

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL BY ALARY FARMS LTD. FROM A DECISION CONCERNING
REPAYMENT OF A LOAN

BETWEEN

ALARY FARMS LTD.

APPELLANT

AND:

BRITISH COLUMBIA CHICKEN MARKETING BOARD

RESPONDENT

AND:

BRITISH COLUMBIA CHICKEN GROWERS' ASSOCIATION

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Garth Green, Panel Chair
Sandra Ulmi, Member
Honey Forbes, Member
Suzanne Wiltshire, Member

For the Appellant

Daren Alary

For the Respondent

John Hunter, Q.C., Counsel

For the Intervener

Frank Flokstra, Vice Chair
Art Penner, Director

Date of Hearing

March 27, 2007

Place of Hearing

Abbotsford, British Columbia

INTRODUCTION

1. In 2004, the poultry industry in the Fraser Valley region of British Columbia experienced a devastating outbreak of Avian Influenza (AI), which resulted in the culling of millions of birds, and created a huge challenge for the poultry industry. Many producers had their birds destroyed and were not allowed to produce for a period of time until the outbreak subsided and their barns were cleaned and disinfected.
2. In the broiler chicken industry, growing periods are broken into eight-week cycles which are numbered to distinguish each period. During the AI outbreak, all affected Fraser Valley growers missed the cycle called A-59. In addition, some missed A-58, and some missed A-60.
3. Daren Alary, of Alary Farms Ltd., is a second-generation chicken grower whose family has been farming for 35 years. During the AI outbreak in 2004, Alary Farms was not allowed to grow chickens for cycle A-58, as well as A-59.
4. The Respondent, the British Columbia Chicken Marketing Board (Chicken Board), established a Loan Equalization Program (Program) during this AI outbreak to provide assistance to those growers not allowed to grow birds during all or part of their usual growing cycles of A-58 and A-60. The Chicken Board provided a pool of \$3.2 million for these loans. Of this amount, \$3.1 million was applied for and paid out to growers by the Chicken Board.
5. Under this Program, Alary Farms applied for and received a \$16,281.28 loan.
6. The national Canadian Agriculture Income Stabilization (CAIS) program was introduced in 2002 as an ongoing program to provide assistance to Canadian farmers who experience a reduction in their annual production margin. The farmer's annual production margin is calculated by averaging three of the prior five years production margins after dropping the highest and lowest figures. Supply managed farms, such as broiler chicken farms, only benefit from this program if their production margins decline by more than 30 percent from their average. Since most chicken growers affected by AI missed only one or two eight-week periods of production, many did not qualify for CAIS compensation.
7. Growers who applied to CAIS for funding, but were rejected on the basis that they did not qualify for CAIS funding, had their loans forgiven by the Chicken Board. Growers who applied to CAIS and received partial compensation had the balance of their loans forgiven.
8. On September 5, 2006, the Chicken Board wrote to all growers to advise that outstanding loans under the Program were due and payable and attaching an invoice for the loan amount. Since CAIS had not yet processed all applications,

growers still awaiting a decision from CAIS were instructed to provide proof of application to CAIS to put their loan into abeyance pending receipt of their decision from CAIS.

9. Alary Farms did not apply for CAIS funding.
10. On November 3, 2006, the Chicken Board wrote to Alary Farms noting that the \$16,281.28 loan remained outstanding and advising that a deduction would be assessed on its A-80 and future allotments until the loan was repaid in full.
11. The Chicken Board contends that Alary Farm did not fulfill the regulatory condition of applying for CAIS funding and so must repay the entire amount advanced.
12. The appeal was heard March 27, 2007 in Abbotsford, British Columbia.

ISSUE

13. The issue on appeal is whether the BC Chicken Marketing Board acted unfairly or inappropriately in demanding repayment of the loan received by Alary Farms Ltd. in the amount of \$16,281.28 from the Chicken Board under its Loan Equalization Program.

ARGUMENT OF THE APPELLANT

14. Mr. Alary, argues that the Loan Equalization Program was a payment to growers who lost income due to AI and was about being fair and equitable to all involved in the Program. He submits that the Chicken Board changed the rules part way through the Program when they decided that the money paid out under the Program had to be paid back and that growers had to apply to CAIS in order for their loan to be forgiven. He argues that this resulted in unequal treatment and that you “can’t change a deal once it is made.”
15. In support of his argument, Mr. Alary introduced correspondence from the Chicken Board and the BC Chicken Growers’ Association, as well as extracts from minutes of various meetings of these organizations, during the period between late March and early June of 2004. He pointed to many instances where compensation for AI was mentioned with no mention of repayment and noted that where CAIS was mentioned, growers were encouraged to apply to CAIS, but nowhere was it stated that they must do so.
16. Mr. Alary argues that the promissory note signed on behalf of Alary Farms should be the only evidence needed in this hearing as that is the contract and all the Appellant should be held to. He argues that while the promissory note does state

that any funding *received* by CAIS must be repaid to the Chicken Board, it does not state that growers *must* apply to CAIS.

17. In this regard, Mr. Alary referred the Panel to the promissory note dated July 19, 2004, signed on behalf of Alary Farm which states:

Promissory note: I accept the loan payment as described above. My signature below signifies that I am obligated and agree to repay all or a portion of the loan out of any proceeds received from the CAIS program. I understand that I may be required to provide copies of any financial statements or other documentation as required by the Board to support the amount disclosed as received from CAIS. Upon receipt of the signed copy of this page the Board will issue payment in the said amount above. Further, I understand that in order to received a payment under this or any other Board program I must be in good standing with the Board. Any funds owed to the Board will be deducted prior to any payments being made.

18. Mr. Alary argues that the first mention of the necessity for growers to apply to CAIS is in the August 24, 2005 minutes of the Chicken Board. He argues that this is one year after production had resumed and, to that time, not one grower had received CAIS funding.
19. Mr. Alary argues that he did not apply to CAIS because it was pointless. He knew that he did not qualify because he had not lost 30 percent of his income, a requirement for CAIS funding. He stated that he talked to his accountant about this and the accountant also said that he would not qualify. Rick Shead, another grower, testified that he did not want to apply for CAIS because it would cost \$500-\$3000 in accounting fees to prepare the information required by CAIS and he would have to put between \$50,000 -\$60,000 in an escrow account which he did not want to do.

ARGUMENT OF THE RESPONDENT

20. The Chicken Board agrees with the Appellant that AI compensation from the Loan Equalization Program was about being fair and equitable, but argues that the Chicken Board did not change the rules, rather that it was Alary Farms who did not comply with the conditions of the Program.
21. The Respondent states that since the total amount to be made available under the Program represented a significant financial cost to the Chicken Board and would eventually lead to a special levy on all growers, payments under the Program were structured as loans to allow growers to be eligible for other outside assistance. Since it had also become apparent that the only potential source of outside assistance was CAIS, growers were required to seek compensation from CAIS as a condition of their participation in the Program. Amounts were loaned to growers on the basis that any monies received from CAIS would be repaid to the Chicken Board in reduction of the loans made to them under the Program and any shortfall might be forgiven. The Chicken Board argues that this is not a new idea, but rather the original rules.

22. The Respondent argues that all of the documentation accompanying the promissory note must be considered, not simply the promissory note signed by Alary Farms; but in any case, a promissory note is just that, a promise to pay back the money loaned.
23. Bill Vanderspek, General Manager of the Chicken Board, testified that during March and April of 2004, the Chicken Board was working on a compensation package for growers under unprecedented circumstances because of the AI crisis. He stated that things were changing daily and even hourly as the compensation package evolved and admitted that the conditions for it may not have been clear during that time. During the time from June 4 until June 23, 2004, he stated that the Chicken Board was advised to change the compensation package to loans to maximize opportunities for growers to access government compensation.
24. Mr. Vanderspek stated that on June 23, 2004, the Chicken Board issued a letter to all growers explaining the final terms of the Program and it has been administered consistently since that date. The June 23, 2004 letter explained how the Program would be administered, how to apply for a loan, and included the promissory note to do so. This letter was headed “Important: Please Read Carefully” and stated (in bold in the original):

The Board wishes to remind growers once again that they must apply for CAIS and the Board recommends they apply at the highest level of compensation. The deadline date has been extended to June 30, 2004 so there is still time. Since CAIS support can offset a significant amount of the debt burden of the Board, the Board wishes to make it clear to all growers that anyone expecting compensation as a result of the AI crisis from the Board must have registered with CAIS and made maximum use of its programs before receiving compensation from the Board.
25. Mr. Vanderspek gave evidence that the memo sent out to all growers on August 25, 2005, 13 months after Alary Farms had signed the promissory note, once again made clear that CAIS funding must be applied for. It stated:

Many growers received financial compensation from the Board for missed production due to Avian Influenza in Periods A-58 and A-60. These payments were given in the form of a loan, and were contingent upon a grower making application under the Canadian Agricultural Income Stabilization (CAIS) Program. These loans were to be repaid to the Board in the event that a grower received payments under the CAIS program.
26. The Respondent argues that since the CAIS program was eventually extended until November 30, 2005, Alary Farms still had ample opportunity to apply for the program after the reminder of August 25, 2005, but chose not to do so.

POSITION OF THE INTERVENER

27. The position of the Intervener, the British Columbia Chicken Growers’ Association (the Association) is that the Chicken Board clearly spelled out the terms of the

Loan Equalization Program to growers in writing, through mail outs, and at grower meetings.

28. The Association states that it is in complete agreement with the conditions set forth pertaining to the Program and that growers had ample time and extensions for applying to CAIS.
29. The Association further recommends that the conditions be upheld as put forth by the Chicken Board at the time of Program implementation.

DECISION

30. The first point for consideration is whether, as the Appellant argues, the Chicken Board changed the rules part way through the Program resulting in unfairness to Alary Farms.
31. The Panel agrees that it was not clear in the formative stages, whether the compensation package was to be a grant or a loan. Mr. Alary showed numerous documents using both “compensation” and “payment” in reference to the program being discussed in the time frame between April and June of 2004.
32. However, by the time Alary Farms came to sign the promissory note, there is no question that compensation was to be “in the form of a loan”, as noted in the first sentence of the document which states:

The Board has instituted a policy giving producers who did not receive any chicks or had a shortage of chicks in A-58, an opportunity to apply for compensation in the form of a loan from the Board.

That the Program was a loan and not a grant was not only clear in the promissory note signed by Alary Farms in July 2004, but in the June 23, 2004 letter sent to all growers describing the finalized Program.

33. Since no money was distributed before the letter of June 23, 2004, and the Alary Farms promissory note was signed on July 19, 2004, the Panel is not persuaded that the rules changed thus treating the Appellant unfairly.
34. Mr. Alary further argues that the Chicken Board acted unfairly in requiring Alary Farms to repay the loan simply because it did not apply for CAIS funding. In support of this argument, he says that the only piece of evidence that should be considered in this appeal is the promissory note which was signed. He argues that while this promissory note states that any funding *received* from CAIS has to be repaid to the Chicken Board, the note does not say that funding *must* be applied for.
35. We do not accept this argument. The promissory note is not the only document to be considered in determining the terms of the loan under the Program. The June 23,

2004 letter that accompanied the promissory note clearly established the conditions to qualify under the Program. One of those conditions, the need to apply to CAIS, was explicit. While Mr. Alary may not have read this letter, his failure to do so is no basis for alleging unfairness, especially in light of the ongoing communication regarding this obligation. In addition to the specific instructions in the letter regarding application for CAIS funding, the promissory note itself implies that an application has been or will be made when it speaks of the obligation to repay the loan out of any proceeds received from the CAIS program.

36. After the June 23, 2004 letter, the importance of applying to CAIS was communicated in many ways including grower meetings, grower newsletters, as well as in the memo sent out in August of 2005 specifically reminding all growers of this requirement. The deadline to apply to CAIS was extended for a period of almost one and one half years from the original date of June 30, 2004 until November 30, 2005. In our opinion, it was incumbent upon the Appellant to inform himself of the nature of the benefit received and by November 30, 2005, the Appellant could hardly have been unaware of the condition to apply for CAIS funding in order to have the loan forgiven. The Panel finds, therefore, that the Chicken Board did not act unfairly or inappropriately in demanding that the amount of \$16,281.28 be repaid by the Appellant.
37. Mr. Alary further argues that there was no point in applying for CAIS funding since Alary Farms would not have qualified because it did not lose 30 percent of its annual income. While this may be true, in the view of the Panel, it does not change the conditions of the Program and the necessity for Alary Farm to apply to CAIS. It was not for an individual to decide not to apply because it was “pointless” as conditions of federal funding programs can change under exceptional circumstances such as the AI crisis. Many other growers in the same position as Alary Farms did apply for CAIS funding even though they knew that they were ineligible under the rules at the time. The Panel is not persuaded that the fact that Alary Farm thought it would not qualify relieved it of the obligation, which every other grower also had, to apply for CAIS funding.
38. The Panel agrees with the Chicken Board's reasoning for requiring growers to apply to CAIS. The Panel believes that the intent was not to knowingly make them go through a futile exercise of applying when almost none of them would qualify, but rather, to manage the affairs of the organization in as cautious and prudent a manner as possible in a situation of great uncertainty and unpredictability. By requiring all growers to apply to CAIS, the Chicken Board protected itself, and ultimately the growers themselves, from bearing the entire burden of loss in the event of the worst-case scenario where substantial grower losses occurred. The best possible outcome, the one that in fact did occur, was that few growers suffered losses so great that they qualified for CAIS. It would be unfair to now penalize the Chicken Board for operating in a cautious and prudent manner during a difficult time in the industry.

39. After carefully considering all of the evidence and submissions, the Panel is not persuaded that the BC Chicken Marketing Board acted unfairly or inappropriately in demanding repayment of the loan in the amount of \$16,281.28 received by Alary Farms Ltd. from the Chicken Board under its Loan Equalization Program.

ORDER

40. The appeal is dismissed.
41. There will be no order as to costs.

Dated at Victoria, British Columbia this 15th day of May, 2007.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

(original signed by:)

Garth Green, Panel Chair
Sandra Ulmi, Member
Honey Forbes, Member
Suzanne Wiltshire, Member