

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISIONS CONCERNING WITHHOLDING
OF PAYMENT FOR EGGS DELIVERED TO THE GRADER,
BURNBRAE FARMS LTD.

BETWEEN

RUNNING W EGG FARM LTD.

APPELLANT

AND:

BRITISH COLUMBIA EGG MARKETING BOARD

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Diane Fillmore
Presiding Member

For the Appellant

Ian Woike

For the Respondent

Robert Hrabinsky, Counsel
BC Egg Marketing Board

Hearing

Written Submissions

INTRODUCTION

1. On or about October 31, 2013, the British Columbia Egg Marketing Board (Egg Board) made a decision to withhold from the appellant, Running W Egg Farm Ltd. (Running W) monies received from the grader, Island Eggs, a Division of Burnbrae Farms Ltd. (Burnbrae) in respect of eggs delivered by the appellant to Burnbrae on or about August 29, 2013. The appellant filed a Notice of Appeal on November 12, 2013 with the British Columbia Farm Industry Review Board (BCFIRB) appealing the October 31st decision.

BACKGROUND

2. On August 29, 2013, Burnbrae Farms picked up 6480 dozen eggs (9 skids of 720 dozen eggs each) from Running W.
3. On September 4, 2013, Burnbrae went to grade the Running W eggs from the August 29th pick up and discovered mould (mildew) on eggs throughout all the skids. Burnbrae advised the appellant the eggs were mouldy and that it wished to return the shipment to the appellant.
4. The Canadian Food Inspection Agency (CFIA) was contacted and on September 9, 2013, the CFIA Inspector detained the eggs. Burnbrae Farms decided to destroy the eggs, which was done under the supervision of the CFIA Inspector on September 9th.
5. Burnbrae maintains that the mildew resulted from poor handling by Running W while Running W says that the mould (mildew) occurred after the eggs were picked up by Burnbrae and the mildew on the eggs is Burnbrae's responsibility.
6. The Egg Board received payment from Burnbrae, pursuant to section 22 of Part VI of the Egg Board's Consolidated Order which provides:
 - (2) The purchase price payable for Regulated Product shall be paid by delivering directly to the Board, at the commencement of each such period as the Board may specify, a cheque made payable to the Board, in the amount equal to the purchase price of the Regulated Product so supplied during the previous period, without deduction, withholding or abatement of any kind except as may be expressly authorized or required by the Board. [emphasis added]
7. The Egg Board received the payment from Burnbrae on the understanding the monies will be held in trust until there is mutual agreement between Running W and Burnbrae as to the disposition of the funds or a Court order.
8. Running W has demanded payment for the eggs delivered on August 29th from the Egg Board from the time it became aware that Burnbrae had submitted payment to the Egg Board.

9. The Egg Board considered Running W's request for payment for the eggs delivered and on or about October 31, 2013, made the decision to withhold payment on the basis that there was a commercial dispute between Running W and Burnbrae which was not within the Egg Board's mandate to resolve.
10. On November 12, 2013, Running W appealed the Egg Board decision to BCFIRB.
11. In a letter to the parties dated November 28, 2013, the Executive Director of BCFIRB, Jim Collins, stated that "the notice of appeal raises questions as to whether the issue is an appeal from an order, decision or determination of the Egg Board or is a commercial or other type of dispute between the farm and the grader". Accordingly, he established a submission process to address this preliminary issue.
12. After reviewing the submissions of the parties on the issue, a preliminary decision was issued on January 10, 2014, by Carrie Manarin, Presiding Member, BCFIRB, concluding that the notice of appeal filed by the appellant on November 12, 2013, satisfies the requirements of section 8 of the *Natural Products Marketing Act (NPMA)* with respect to a decision of the Egg Board and Rule 1 of the Practices and Procedures to the *NPMA* regarding the decision being appealed. She stated in part:

In my view, once the Egg Board determined that there was a dispute between the appellant and Burnbrae, it three potential options. The first option was to pay the producer for the eggs in the usual course. The second option was to return the payment to Burnbrae if the Egg Board was satisfied that it was appropriate to do so. The third option was for the Egg Board to hold the purchase funds in trust pending the resolution of the dispute to the parties' satisfaction or a court order directing the payment. In this case, having satisfied itself that there was a legitimate dispute, the Egg Board exercised its discretion to hold the purchase funds in trust. In my view, this exercise of discretion by the Egg Board is a decision or determination and as such is appealable.
13. Following a Pre-hearing Conference held on February 20, 2014, the presiding panel member directed that the appeal proceed by way of written submissions. The following submissions were received and reviewed:
 - a) Running W. Egg Farm Ltd – March 11, 2014 (received March 17th);
 - b) BC Egg Marketing Board – March 20, 2014 response;
 - c) Running W. Egg Farm Ltd. – March 25, 2014 final reply.

ISSUE

14. Did the Egg Board err when it decided to withhold from the appellant purchase funds for eggs received by the grader, Burnbrae Farms Ltd., on or about August 29, 2013?

APPELLANT'S EVIDENCE AND SUBMISSION

15. The appellant submits that the Egg Board erred by not paying it for eggs picked up by Burnbrae on or about August 29, 2013.
16. The appellant maintains that this is not a quality issue and that it was never asked by the Egg Board to provide any supporting documents to back up its claim, such as its quality assurance procedures and documentation. The appellant claims that a review of this documentation would show that there was no policy breach on the appellant's farm in respect of handling the eggs which could have caused the alleged mould (mildew).
17. The appellant states that it questioned the Burnbrae grader about the inspection policies of Burnbrae and it was informed that there were two quality assurance policies in place, one inspection done at the time of pick-up of the eggs by the driver, and another upon arrival at the grading station by the plant manager. According to the appellant, this supports its position that there was no issue with the eggs when they were picked up or when they arrived at the grading station.
18. The appellant maintains that once the eggs were picked up from its establishment, it lost control of the product and the buyer is responsible for all costs and risks after that time and that it should be paid for the eggs delivered.
19. The appellant contends that two of the nine skids picked up on August 29th were left behind by the Burnbrae driver on August 22nd as they were partial skids. It further maintains that the other seven skids were collected August 23rd to 28th not on August 21st and 22nd as alleged by Burnbrae.
20. The appellant points out that the August 29th pick-up was before a long weekend so the Burnbrae claim that it stockpiled eggs for pick-up after a long weekend is not correct and clearly does not apply in this case.
21. The appellant submitted barn logs to show that cooler readings for the month prior to pick-up had no fluctuations of temperature which would account for the subsequent appearance of mould (mildew).
22. The appellant disputes the claim by Burnbrae that a Burnbrae driver went to the barn in question to pick up eggs on August 27th.
23. The appellant claims that the Egg Board could not make an informed decision as no documentation was requested from it and that the Egg Board should not have withheld payment to the producer when it did not have all the facts.
24. The appellant questions how the grader came to the dollar amount it provided to the Egg Board as payment for the eggs in question as no documentation was included in the respondent's documents.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

25. The respondent, Egg Board, maintains that its relationship with producers and graders is regulatory in nature, not commercial in nature. It points out that the Egg Board is not engaged in the business of producing or marketing eggs but that, as a regulator, its duties are to regulate and control the production, transportation, packing, storing and marketing of the regulated product.
26. The Egg Board, as part of its duties, regulates "Prices and Method of Payment" between producers and graders as set out in Part VI of the Consolidated Order. As part of that Order, the Egg Board sets a minimum price and establishes that the minimum prices are to be "EXW the farm-gate". "EXW" stands for Ex Works and is defined in the *Incoterms 1990*¹ as follows:

"Ex works" means that the seller fulfills his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouses, etc.) to the buyer. In particular, he is not responsible for loading the goods on the vehicle provided by the buyer or for clearing the goods for export, unless otherwise agreed. The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. This term thus represents the minimum obligation for the seller.
27. The Egg Board points out that under the Part VI, every Grading Station Operator is required, within 10 days of delivery, to provide to the person supplying the ungraded eggs, a true and detailed report of the quantity and weight of such eggs. Part VI also provides that the purchase price payable for the eggs is to be paid directly to the Egg Board at the time specified by the Egg Board without deduction, withholding or abatement of any kind except as may be expressly authorized or required by the Board.
28. The Egg Board received e-mail communications from the appellant's grader, Burnbrae on September 4, 2013 stating that when it went to grade the appellant's eggs, mildew was found on eggs throughout the appellant's skids. The e-mail further states that the producer skid tags show that the eggs were collected on August 21st and 22nd. Burnbrae claims in the e-mail that it has had trouble with the producer previously as it has not shipped eggs before a long weekend and will then ship a large quantity the week following the long weekend. It goes on to say that mildew will form on eggs if they have had condensation due to irregular cooler temperatures and further claims that mildew will not show up right away. Mildew was found within the skid of eggs and cannot be seen until the eggs are being graded. Burnbrae also states that it had other producer eggs in the same cooler as the appellant's eggs that had no problems with mildew.
29. The Egg Board says that it is aware that a dispute has arisen between the appellant and Burnbrae and each claims the mould (mildew) on the eggs is the responsibility of the other. The Egg Board argues that this is a commercial dispute

¹ Incoterms 1990 provides a set of international rules for the interpretation of the most commonly used trade terms in foreign trade.

that the two parties must resolve themselves. The Egg Board maintains that while it is a facilitating intermediary (payment by graders to producers is tendered through the Egg Board), the commercial dealings take place between the producer and the grader themselves.

30. The Egg Board points out that, in the absence of any direction by the Board, it is incumbent on the grader to make payment for the eggs received and thereafter, take whatever steps it considered necessary to obtain relief against the producer for the allegedly unsuitable eggs.
31. The Egg Board advises that, while it recognized there was a legitimate dispute between the parties, it decided that Burnbrae must make payment in accordance with section 22 for the eggs delivered by the appellant but that the Egg Board would hold the purchase money (or pay the money into Court as may be directed by the parties or by Court order) pending mutual agreement between the parties as to the disposition of the funds, or Court order. As a result of this decision, Burnbrae sent a cheque to the Egg Board in the amount of \$13,490.76 in respect of the appellant's eggs on the understanding the money would be held in trust until resolution of the dispute between Burnbrae and the appellant.
32. The Egg Board argues that while the appellant on the one hand states that the issue is not a quality issue, correspondence from the appellant has in fact referred to this as a quality issue. The Egg Board states that it takes the view, which view was accepted by the panel at paragraph 10 of the preliminary decision of January 10, 2014, that it would not be within the jurisdiction of BCFIRB under the *NPMA* to hear an appeal about the quality of eggs supplied by a producer to its grader.
33. The Egg Board submits that it is satisfied that there is a *bona fide* dispute between the parties which it characterizes as:
 - (a) Was there, in fact, mildew present on the eggs rendering them unsuitable for their intended purpose?
 - (b) If so, was the mildew caused by the seller, the buyer, or some combination thereof?
34. The Egg Board maintains that the fact that the terms of sale are "EXW the farm-gate" is not dispositive of the issues between the appellant and its grader. It further submits this term of sale simply means that the seller fulfils his obligation to deliver when he has made the goods available at his premises to the buyer. The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. The Egg Board goes on to say that even though the risk may pass to the grader after the goods are picked up on the farm, the terms of sale do not insulate a seller against a claim that the goods were unfit for their intended purpose at the time they were made available to the buyer, which is the nature of Burnbrae's claim in this instance.

35. The Egg Board argues that once it recognized the existence of a *bona fide* dispute, the Egg Board was entitled to exercise its discretion by requiring Burnbrae to provide payment to the Egg Board on the understanding that the purchase money would be held by the Egg Board (or paid into Court) pending mutual agreement between the parties as to the disposition of the fund, or Court order. This discretion is referred to in the Consolidated Order where the Egg Board is given the authority to “expressly authorize” a “deduction, withholding or abatement” of payment.
36. The Egg Board submits that it exercised its discretion reasonably, and in a manner that reflects BCFIRB’s “principle/outcome based approach” to decision making. In particular, the Egg Board submits that by exercising its discretion in the manner which it did, it was able to secure the purchase monies pending the resolution of the parties’ dispute. The Egg Board claims that to have paid the monies over to the producer, or to the grader, would improperly favour one party over the other in circumstances where the outcome of the dispute cannot be predicted.
37. The Egg Board maintains that it exercised its discretion reasonably but that it has no other interest in the outcome of the appeal. While recognizing that an appeal to BCFIRB is a *de novo* hearing, it submits that where the decision under appeal is purely discretionary in nature and does not engage matters of marketing policy in any material way, it would be appropriate to leave the original exercise of discretion undisturbed on appeal unless it can be said to be clearly wrong.

ANALYSIS

38. The position of the appellant is that it has records to show that the eggs in question were properly handled prior to pick up by Burnbrae and that the inspection of the eggs by the Burnbrae driver and on arrival at the Burnbrae premises disclosed no problems with the eggs. It, therefore, feels it is entitled to payment for those eggs due to the fact that the grader picks up the eggs EXW. The appellant maintains that the Egg Board erred in making a decision to withhold payment to it without considering the evidence of the appellant which show, according to the appellant, that the eggs were properly handled while in the possession of the appellant.
39. The Egg Board argues that its relationship with producers and graders is regulatory in nature, not commercial. As a regulator, it has enacted Consolidated Orders to set minimum price and establish rules around payment. Having made the decision that a *bona fide* dispute existed between the appellant and Burnbrae, it exercised its discretion to hold the payment from Burnbrae in trust. The Egg Board maintains that it is not appropriate to favour the appellant and make payment to it prior to resolution of the dispute.

40. The Egg Board is a statutory body created by the *BC Egg Marketing Scheme, 1967 (Scheme)* enacted under the *NPMA*. The purpose of the *Scheme* is defined in section 16:

The purpose and intent of this scheme is to provide for the effective promotion, control and regulation of the production, transportation, packing, storage and marketing of the regulated product within the Province, including the prohibition of such production, transportation, packing, storage and marketing in whole or in part.”

41. Section 17 sets out to whom the *Scheme* applies:

The scheme shall apply to all persons who produce, transport, pack store or market the regulated product but in no way applies to a consumer who acquires the regulated product from a producer.

42. The authority of the Egg Board is broadly defined in section 37 which reads, in part:

The board shall have authority within the Province to promote, regulate and control the production, transportation, packing, storing 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,...

43. The purpose of the *Scheme* and the broad authority given to the Egg Board make it clear that the role of the Egg Board is to regulate the egg industry, including producers and graders. The Egg Board must treat all stakeholders fairly and with an even hand. By requiring the grader to pay to the Egg Board the payment in respect of the eggs delivered by the appellant, the Egg Board evened the stakes between the appellant and the grader. Both are deprived of the money until the issue between them is resolved. In doing this, the Egg Board is remaining neutral, not favouring either the appellant or the grader and encouraging a resolution of the dispute.

44. The appellant argues that this appeal is not about an issue of quality. While the appellant has recognized the existence of a quality dispute between it and the grader in various documents, this appeal against the Egg Board decision does not raise an issue of quality. In a document dated December 12, 2013, provided in the respondent’s documents, the appellant said “If the BCEMB feels that this is truly a quality issue, then they should pay out the farm (RWEF) and allow the grader (Burnbrae) to take action against the producer (RWEF) if they feel entitled to do so.” I cannot agree with the appellant that quality is not an issue to the Egg Board. The Egg Board has a responsibility to both the grader and the producer and cannot just favour the producer in the face of a legitimate dispute as to the quality of the product provided by the producer.

45. The appellant has questioned the fact that the Egg Board made its decision to withhold payment to the appellant without requesting or receiving any information from the appellant in order to make an informed decision. In my view, the decision of the respondent to require payment from the grader on the

understanding that it would hold the funds pending agreement of the parties or a Court order did not require the Egg Board to obtain specifics from either party. The Egg Board satisfied itself that there was a legitimate dispute between the parties and exercised its discretion so as to be even-handed to both the appellant and the grader by holding the monies in trust until the dispute is resolved.

46. Both the appellant and the grader claim they were not responsible for the mould (mildew) on the eggs. It is clear that there was mould (mildew) as CFIA detained 6480 dozen eggs and supervised their destruction. The live issue between the parties is what caused the mould (mildew) and who is responsible for it. The appellant also raises a secondary issue of how the grader determined the amount paid to the Egg Board. These are issues for the parties to resolve. I find that having properly exercised its discretion to secure the monies pending a resolution of the dispute, the Egg Board was not required to do anything more.

DECISION

47. I find that the Egg Board did not err when it exercised its discretion to withhold from the appellant purchase funds for eggs received by the grader on or about August 29, 2013.
48. For the foregoing reasons, the appeal is dismissed.

Dated at Victoria, British Columbia this 21st day of May, 2014

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Diane Fillmore, Presiding Member