fees, the remaining graders would have shared in the available fund (\$936,000) distributed amongst its members.

39. Finally, the Egg Board argues that it cannot simply augment the farm gate pick-up fee fund beyond \$936,000 to pay non-members of Council as there is an agreement between British Columbia and the other western provinces as to this fund's limit.
40. The real opposition to this appeal comes not from the Egg Board but from the Council. Ralph Payne is employed by Golden Valley, and was the spokesperson for the Council on this appeal. His argument is simple and straightforward. The Council is an Association with its own bylaws and rules for membership; it does not apologise for that. It has established reasonable and fair criteria for membership by graders, not producer-vendors. Further, the Facilitated Agreement which is in part the subject of this appeal is an agreement between the Egg Board and the Council. It is not an agreement between the Egg Board, the Council and anyone else who would like to join. The Facilitated Agreement was negotiated on behalf of the Council and its members and only its members. Whether the Appellants think that is fair and reasonable is not the issue. As producer-vendors, the Appellants can make whatever deal they like with the Egg Board. The Council argues that the Egg Board's decision to pay non-members of Council approximately \$16,000 out of the Council's \$936,000 fund was a very clear breach of the Facilitated Agreement. Should Mountain decide that it wants to be a grader and not a producer-vendor, it just has to meet the criteria and grade and wholesale at least 50% of its annual egg supply and it will be welcomed.
41. The first issue to be dealt with on this appeal is whether the Egg Board erred in entering into the Facilitated Agreement with the Council. There is no issue that the Egg Board can enter into agreements to resolve issues on appeal. On its face, there is nothing wrong with the Facilitated Agreement as it was originally contemplated. The Egg Board committed to raising the amount of the transportation fund, not to exceed \$936,000. This amount could be higher if there was an agreement with Western Provinces. The Egg Board backed away from its earlier requirement that graders not be reimbursed unless they used a public road and agreed to allow the Council to administer the transportation fund. The Council agreed to develop a policy for transparent, accountable administration of the transportation fund. However, the foregoing Agreement did not remove from the Egg Board the obligation to review any policy developed by the Council to ensure that public policy objectives of transparency, accountability and fairness were being met. At the very least and as a matter of good governance, there remained an obligation on the Egg Board to understand the rationale behind the membership criteria and consider their appropriateness in light of the concerns of which it was aware or should have been aware.
42. Quite surprisingly, the Egg Board did not defend the criteria at this hearing. Rather its position was that it was part of the Facilitated Agreement that the Council develop the membership criteria. Given that the transportation fund is supported by producer levies it is incumbent on the Egg board to ensure that these monies are being fairly administered. The Egg Board is not a private sector entity; it generates revenue through levies that it imposes on those parties subject to its regulations.

Under ss. 37(r) of the *Scheme*, the Egg Board has the authority to delegate the administration of the farm gate pick-up program to the Council. However, the Egg Board cannot delegate responsibility for producer levies to a third party without ensuring that those funds are administered fairly and transparently.

43. Very clearly the Egg Board recognised there were problems with the manner in which the transportation fund was being administered when it opted to pay non-Council members. It acknowledged to Mountain that fairness in the distribution of farm gate pick-up fees between graders both within and outside of the Council was an issue. It informed Mountain in May 2003 that the fees would be available to all graders and that effective May 4, 2003, all graders having to transport eggs on public roads would be reimbursed a portion of their costs. The Egg Board also seemed concerned that graders who were not in fact transporting eggs to a grading station on a public road were receiving farm gate pick-up fees. Presumably the concern here is if a grader is producing eggs on the same property as the grading station why should there be compensation to offset transportation costs that are not being incurred? These are valid concerns which do not seem to have been addressed by the Egg Board in its analysis of the Council's policy and membership criteria.
44. As part of the Facilitated Agreement, the Egg Board delegated the responsibility of establishing membership criteria to the Council. The Appellants allege that the Egg Board erred when it approved the membership criteria in December 2003. No issue can be taken with the Egg Board delegating the decision to determine membership criteria to the Council. However, when such a delegation is made, the Egg Board still has a role to play. It is an error for the Egg Board to simply rubber stamp the decision delegated to a third party whether through blind acceptance or worse through a feeling of pressure or coercion.
45. As to the comment about pressure or coercion, the Panel has the following comments. At the conclusion of this hearing, we were left with the very real sense that this appeal involved a power struggle between the Council and the Egg Board. The Council was very clearly of the view that the \$936,000 transportation fund was *its* money that it had negotiated with the Egg Board and the Council alone could determine who had an entitlement to that money. The Council is right that as an association it can determine the rules under which it operates including its membership, however, how \$936,000 of producer levies is expended is a matter of public policy. The Egg Board alone is responsible and ultimately accountable for how these monies are spent.
46. The Panel finds that the Egg Board has failed to set out any independent analysis that it performed nor did it address how the Council's membership criteria addressed the earlier concerns of "fairness between graders, both within the [Council] and outside of the Council" and the appropriateness of the requirement that graders use a public road in the transportation of eggs. Further the Egg Board was aware of the concerns of the excluded graders and yet at no time did it engage

in a process to seek their input and address their concerns. The Egg Board had a duty to give those graders fair notice and an opportunity to be heard before approving criteria excluding them from the transportation fund.

47. At the end of the day, the Panel is left wondering as to the real purpose of the transportation fund. While it is called a transportation fund and while it purports to pay graders a “farm gate pick-up fee”, we have a sense that this is really a misnomer. It appears that the real issue here is the price of eggs. Given that eggs are priced based on a national formula where provinces price off a base price set for Manitoba, there is little ability for the Egg Board to adjust the price paid by British Columbia graders to producers. It appears that British Columbia processors pay too much for their eggs and as such require approximately \$1,000,000 from the system to offset that price. If that is the reality, arguing about the work that is done by certain graders and whether eggs are actually transported or whether eggs are moved on public roads misses the central policy issue. If the price of eggs is too high, then proper policy supports need to be put in place that are administered fairly so that all graders share equitably. If there is a valid policy reason for why a small grader or a producer vendor should not get the same price for their eggs then those policies need to be clearly set by the Egg Board after proper consultation.
48. We are not satisfied that the Egg Board has exercised the authority vested in it by the *Scheme* to regulate the egg industry in this instance. Accordingly, the Panel directs the Egg Board to review the transportation program and determine what modifications are necessary to make it a fair and transparent program whereby all graders can participate or alternatively, if a grader is to be denied access, then there must be very clear policy reasons enunciated for why that policy is appropriate.

ORDER

49. The Egg Board is directed to consult with the Egg Industry Advisory Committee, all British Columbia graders and any other relevant stakeholders to develop a fair and transparent transportation program.
50. Within two months of the date of this decision the Egg Board is to report to the Provincial board with its recommendations for changes to the transportation program.
51. There will be no order as to costs.

Dated at Victoria, British Columbia this 6th day January, 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

Barbara Buchanan, Panel Chair
Christine J. Elsaesser, Vice Chair
Wayne E.A. Wickens, Member